602 Practical Tools for Managing & Negotiating Today's Contracts

Jack O'Neil
General Counsel
Western Construction Group, Inc.

Todd Silberman
Vice President & General Counsel
Express Carriers

Susan Zoch
Associate General Counsel
Vertis, Inc.

Faculty Biographies

Jack O'Neil

Jack O'Neil is the general counsel and secretary for Western Construction Group, Inc., in Breckenridge, Colorado, which operates a specialty contracting business nationwide through subsidiaries with branch offices in 35 cities. He started the legal department after several years of private practice and teaching experience.

Prior to joining Western, Mr. O'Neil was affiliated with the law firm of Armstrong Teasdale Schlafly & Davis in St. Louis. He has served as an instructor and adjunct assistant professor at the Saint Louis University School of Law.

Mr. O'Neil is a member of the Missouri Bar, the construction law forum of the ABA, and the ACC, previously serving as president of the St. Louis Chapter.

He has a B.A. from DePauw University, and a J.D., cum laude, from Saint Louis University School of Law.

Todd Silberman

Todd H. Silberman is vice president and general counsel for Express Carriers, an international trucking company, located in San Antonio, Texas. His responsibilities include advising directors, managers, and operating areas in corporate decisions and issues, corporate governance, strategic planning, institution of preventative measures, monitoring the activities of the company, management and handling of cases in all stages of litigation, risk management including the handling of claims and settlements, supervise, support, coordinate, and manage outside counsel, review, drafting, and negotiation of corporate contracts, labor and employment law, transportation law, customs issues, agency law, real estate transactions, acquisitions, internal auditing, formation of subsidiaries and additional companies, drafting of company minutes, and drafting and probating of wills and trusts.

Prior to that, Mr. Silberman was a general practitioner. His practice focused on the areas of family law, business, wills and trusts, real estate, and insurance defense litigation.

Currently he serves as chair for ACC's Small Law Department Committee and was a past president of ACC's South/Central Texas Chapter. He is serving on the council of the corporate counsel section of the State Bar of Texas, serves on the board of directors of the Community Relations Council, has volunteered at the Children's Bereavement Center, and has worked as a mentor with at-risk youth. Additionally, Mr. Silberman has spoken at St. Mary's Law School and the University of Texas School of Law about practicing law in-house and has spoken at numerous ACC sponsored or co-sponsored meetings.

Mr. Silberman received a B.A. from the University of Florida and is a graduate of South Texas College of Law.

Susan Zoch

Susan Aldrich Zoch is associate general counsel for Vertis, Inc., headquartered in Baltimore, Maryland. She negotiates and provides advice concerning a significant portion of the company's contracts with its customers and vendors. Her responsibilities also encompass the company's labor, employment, real estate, environmental law, and worker safety matters.

Before joining Vertis, Ms. Zoch was in private practice in the Washington, D.C. and Houston offices of Baker Botts, L.L.P. She also served as a judicial clerk for the United States District Court in Fort Worth, Texas.

Ms. Zoch received her BA from Rice University and graduated with honors from the University of Texas School of Law, where she was executive editor of the *Texas Law Review.*

Does Anyone Really Negotiate the "Legal" Stuff?

Suggestions for Making Some Headway in Day to Day Transactions.

Jack O'Neil
General Counsel
Western Construction Group, Inc.

Session 602 ACC 2005 Annual Meeting.

If the only contracts you review and negotiate are the major deals that can make or break the company, then this may not be of much use to you. However, if your operating people look to you for some help on the terms and conditions of day to day transactions, then the information here may help you be more effective and responsive to your day to day clients.

In many such transactions, form contracts are widely used, and parties like to use their own form. Any party that has a form, probably paid a lawyer a lot of money to draft it, and they are not eager to make changes, or even to discuss the general terms and conditions. My in house experience is in the construction industry, but hopefully many of the suggestions here will apply to other service businesses, and perhaps others as well.

Have you ever heard these?

"We don't worry about the terms and conditions, that's just for the lawyers."

Response: *That's true only in the sense that if there is a dispute, the lawyers will use these against you.*

By the time the lawyers get involved, it is too late to do anything about these terms.

OR

"Why propose changes, they never agree to them anyway?"

Response: *Of course not, if you don't ask. So, lets ask and see what you get.*

It often falls to the in house counsel to try to move beyond this situation, and advance the cause of real negotiation on these "legal" topics.

If you understand the reasons why there is no negotiation, you can start to do something about it. Here are some things that might help.

What is the process. Negotiation is usually not a meeting where the parties discuss and resolve issues. It is proposed changes to a form contract with some reaction to those changes. There may be a flurry of faxes, e-mails, and one or two phone calls.

On one side is the reaction to the form: **"Why on earth do they think that we will sign this?**

On the other: "**This is our standard contract, we never make changes?"**

Of course many of these forms are drafted with the assumption that no one will read them, much less send them to their legal department to review and propose changes.

Therefore, trying to get any meaningful negotiation going is not always easy. There is pressure from the business people to move on, get the deal done.

If your first step is reviewing a form contract with an eye to making changes, here are a few ideas that may make the process more fruitful.

If you are making changes to someone else's form.

- **Talk to your business people about the nature of the deal.**
  How much control do they have over some of the risks? How much do they really need or want this deal? Do they have any history with the other party? What has their experience been? How big a deal is it? What is their bargaining leverage? If they rock the boat, will the deal just go to the next person in line?

- **Don't scratch stuff out.**
  People take great offense at others scratching out sections of their forms and them sending them back with large deletions. Experience shows a better reaction to a more professional approach. Try sending a list of proposed changes. If a particular provision is very offensive, try proposing an alternative.

- **Propose qualifications, not deletions.**
  Instead of deleting a large section, try a qualification. "provided however, that this shall not apply to …." This is a good way to deal with the overkill provision that asks for a complete waiver when only a partial one will accomplish the goal just as well.

- **Make changes on a separate sheet, don't scribble in the margin**.
  Remember those faxed contracts with the handwritten changes squeezed into the margin? There is a better way. Experience shows

that if you present an organized separate sheet that is easy to follow, it gets taken much more seriously that a bunch of scribbles on a hard to read fax. If the contracts you read fit into a pattern, you can prepare a template as a staring point for this sheet. A Sample Copy of the Template I use is attached.

- **Don't over reach.**
  When reviewing a provision that goes way beyond what is needed, try not to react by going just as far in the other direction. It is harder for people to reject a reasonable approach. Add some explanation if needed.

- **Try for a compromise position.**
  The other party spent a lot of money with some lawyer to draft the language that would protect them from some perceived risk, and they are not likely to want to give it up. A compromise may be possible if you can demonstrate that what you are asking for does not impact their primary concern, but only eliminates the overkill that puts your side in an unacceptable position.

- **Be ready to explain why you want the change.**
  This usually involves having a good understanding of the risk you are concerned about, and how the provision you are not happy with increases this risk beyond an acceptable limit. When explaining it, you need to be able to describe an alternative that does not threaten the other party's perceived risk. If you can cite examples of past experience that demonstrates your concern, it helps to dispel those who would dismiss your concerns as unfounded.

- **Try to understand the other parties concern**.
  The other half of "getting it" is understanding the other sides concerns, whether they be real or just perceived. If you can propose something that covers their main concern but still gives you something to cover yours, you have a good chance of reaching a compromise.

- **Try alternative language.**
  Look for ways to use put your position in as an exception to the broad sweep of the other parties provision. "Notwithstanding anything to the contrary, this provision shall not apply to…."

- **Be open to alternative language.**
  If you can get what you want, don't be afraid to let the other side propose the alternative. If you have effectively explained your concerns, the other side may have a compromise that will work. If you are OK with what they propose, the matter will close quicker, if you resist the temptation to "nit pick."

- **Be ready to give as good as you get.**
  When you find yourself on the other side of the same issue, be willing to look at the other sides concerns with the same perspective.

<u>If you are reviewing someone's proposed changes to your form.</u>

- **Don't take it personally.**
  Remember the other person is just trying to do their job, and protect their client from risks as well.

- **Try to see what the concern is that causes them to ask for the change.**
  Since so many form contracts take a broad brush approach to dealing with certain risks, there is often a reasonable middle ground. If you understand the other parties concern, it is very possible that some accommodation can be made without giving away all the protection.

- **Talk to your business people about the nature of the deal.**
  Is the other party someone they have a history with? Do they have other options if a deal can't be struck? How much control do they have of the transaction going forward, especially the risks covered in the disputed terms?

- **Be willing to compromise.**
  You may not need the sledge hammer to kill ants attacking your picnic. There is a temptation to solve problems by writing a risk transfer provision so broad, that if anyone reads it they will deem it unreasonable. Some day you will be on the other side.

<u>Some other ideas that may help.</u>

- **Consider with whom you are "negotiating".**
  You may not always be talking to a lawyer on the other end. If you have made changes to a contract, sent it back to your business folks, who sent the changes along to the vendor, customer, or contractor, be prepared to discuss the reasoning for your changes with almost anyone. You may be asked to call someone to explain your changes. It may be a lawyer, or it may be a risk manager, sales or purchasing executive, CFO, or the owner of the company.
  Keep the discussion matter of fact, and friendly. You don't want to be the one who gets the reputation of driving off customers. If that happens, you will get by-passed, and your advice will be ignored.
  Different people look at contracts from their own perspective. Risk

managers often focus on Insurance, and indemnification. CFO's often focus on financial strength. Sales and Purchasing people may focus on just getting the deal done, and "please don't make me send this to my lawyer".

- **Understand the market power involved.**
  This of course is one way people get away with heavy handed terms. They have the market clout to demand their own terms. Ask how bad does your company need the other party, and how bad do they need you? If you are the only game in town, you can demand more on your terms. If there are dozens of competitors just waiting in line to take the deal, you may have to take what you can get. Why not suggest to your clients that the mere fact that they take the trouble to read the contract shows that they pay attention to detail. Shouldn't a customer want that?

- **Examine form contracts, even for routine transactions.**
  The contracts are never intended to be negotiated, much less reviewed by any lawyers for the company. Take the time to help your clients understand what they are getting into. If you are perceived as helping them on the small stuff, they will come to you more readily when the bigger deals come along.

- **Distinguish the real terms from the defensive "gotchas".**
  Frequently terms are put into contracts to act as a defense to something they think the other side might do. These are often short notice provisions, which may not be that important in a transaction that runs smoothly, but provide a defense to claims at the end. These can often be managed if your people are just made aware of them. Often there is not a need to change these provisions, just bring them to the attention of your client.

Common roadblocks to negotiation

- **Lack of Authority.**
  It is a major waste of time to spend an hour discussing and explaining things to the other party's representative only to be told that he or she doesn't have the authority to agree to any changes. Establish up front that you are prepared to reach a resolution. Certainly if you are dealing with a lawyer, you may both have to say "I can recommend that", but this is often all you really need. If they weren't going to take the lawyers recommendation, they would not have called them in.

  On your side, have an understanding before you start just how far you can go. If you poll a room full of in house lawyers, about their authority to call off the deal, most will say they do not have that. Your authority may be limited by the inability to slam the door. This is a good reason to keep the discussion friendly, but business like.

- **This is our standard language.**
  What you will be thinking when you hear that is "who gives a _____". But to keep the discussion going you might suggest that you understand that they have this language, and that they probably paid a lawyer a lot of money to draft it. However, we have our own concerns that do not necessarily conflict with theirs. A more direct approach is: "Yes, I understand that, and these are our standard changes. So to get beyond that deadlock, let's talk about the underlying concerns, rather than just the language."

- **Don't make me send it to my lawyer (or legal department).**
  This is a sure sign that you are talking to someone that does not have any authority to make changes, and does not want to be seen as ineffective, because they can't get the deal closed on the "standard terms". This excuse is usually presented first to your business people, who can respond: "We care enough about having a well thought out deal to have our legal department look at it, and they gave us a read on it in 24 hours, so it shouldn't slow anything down for you to do the same."

  This may get you to a discussion with the lawyer which may get you to a real negotiation of issues rather than just language.

- **Everyone else signs it**
  This is just a variation on the standard language line. Of course the obvious response is "So what? We don't jump off cliffs just because everyone else does." However, this won't win any contests, so you need to be a little more professional. Perhaps suggesting that you understand that many people sign contracts without reading them, but we take a more thorough approach. You might explain that you are not asking for them to abandon their protections completely, just recognize that we have concerns also, and be ready to explain how the two are not mutually exclusive.

Ways to get to the next level.

If you are getting any of these roadblocks, it is a good sign that you need to get to the next level.

- Just ask. Is there anyone else I could talk to about this?

- If you hear "our lawyer says we have to have this. Suggest discussing it with the lawyer".

- If it is suggested that someone else has that authority, ask to speak to them.

- Give such a thorough and detailed description of the issue, that the person without authority has to pass it on to the next level because they have no clue what you are talking about or what the contract says anyway.

- Another variation on this is to demonstrate that you know more about the contract language than they do, because you have read and understand it.

Suggestions for helping you own client.

- **Become a partner not a bottleneck, or roadblock.**
  People avoid or go around roadblocks. Explain the risks in terms they can follow from a practical business point of view. Respond as quickly as you can. You can ask that people give you a reasonable amount of time to make these reviews, but be prepared to respond on short notice. You will get an appreciative thank you, and they will listen to you much more than if you tell them, sorry I am too busy.

- **Learn the business risks and issues.**
  Not every contract risk is a deal breaker in every deal or business. Sometimes if your people are just aware of the risk, they can manage it. Discuss how they will carry out the transaction, and steps they can take to minimize the risk.

  On the other side, point out the real risks involved in some contract provisions and why they should try very hard to get them changed.

- **Let everyone know what the deal killers are.**
  This may come from a discussion with senior management about the real risks. In these cases, there should be some directive from management that these terms are not acceptable. Frequently this also means that only approval at a high level can allow this to go through.

- **Get involved at an earlier stage.**
  This is often a hard one, but people learn by experience. Cite examples of successes with earlier involvement.

  If an RFP or Bid package has the contract terms in it that may be the only stage where they can propose changes. There is often a provision that says "if you submit this bid, you are agreeing to our contract terms."

- **Teach them a little about contracts.**
  Educate your operations people on the basics of what is in the contracts that they see on a regular basis. This has been the subject of two previous ACC programs. (Annual Meetings in 2001 and 2003) You are not training them to be lawyers, but better informed business people. Some quick examples that I have used:

  It is the snake that you don't see that bites you, so learn how to spot the snakes in the contract.

  We call ourselves "contractors", we should know something about the contracts we sign.

  Even if you can't change anything, if you don't know what is in there, how can you evaluate the deal?

  Better to hear it from me than your customer's lawyer.

  Knowledge is power. If you understand what your vendor or customer has in their standard form, you may be way ahead of the person you are dealing with.

  If you make the person on the other side live within the tough rules they made, it may work to your advantage.

- **Try to get buy in from upper management.**
  For your contract review and education programs to be successful, provide outlines to upper management. This is best punctuated with real examples of how the material in the program could have avoided a problem, or even better how a problem was avoided because someone paid attention. If the top people believe there is a benefit, you can sell the programs to the rest of the company.

Sample for use with written materials for Session 602, 2005 ACC Annual Meeting

CHANGES TO CONTRACT
BETWEEN
CUSTOMER COMPANY
AND
YOUR OPERATING COMPANY
FOR THE WORK AT

The Contract dated September 25, 2005 is changed as follows:

Paragraph 3. In line 6 change "you indemnify us no matter what" to **"You will indemnify us to the extent you cause the problem."**

Paragraph 16. At the end of the Paragraph insert: **"Notwithstanding anything in this agreement to the contrary, Contractor shall not waive its rights to statutory liens in advance of payment, and any and all lien waivers delivered prior to payment will be conditioned upon actual receipt of payment."**

Customer Company Your Operating Company

By: _____ By: _____

ACC Association of Corporate Counsel

PRACTICAL TOOLS FOR MANAGING AND NEGOTIATING TODAY'S CONTRACTS

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Bargaining Power Drives Negotiations

- Whose form of contract gets used, or who gets to prepare the first draft
- Whether the terms in the first draft are even open to discussion
- What terms end up in the final agreement
- Whether lawyers actively participate in the negotiations
- Pace of negotiations
- Mechanics of execution

Your Client's Position in the Deal Determines Bargaining Power

- Are there plenty of other companies lined up to grab the deal if you try to negotiate?
- How bad do you need them? – OR – How bad do they need you?
- Do the parties have an existing relationship?
- Is the deal so small, it's not worth negotiating over?

Your Client's Expectations Shape Your Role in the Negotiations

- Active from the beginning of the transaction?
- Consulted along the way about key issues?
- Asked to review the final deal 20 minutes before closing?

How Do You Negotiate?

- Directly with a lawyer for the other party?
- Included in discussions with business people?
- Asked to call someone at the other party to explain what we mean?
- Feeding information to your client so they can do the negotiation?

What Determines How or If the Lawyer Negotiates?

- That's the way it has always been done?
- The sales team prefers to control the dialogue with the customer?
- Getting the lawyers involved just slows down the deal down and makes everything too complicated?
- You are too swamped to get more involved?
- Management wants Legal involved every step of the way?

Possible Ethical Concerns

- If you know the other side has an attorney, must that attorney be involved in the negotiations?
- If you don't know, does it make a difference?
- What if you are wearing your business hat and not your legal hat?
- Does it matter if they are not represented for purposes of the contract only?
- What do the Rules of Professional Conduct have to say?

Policies Can Articulate When and How Legal Needs to Be Involved

- Top Management needs to buy in
- The business team needs to be trained in the policy
- Legal needs to be staffed to handle the volume
- Legal needs to be flexible to handle the exceptions

When Lawyers Step Aside

- Is it cost effective or feasible for a lawyer to review all contracts?
- Can some contracts be executed without legal review or involvement?
- Can some contracts be drafted or negotiated by non-lawyers?

Candidates for No Legal Involvement

- Short term
- Low dollar value
- Not significant to your client's business

Candidates for Handling by Non-Lawyers

- Working from your established form contracts
- Negotiation points addressed by toolkit
- Standard sale of your client's products/services (no customization)
- Standard purchase of goods/services typically bought by your client

In Negotiations, Know Your Client and the Business

- Who has the bargaining power?
- How important is the contract to your client?
- What are your client's products/services? Business strategies? Other important vendor or supplier relationships?
- What are your client's risk management philosophies?
- What are your client's short and long term goals?
- What are your client's "deal killers"?
- What terms is your client willing to give on?

Negotiating, No Matter Whose Form

- Discuss the deal with your client.
- Try to understand the whole transaction from the business point of view.
- Start with fair. (unless you have all the bargaining power and your client wants to use it)
- Don't get mad. Stay calm.
- Try to state your concerns in a non-accusatory manner.
- Avoid a lot of legalese. You may not be talking to a lawyer.
- Don't try to sneak in changes without redlining them.

Negotiating Through Your Business Team

- Look for the issues that are more important because of the nature of the transaction.
- Help them evaluate the risks, and walk them through the business decision.

Negotiating from the Other Side's Draft

- Try to understand the other side's concerns.
- Recognize what your "give" points are.
- Don't kill ants with sledgehammers.
- Fight for the important points, and let the other issues go.
- Look for ways to make clarifications and qualifications rather than wholesale changes.
- Edit Word version, rather than mark-up pdf version.
- Request changes you know they will not take so you will have "gives" later.

If You Get to Use Your Form

- A fair form contract can be a selling tool.
- A fair form contract can mean less time spent negotiating.
- If you consistently have greater bargaining power, your form contract can be more aggressive.
- If you want to discourage negotiation
  - Send in pdf form instead of Word
  - Reduce font size and put in double column format
- If you send in Word format, Protect document in Word to make "read only" or to require "track changes"

Developing Form Contracts

- Develop a form for each of the types of contracts used most frequently in your business.
- Decide whether the forms will be made available to the business team, or if Legal must be involved each time a form is used.
- The form contracts also serve as a helpful clause library.

Develop a Toolkit for the Forms

- Enables consistent use of the forms across the Legal department
- Gives lawyers clear guidance on acceptable alternative language
- Documents the fallback positions already approved by management
- Streamlines negotiations through pre-approval of fallback positions
- Facilitates use of non-lawyers in contract drafting and negotiation
- Provides a training tool for lawyers new to the company

Tools to Help Draft and Negotiate

- ElectraSoft's Multi Clipboard
  - www.electrasoft.com
  - Provides simple system for cataloging fallback provisions and other common text
  - Can be shared among members of a department by sharing files
- Word "Paste Special" feature
- Word "Protect" feature

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Tools to Help Draft and Negotiate

- To prevent execution of draft versions:
  - "Draft" watermark in Word
  - "Draft" inserted in signature block
- To keep track of multiple versions:
  - "Draft + date + time + Party Creating" in Header or Footer

Appendix

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Commonly Negotiated Provisions

- Termination
- Risk Allocation
  - Warranties
  - Limitations of Liability
  - Indemnification
- Audit Rights

Termination

- Know when and under what circumstances you want to be able to terminate the contract -- AND when and under what circumstances you are willing to let the other side terminate the contract
  - For convenience?
  - For breach?
  - For failure to hit specified service thresholds?
  - If parties are unable to agree on price adjustments?
  - If force majeure event lasts longer than a specified period of time?

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Termination—for Convenience

- Considerations
  - How much prior notice is required?
  - Is there an early termination fee?
  - Mutual?
- Support for Provision
  - Long-term contracts need to be flexible
  - Allows flexibility to make proper business choice as needed

Termination—for Convenience

- Example:

  "Client may terminate this Agreement for any reason or no reason, at its convenience, by providing Company a minimum _____ (xx) months prior written notice; provided Client pays Company an early termination fee ("**Termination Fee**") in an amount equal to _____ percent (xx%) of the Estimated Remaining Value of this Agreement. The Termination Fee shall apply to any early termination of this Agreement other than pursuant to termination of this Agreement by Client under cause/default or insolvency provisions hereunder."

Termination—for Convenience

- ***Request:*** **Can we reduce the early termination fee? the notice period?**
  - Client seeks to lower the cost of termination and increase the speed of carrying out the termination
- ***Response:***
  - Remind client that this fee can be avoided by simply not choosing to terminate – choice is in their control
  - Vendor needs to protect its overall risk profile – changes to these two provisions will likely effect pricing
  - Contemplate lower percentages and a shorter period but do not significantly change the risk profile without a reciprocating change in the pricing

Termination—for Cause

- Considerations
  - For only "material" breaches?
  - Notice requirement?
  - Cure period? Different cure period for different types of breaches?
  - Even if complete cure not yet achieved, is termination precluded as long as long as attempts to cure are being diligently pursued?
  - Mutual?
- Support for Provision
  - Non-breaching party needs ability to terminate its obligations under the agreement when the other party is failing to meet its obligations

Termination—for Cause

- Example:
  - "In the event either Party fails to perform any of its material obligations under this Agreement and the defaulting Party fails to substantially cure such default within sixty (60) days after receiving written notice specifying the nature of the default, then the non-defaulting Party may, by giving notice to the other Party, terminate this Agreement as of the date specified in such notice of termination."

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Termination—for Cause

- ***Request:*** **Can we shorten the cure period?**
- ***Response:***
  - Assess the nature of the agreement and determine whether a shorter period is feasible.
    - Vendor typically wants longer cure period, and client a shorter cure period, except for payment issues.
    - Nature of services required may require lengthy cure period.
  - Assess adding a provision allowing some monetary remedy during period of cure.

Termination — Insolvency/Bankruptcy

- Support for Provision
  - Vendor (or client) needs ability to terminate its obligations under the agreement when client (or Vendor) is financially unable to meet its obligations

Termination — Insolvency/Bankruptcy

- Example:
  - "In addition to the termination rights set forth herein, subject to the provisions of Title II, United States Code, if either Party becomes or is declared insolvent or bankrupt, is the subject of any proceedings relating to its liquidation, insolvency, or for the appointment of a receiver or similar officer for it, makes an assignment for the benefit of all or substantially all of its creditors, or enters into an agreement for the composition, renewal, or readjustment of all or substantially all of its obligations, then the other Party, by giving written notice to such Party, may terminate this Agreement as of the date specified in such notice of termination. In addition, immediately prior to the voluntary or involuntary filing of bankruptcy, Client grants a preferred security interest in any and all Client Equipment located in Company's Data Center pursuant to this Agreement, subject only to any purchase money security interest(s) in such Client Equipment and grants Company preferred/critical vendor status and shall represent Company as such in subsequent bankruptcy filings."

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Termination — Insolvency/Bankruptcy

- ***Request:*** **Can we remove the security interest provision? the critical vendor requirement?**
  - Client usually has bank covenants that prevent this type of security interest clause
  - Client may push back on critical vendor status if Vendor is unable to convince Client that Vendor is critical to operations of Client
- ***Response:***
  - Usually no issue with removing these clauses

Risk Allocation

- Parties try to allocate and manage their risk through a variety of provisions, most often warranties, limitations of liability, and indemnities.
- All of these provisions need to be considered together. In negotiating these provisions, keep in mind how they affect and interact with the others.
- Understanding your client's bargaining power and willingness to accept risk are key to negotiating the risk allocation portion of a contract.
- Establish policies or other tools that let you and others in your company know what approvals within the company are required to agree to risk allocation terms that depart from your standards.

Warranties

- If you are the seller, understand the warranties you are giving and be sure your client understands them too
- If you are the buyer, understand what warranties your client needs from the seller, and what limitations your client can accept
- Understand how the warranty affects your client
  - Revenue
  - Risks involved
- Understand how the warranty affects and interacts with the other parts of the contract

Warranties

- What warranties do you offer? Are being offered?
  - For example: Quality of Service; Performance of Goods; Conformity of Goods to Documentation or Specifications; Adequacy of Documentation and Training; Frequency and Quality of Updates; Corporate Power and Authority; Sufficient Title; No Intellectual Property Infringement; Y2K Compliance
- Remedies? – repair, replace, refund? Sole remedy?
- Time limit for bringing claims?
- What warranties are disclaimed?

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Warranties

- **Example:**

"Licensor warrants that for a period of ninety (90) days from the Installation Date, when used as intended in this Agreement, the Software will operate in conformance with the specifications (the "Warranty"). Licensor does not warrant that the functions contained in the Software will meet Licensee's requirements or that operation of the Software will be uninterrupted or error free. If Licensee discovers a material defect that causes the Software to fail to substantially conform to the specifications, Licensee shall promptly inform Licensor in writing setting forth in detail such nonconformity. Licensor's entire obligation and Licensee's sole remedy will be for Licensor to (a) use commercially reasonable efforts to correct such failure; and (b) if Licensor is unable to correct such failure, refund that portion of the License Fee paid by Licensee for the non-conforming component of the Software. In the event a portion of the License Fee is returned, Licensee will de-install and return to Licensor all copies of the non-conforming component of the Software. **THE FOREGOING IS LICENSOR'S ENTIRE LIABILITY TO LICENSEE AND LICENSEE'S EXCLUSIVE REMEDY FOR DEFECTS IN THE SOFTWARE OR ANY BREACH OF THE FOREGOING WARRANTY. THE FOREGOING WARRANTY SHALL TERMINATE IMMEDIATELY IF THE SOFTWARE IS USED FOR ANY PURPOSE OTHER THAN AS IS EXPRESSLY INTENDED HEREUNDER OR IN THE EVENT OF ANY OTHER MATERIAL BREACH OF THIS AGREEMENT BY LICENSEE."**

Warranties

- **Example:**

"Company warrants that it will perform the Services in a workmanlike manner, and that the Services will conform materially to their written specifications contained in this Agreement. Customer's sole and exclusive remedy for any breach of Company's warranty is set forth in the exclusive remedy and limitation of liability section of this Agreement. Customer must bring any warranty claims within 30 days of Company's provision of any non-conforming portion of the Services, and failure to do so will constitute irrevocable acceptance of such Services and waiver of any related claims. **COMPANY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, ACCURACY, OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. COMPANY DOES NOT WARRANT OR REPRESENT THAT ACCESS TO AND USE OF ANY SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ENJOYMENT OF SUCH SERVICES WILL BE WITHOUT INTERFERENCE."**

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Limitations Of Liability

- Multiple elements – need to be considered together
  - Exclusive remedy
  - Limitation on direct damages
  - Disclaimer of consequential damages
- Should have a reasonable relationship between the value of the agreement and the liability risk
- Limitation is fair -- neither party should have to "insure" against all damages the other may suffer

Limitations Of Liability–Exclusive Remedy

- **Support for Sole and Exclusive Remedy Provision:**
  - If a customer is not satisfied with the work that has been performed or goods that have been furnished, or otherwise feels that the vendor has not satisfactorily performed its obligations, then the vendor would like the opportunity to "make good" with the customer.
  - If vendor is not able to "make good" with the customer, then it will refund to the customer the fees it paid for the defective services.
  - With either result, the customer is fairly compensated for the vendor's failure.

Limitations Of Liability–Exclusive Remedy

- **Example:**

"Customer will provide Company with prompt written notice of any claim arising out of this Agreement, and Customer's sole and exclusive remedy for any such claim will be for Company, in its sole discretion and subject to the limitations described in this section, to: (a) use commercially reasonable efforts at its expense to cure the breach or damage that gave rise to the claim; or (b) refund to Customer the amounts paid to Company for Services related to the claim."

Limitations Of Liability–Exclusive Remedy

- **Example:**

"Licensor warrants that for a period of ninety (90) days from the Installation Date, when used as intended in this Agreement, the Software will operate in conformance with the specifications (the "Warranty"). Licensor does not warrant that the functions contained in the Software will meet Licensee's requirements or that operation of the Software will be uninterrupted or error free. If Licensee discovers a material defect that causes the Software to fail to substantially conform to the specifications, Licensee shall promptly inform Licensor in writing setting forth in detail such nonconformity. **Licensor's entire obligation and Licensee's sole remedy will be for Licensor to (a) use commercially reasonable efforts to correct such failure; and (b) if Licensor is unable to correct such failure, refund that portion of the License Fee paid by Licensee for the non-conforming component of the Software.** In the event a portion of the License Fee is returned, Licensee will de-install and return to Licensor all copies of the non-conforming component of the Software. **THE FOREGOING IS LICENSOR'S ENTIRE LIABILITY TO LICENSEE AND LICENSEE'S EXCLUSIVE REMEDY FOR DEFECTS IN THE SOFTWARE OR ANY BREACH OF THE FOREGOING WARRANTY. THE FOREGOING WARRANTY SHALL TERMINATE IMMEDIATELY IF THE SOFTWARE IS USED FOR ANY PURPOSE OTHER THAN AS IS EXPRESSLY INTENDED HEREUNDER OR IN THE EVENT OF ANY OTHER MATERIAL BREACH OF THIS AGREEMENT BY LICENSEE."**

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Limitations Of Liability–Exclusive Remedy

- **Considerations**
  - An exclusive remedy may fail of its essential purpose if it does not actually give the customer a remedy (e.g., if the sole remedy is repair or replacement, and the vendor is unable to repair or replace)
  - To avoid having the exclusive remedy fail of its essential purpose, offer a refund as an alternative remedy
- **Recommended Reading**
  - Piper Jaffray & Co. v. SunGard Systems International, Inc., United States District Court, D. Minnesota, September 30, 2004
  - Caudill Seed and Warehouse Company, Inc. v. Prophet 21, Inc., United States District Court, E.D. Pennsylvania, November 22, 2000 (123 F.Supp.2d 826).

Limitations Of Liability–Exclusive Remedy

- ***Request:*** **Remove exclusive remedy provision**
- ***Response:***
  - Establish dialogue regarding what damages each side may actually experience to identify potential compromise areas
  - Rather than removing the provision entirely, consider compromise options:
    - Add to list of exclusive remedies with specific additional remedies
    - Allow customer to select remedy among options if contract gave discretion to service provider
    - If compromise is not reached, agree to remove the provision, but then be sure to get an adequate cap on direct damages.

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Limitations Of Liability -- Disclaimer of Consequential Damages

- **Support for Disclaimer of Consequential Damages:**
  - This disclaimer is reasonable because Company should not be held liable for losses that are far removed from a breach of the contract. Company cannot predict, and be prepared to be held responsible for, every possible loss that may stem from a breach of the Agreement. Company is not an insurer.
- **Example:**

  "In no event will Company be liable for any indirect, punitive, special, or consequential damages, including lost sales or profits, even if it has been advised of the possibility of such damages."

Limitations Of Liability -- Disclaimer of Consequential Damages

- ***Request*: Make this mutual**
- ***Response:***
  - Unless there are very compelling reasons why the nature of the obligations between the parties are sufficiently different such that only one side should be liable for these types of damages, you should probably agree to the request. Be sure to consider the types of claims each side would likely make against the other in evaluating what you lose in making this mutual.
  - Example response:

    "In no event will either party be liable for any indirect, punitive, special, or consequential damages, including lost sales or profits, even if it has been advised of the possibility of such damages."

Limitations Of Liability -- Disclaimer of Consequential Damages

- ***Request:*** **Delete provision.**
  - You should avoid at all costs incurring consequential damage liability in a contract in which you are the service provider. If your only obligation is to make payments or your obligations are otherwise not going to entail large and spiraling damages, then you can consider not having a disclaimer of consequential damages.
- ***Response:***
  - Argue that the prices quoted would need to be increased significantly for vendor to assume that level of risk.
  - Argue it is commercially standard in most contracts to have limitations for these types of damages.
  - Explore whether other side has similar provision in its contracts with its customers (check the other side's website; check EDGAR)
  - Require appropriate level authority to approve high levels of liability

Limitations Of Liability – Limits on Damages

- **Support for Limitation of Direct Damages Liability:**
  - It is prudent that the vendor limit its exposure to an amount that is related to the value of the services being provided. The services are (or should be) priced by taking into account the liability that the vendor may be exposed to in the event of a breach of the agreement. If vendor expected to be exposed to a greater limit of liability (or no limit of liability), then it would price its services much higher.
- **Example:**

"Company's liability to Customer for claims arising under this Agreement, regardless of form, will not exceed the amounts paid by Customer for the defective portion of the Services that is the subject of the claim, and in no event will Company's aggregate liability for all claims under this Agreement exceed the total fees paid by Customer for the specific portion of Services in dispute."

Limitations Of Liability – Limits on Damages

- ***Request:*** **Increase (or remove) this limit of liability**
- ***Response:***
  - Negotiate increases to the cap seeking to keep limit to no more than one times the value of the entire contract. Be sure to obtain appropriate approvals for liability level accepted.

    "Company's liability to Customer for claims arising under this Agreement, regardless of form, will not exceed two times the amounts paid by Customer for the defective portion of the Services that is the subject of the claim, and in no event will Company's aggregate liability for all claims under this Agreement exceed two times the total fees paid by Customer for the specific portion of Services in dispute."
  - Resist having no limit on direct damages liability. If you decide to have no limit, return to the sole and exclusive remedies and be sure they are as limiting as possible.
  - Use same arguments used for disclaimer of consequential damages.

Limitations Of Liability – Limits on Damages

- ***Request:*** **Make the limitation on direct damages mutual**
  - You need to consider the type of contract and the obligations on each side. As service provider, if you agree to make this sentence mutual, then you must take into consideration that the cap would apply to the customer's obligation to indemnify the service provider for third party claims, and the customer's obligation to make payments due under the agreement (and any other unique obligations the customer might have in a particular matter). Therefore, the service provider could agree to make this sentence mutual, but the cap should not apply to the customer's payment obligations and service provider must determine whether it should apply to indemnification obligations. If both the service provider and the customer are equally likely to seek indemnification, the cap generally should not apply. If, however, the customer is more likely to seek indemnification from the service provider, the cap should apply to indemnification claims.

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Limitations Of Liability -- Limits On Damages

- ***Request:*** **Create an exception from the limitation of liability for indemnification claims. In other words, make the indemnification obligations uncapped.**
- ***Response:***
  - In general, the limitation of damages should apply to indemnification obligations.
  - But if indemnification is only available for third party claims (not for claims by one contract party against the other), it may be permissible to specify that the liability cap does not apply to indemnification claims. This position is reasonable because the indemnitee's liability to the third party is probably not limited, so the indemnitor's liability should not be limited either. Be sure to get appropriate approvals internally.

Limitations Of Liability -- Limits On Damages

- **Example response:**

  "Company's liability to Customer for claims arising under this Agreement, regardless of form, will not exceed the amounts paid by Customer for the defective portion of the Services that is the subject of the claim, and in no event will Company's aggregate liability for all claims under this Agreement exceed the total fees paid by Customer for the specific portion of Services in dispute; provided, however, the foregoing limitations of liability will not apply to limit Company's indemnification obligations under this Agreement."

- **Example response:**

  "Each party's liability to the other party for claims arising under this Agreement, regardless of form, will not exceed the amounts paid by Customer for the defective portion of the Services that is the subject of the claim, and in no event will either party's aggregate liability for all claims under this Agreement exceed the total fees paid by Customer for the specific portion of Services in dispute; provided, however, the foregoing limitations of liability will not apply*[: (a)] to Customer's payment obligations under this Agreement[; or (b) to either party's indemnification obligations under this Agreement]*."

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Indemnification

- What indemnity will you agree to give?
  - IP infringement (trademark, copyright, trade secret, patent)
  - Bodily injury / Property damage
  - Breach
- What indemnity do you need to get?
  - Mirror image of your indemnity?

Indemnification

- How is the indemnity limited?
  - Certain types of damages?
  - All costs or just final judgment?
  - Subject to or excluded from limitation of liability?
- Process for indemnity?
  - Notice required? How much?
  - Is the indemnified party required to provide assistance? At whose expense?
  - Who selects counsel?
  - Who controls the defense?
  - Does the indemnified party have the right to consent to any settlement?

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Indemnification

- **Example:**
  "Licensor will defend at its expense and hold Licensee harmless from and against any third-party action brought against Licensee to the extent it is based upon a claim that the Software, when used in accordance with this Agreement, infringes a U.S. copyright or trade secret, and Licensor will pay any settlements and damages awarded to such third party, including reasonable expenses and attorney's fees incurred by Licensee solely in connection with defending such third party claim; provided that (i) Licensee promptly notifies Licensor in writing of any such action, (ii) Licensee gives Licensor full information and assistance in connection therewith, and (iii) Licensee gives Licensor exclusive control of the defense and settlement thereof. If the Software is, or in Licensor's opinion might be, subject to a claim of infringement as set forth above, Licensor may, at its option, replace or modify the Software to avoid infringement or procure the right for Licensee to continue the use thereof. If neither of such alternatives is commercially reasonable in Licensor's opinion, Licensee will return the infringing component of the Software to Licensor and Licensor shall refund the License Fee paid by Licensee for such component, less amortization based on a five (5) year, straight-line amortization schedule from the Effective Date. Licensor shall have no liability for any claim of infringement arising out of (a) any Modification or Modification by Licensor pursuant to Licensee's specifications; (b) the failure of Licensee to use the current Version (as that term is defined in Exhibit 1) of the Software; or, (c) any combination of the Software with any other software. THIS SECTION STATES LICENSOR'S ENTIRE LIABILITY FOR ANY INFRINGEMENT BY THE SOFTWARE OR ANY PART THEREOF."

Indemnification

- **Example:**
  "Licensor will defend at its expense and hold Licensee harmless from and against all claims of infringement or misappropriation of intellectual property or other proprietary rights related to the Software or other software provided by Licensor hereunder, and shall pay any settlements and damages awarded to such third party. Licensee shall (i) promptly notify Licensor in writing of any such action, (ii) give Licensor full information and assistance in connection therewith, and (iii) give Licensor exclusive control of the defense and settlement thereof."

- **Example:**
  "Client will indemnify, defend, and hold Vendor harmless against any third party claim relating to: (i) Client's misuse of the Services; (ii) bodily injury or death of any person or damage to real or tangible property to the extent proximately caused by Client's negligence or willful misconduct in the performance of this Agreement; (iii) Client's provision of materials that (a) actually or allegedly infringe on any patent, trademark, trade secret, copyright, or other proprietary rights of any third party; (b) invade any person's right to privacy or other personal rights; or (c) give rise to a claim of unfair competition; or (iv) Client's failure to pay sales, use, and similar taxes as required in this Agreement."

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Indemnification

- **Example:**

  "Neither party will be required to indemnify the other party unless the party seeking indemnification: (i) notifies the other party promptly in writing of the claim; (ii) cedes sole control of the defense and all related settlement negotiations to the other party; and (iii) provides the other party with all necessary assistance in the defense (at the indemnifying party's expense)."

Audit Rights

- Especially following SOX, there seems to be an increase in the use of audit right provisions in agreements.
- In deciding how to negotiate an audit right provision, first think about the nature of the performance under the Agreement and whether it makes sense to have an audit provision.
- Audits can be disruptive, overbroad, and give the auditing party inappropriate access to confidential information, so audit requests must be considered with care.

Audit Rights

- **Reasons to Have/Not Have an Audit Provision**
  - An audit provision would be appropriate where the charges for services performed, or rebates paid, are based on a variable factor, such as the number of hours worked. In these situations the audit would permit the auditing party to verify that the charges or rebates are correct.
  - If the charges are based on a final tangible work product that a customer receives or the prices for the work are fixed, then there is no need for an audit.

Audit Rights

- **Example (favorable to customer):**

  "Vendor shall keep full, accurate and complete records of all services provided and billed pursuant to this Agreement. At any time during the term of this Agreement and for a period of [*X]* years after the termination or expiration of this Agreement, Customer shall have the right, upon reasonable notice, to examine, copy and audit up to [*X]* years of Vendor's records (including without limitation, hard copy, electronic access, and computer-readable formats) with respect to any and all matters occurring within the *[X]* year period prior to the request and directly relating to any and all of Customer payments under this Agreement and Vendor's compliance with Customer's ethics policy. Should Customer request such an audit, Vendor agrees reasonably to cooperate with Customer in conducting the audit, including, but not limited to, providing adequate office space, office equipment and computer equipment to facilitate the audit. If the audit reveals that any payment was not in conformity with the provisions of this Agreement or that Vendor knowingly violated any provisions of Customer's ethics policy, then Customer shall be entitled to immediate refund of any such payments and/or demand and receive Vendor's reasonable assistance and cooperation in pursuing, addressing, and rectifying the violations of Customer's ethics policy. If any nonconforming payment exceeds __ percent (__%) of the valid amount, or if the nonconforming payments in the aggregate exceed $_____, or if the audit identifies any knowing violation of Customer's ethics policy, then Customer shall also have the right to offset or demand payment from Vendor for all costs associated with the audit and examination, including, but not limited to, reasonable legal and accounting fees."

Audit Rights

- **Example (still an advantage for customer, but these terms are more favorable to vendor than in the prior example):**

> "For the duration of the Services and a period of 6 months thereafter, Customer will have the right, after giving Company at least 10 days' prior written notice, to review certain records directly relating to the charges paid for the Services. This right will not extend to any fixed fee component of the charges, or to any Services performed more than 2 years prior to the date of Customer's request for a review. If Customer exercises this right, Company will make available such records as it determines to be necessary to support the amounts charged to Customer. Customer agrees to compensate Company for time expended by Company's staff to facilitate the review and to reimburse Company for any expenses incurred in connection with the review. Customer may exercise this right only once in any calendar year and Customer agrees to limit the duration of the review to a reasonable period. The review must be conducted at mutually convenient times and locations and in a manner that does not disrupt Company's business operations. Customer agrees to keep information disclosed to Customer in the course of the review confidential from all third parties, except for any third party participating in the review with Company's consent."

NEGOTIATING TOOLKIT FOR KEY PROVISIONS FROM THE COMPANY SERVICES AGREEMENT

1. Introduction.

The purpose of this Toolkit is to help Company personnel understand the key provisions of the Company Services Agreement (the **"CSA"**) and to facilitate negotiation of these provisions, whether used as part of the CSA or as insertions to customer agreements. This Toolkit addresses the most commonly raised issues in the CSA. For each issue, the Toolkit provides:

- A statement regarding the purpose of the CSA provision.
- Supporting arguments in favor of the provision.
- Requests for changes to the provision that customers may commonly make.
- An argument opposing the customer request and/or a description of a "fallback" position that may be taken in response to a customer request.
- For provisions for which a fallback position is appropriate, fallback language to insert in the contract.

If you have any questions on how to use this Toolkit, or if the customer's concern is not addressed in the Toolkit, please contact an Associate General Counsel or the General Counsel.

2. Non-U.S. Customer Agreements.

This Toolkit is designed for use with customers located in the United States. If a customer is located outside of the United States, you must notify and obtain approval to proceed with the agreement from the General Counsel.

3. Approval of Certain Business Terms.

The business terms of customer agreements may expose Company to risks that require approval by specific Company executives. Approval from one or more individuals, as listed below, must be obtained prior to execution of agreements containing any of the following terms:

- If the value of an agreement exceeds _____, the _____must approve the agreement prior to its execution. If the value of an agreement exceeds _____, the _____also must approve the agreement prior to its execution.
- If an agreement provides for renewal with price concessions, the _____must approve the agreement prior to its execution.
- If an agreement requires Company to make capital expenditures, the _____must approve the agreement prior to its execution.
- If any of the following provisions are in an agreement, the _____ must approve the agreement prior to its execution.
  - Unlimited direct damages liability
  - No disclaimer of consequential damages
  - Exclusivity
  - Most Favored Nations Pricing/Terms
  - Termination of Agreement for Change in Control

4. Use of Fallback Provisions.

It is important that you advocate use of Company's original agreement provisions before you resort to using one of the fallback provisions, because the original agreement provisions are designed to best protect Company's legal and business interests. To assist you in this effort, this Toolkit includes supporting arguments in favor of Company's original agreement provisions. A fallback provision should be a last resort that is used only if a customer will not agree to an original

agreement provision. Also, whenever possible the fallback provision should be "traded" for a concession by the customer that Company wants. Finally, examine the agreement as a whole when determining whether a fallback provision is acceptable, because a provision may function in connection with a related provision so that one change may necessitate another (for example, a provision that limits a party's liability is closely related to a provision that specifies a sole remedy - if the sole remedy is removed, then the limitation of liability should be closely examined).

Before modifying the CSA by using any of the fallback provisions in this Toolkit, you may be required to obtain approval in accordance with the Approval Process specified with each fallback position and described as follows:

Approval Process	Approval
1	An Associate General Counsel in conjunction with the Senior Business Executive (the business executive above the individual who obtained the account) involved in the transaction must approve use of the fallback provision. If such approval is not granted, you may escalate the decision to the General Counsel and the COO for a final determination.
2	An Associate General Counsel must approve use of the fallback provision, taking into consideration the facts of the particular deal.
3	The CFO must approve use of the fallback provision, taking into consideration the facts of the particular deal.
4	The General Counsel must approve use of the fallback provision and, as the General Counsel deems necessary, in consultation with the CFO and the COO. If such approval is not granted, you may escalate the decision to the CEO for a final determination.
5	The Business Unit Credit Executive must approve use of the fallback provision.
6	The Sr. VP Finance, COO, and CFO must approve use of the fallback provision.
7	The COO must approve use of the fallback provision.
8	The General Counsel must approve use of the fallback provision in consultation with the Sr. VP Finance, COO, and CFO. If such approval is not granted, you may escalate the decision to the CEO for a final determination.

Note: In addition to obtaining the approvals noted above, you may need to obtain additional approval for agreements that include any of the business terms specified above in Item 3.

KEY PROVISIONS

I. Intellectual Property Infringement.

A. Main Provision.

Intellectual property rights infringement may occur when one party provides goods or services that inappropriately incorporate another party's intellectual property. For example, if Company were to design a website for a customer using code that was copied from another party's website, Company may be infringing on the other website owner's copyright. If that website owner saw the Company customer's new website, it may realize that the code was used without permission, and sue the Company customer for copyright infringement. The Company customer would want to have Company defend that lawsuit and pay any damages because Company designed the website. Normally, the legal fees for such cases run into the mid-six figures at a minimum. An intellectual property infringement indemnification provision is designed to address this customer concern, while also giving Company appropriate control of the response to such an allegation.

CSA Provision: Indemnification by Company. Company will indemnify, defend, and hold Customer (including its directors, officers, shareholders, and employees) harmless against any third party claim: (a) relating to bodily injury or death of any person or damage to real or tangible property to the extent proximately caused by Company's negligence or willful misconduct in the performance of this Agreement; or (b) that any Services provided by Company misappropriate a trade secret or infringe a copyright or United States patent right of such third party.[1] Company will not be liable to Customer to the extent a claim of infringement is based on: (i) Customer's misuse or modification of the Services; (ii) Customer's failure to use corrections or enhancements made available by Company; (iii) Customer's use of the Services in combination with any service, product, software or hardware not expressly directed by Company in writing to be used with the Services; (iv) information, direction, specifications, or materials provided by Customer or any third party; (v) Customer's distribution or marketing of the Services to third parties; or (vi) any third party items provided under this Agreement.[2] If any portion of the Services is, or in Company's opinion is likely to be, held to constitute an infringing item, Company will at its expense and option either: (a) procure the right for Customer to continue using it; (b) replace it with a non-infringing equivalent; (c) modify it to make it non-infringing; or (d) direct the return of the item and refund to Customer the fees paid for such item, less a reasonable amount for Customer's use of the item up to the time of return. **THE PROVISIONS OF THIS SECTION CONSTITUTE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES AND COMPANY'S ENTIRE OBLIGATION TO CUSTOMER WITH RESPECT TO INFRINGEMENT.**[3]

Sentence 1 ***Indemnification by Company***

Company will indemnify, defend, and hold Customer (including its directors, officers, shareholders, and employees) harmless against any third party claim: (a) relating to bodily injury or death of any person or damage to real or tangible property to the extent proximately caused by Company's negligence or willful misconduct in the performance of this Agreement; or (b) that any Services provided by Company misappropriate a trade secret or infringe a copyright or United States patent right of such third party.

Purpose. Requires Company to take responsibility for certain claims that a third party may bring against a customer alleging that services (including work product) provided by Company to the customer violate the third party's intellectual property rights.

Support. This sentence protects the customer from infringement claims that are within Company's reasonable ability to investigate and remedy. Only claims of infringement of United States patents are included because patent rights are country-specific, and it would be overly burdensome for Company to investigate patent owners' rights worldwide in order to verify that Company's invention does not violate a foreign patent. Therefore, Company should resist a customer's request

that Company indemnify the customer for patent infringement claims brought by individuals holding patents in countries other than the United States.

Request #1: Remove "United States"	**Approval:**	**2**

Fallback #1. Company should resist the customer's request by explaining its reasons for limiting its indemnification obligation to claims for infringement of United States patents. If, however, a customer persists in its request, Company could offer as a compromise to include indemnification for United States and _____patents, because Company conducts business in these countries and thus is willing and able to take on this responsibility. You should explain to the customer that Company will only provide indemnification for patent infringement in the countries where Company conducts business, which are also the locations where Company anticipates the customer will utilize Company's services.

Fallback Language #1. Company will indemnify, defend, and hold Customer harmless against any third party claim that any Services provided by Company infringe any copyright, trade secret, or United States or _____ patent right of such third party.

Request #1 - Fallback #2	**Approval:**	**4**

Fallback #2. If, a customer is still not satisfied Company could agree to remove "United States." This would result in Company taking on more risk than it would typically like, but it is a risk that Company may be willing to take in some situations.

Fallback Language #2. Company will indemnify, defend, and hold Customer harmless against any third party claim that any Services provided by Company infringe any copyright, trade secret patent right of such third party.

Request #2: Include indemnification for trademark infringement	**Approval:**	**None**

Fallback. Company could agree to indemnify the customer if marks or logos Company provides the customer infringe a third party's trademark rights.

Fallback Language. Company will indemnify, defend, and hold Customer harmless against any third party claim that any Services provided by Company infringe any trademark, copyright, trade secret, or United States patent right of such third party.

Sentence 2 ***Indemnification by Company***

Company will not be liable to Customer to the extent a claim of infringement is based on: (i) Customer's misuse or modification of the Services; (ii) Customer's failure to use corrections or enhancements made available by Company; (iii) Customer's use of the Services in combination with any service, product, software or hardware not expressly directed by Company in writing to be used with the Services; (iv) information, direction, specifications, or materials provided by Customer or any third party; (v) Customer's distribution or marketing of the Services to third parties; or (vi) any third party items provided under this Agreement.

Purpose. Excuses Company from indemnifying the customer in situations where infringement occurs due to something that was beyond Company's control (and, in many cases, was in the customer's control).

Support. Company should not be required to indemnify the customer for infringement claims that arise because the customer does not follow Company's instructions, or because the infringement is caused by something not provided by Company. In the case where Company provides third-party items to a customer, such as computer hardware, Company is doing so primarily as a convenience to the Customer. Supplying hardware is not Company's usual business, so it is not in a position to assess whether third-party items may have infringement issues. If any such issues exist, the customer can deal directly with the manufacturer.

Request #1. Remove or change this sentence.	**Approval:**	**1**

Fallback #1. Company should not change the substance of items (i) through (v) of this sentence. If a customer uses an item in a way that is not permitted, or if the infringement is caused by something not provided by Company, then Company should not be held responsible.

However, if a customer expresses a particular concern regarding item (vi) (infringement by third party items), Company could agree, to the extent reasonably possible, to pass through any warranties against non-infringement or indemnification for infringement made by the seller or licensor of the third party items (this will require review of the third party warranties and indemnification provisions and possibly discussion with the third party).

Fallback Language #1. Company represents that Customer is entitled to make [warranty and/or indemnification] claims regarding the third party items specified in Exhibit 1 against the third party specified in Exhibit 1, under the terms of the [warranty and/or indemnification] provisions[s] set forth in Exhibit 1. Such claims shall be Customer's sole and exclusive remedy with regard to such third party items, and Company shall have no liability for such third party items.

Fallback #2. If a customer is still not satisfied, Company could agree to remove item (vi) if Company reviews the contracts under which the third party items were purchased by or licensed to Company and confirms that Company received a warranty of non-infringement and/or indemnification from the provider of the third party items. This would allow Company to pursue claims against the third party if the customer pursued claims against Company.

Fallback Language #2. Remove item (vi) from the paragraph.

Sentence 3 ***Indemnification by Company***

If any portion of the Services is, or in Company's opinion is likely to be, held to constitute an infringing item, Company will at its expense and option either: (a) procure the right for Customer to continue using it; (b) replace it with a non-infringing equivalent; (c) modify it to make it non-infringing; or (d) direct the return of the item and refund to Customer the fees paid for such item, less a reasonable amount for Customer's use of the item up to the time of return.

Purpose. This Sentence limits the remedies that Company must provide to a customer who is sued because an item provided by Company infringes a third party's intellectual property rights.

Support. This sentence is reasonable because they result in the customer being fairly compensated (i.e., the customer receives from Company either a repaired or substituted item that does not infringe, or the customer is refunded any fees that have been paid for the period in which the customer will no longer be able to use the infringing item).

Request #1. Remove the phrase "less a reasonable amount for customer's use of the item up to the time of return."	**Approval:**	**2**

Fallback. Company should explain that this phrase is reasonable because if the item is found to be infringing after it has been used by the customer for several months (or years, as the case may be), then the customer should not be entitled to a refund of fees that are attributed to the customer's use of the item prior to it being found to infringe.

If the customer persists in its request, Company could offer the following compromise: the phrase "less a reasonable amount for customer's use of the item up to the time of return" must remain in the CSA, but Company will agree to reimburse the customer for the expenses (up to a reasonable cap) that the customer may incur to transition to a new service provider. The cap should be set by considering the costs the customer will incur during the time of the transition, which are the costs the customer would have avoided (for awhile, at least) if the customer had been able to use Company's service. The cost of the new service is less relevant, however, because the customer would have had to pay for Company's service.

Fallback Language. . . (d) direct the return of the item and refund to Customer the fees paid for such item, less a reasonable amount for Customer's use of the item up to the time of return, in which case Company will reimburse Customer for up to $_____ of the costs that Customer actually incurs to transition to a new service provider, such costs to be substantiated by documentation

provided by Customer to Company within ____ days of Company's notice to Customer to return the infringing item.

Request #2. **Allow the customer to decide which remedy Company will use.**	***Approval:***	**2**

Fallback. Company should explain that as the provider of the service, it is in the best position to identify the appropriate remedy. If a customer persists, arguing, for example, that Company's proposed remedy would unduly disrupt the customer's operations, Company could allow the customer the right to approve the remedy, providing such approval could not be unreasonably withheld.

Fallback Language. If any portion of the Services is, or in Company's opinion is likely to be, held to constitute an infringing item, Company will at its expense and option, subject to Customer's approval (not to be unreasonably withheld), either . . . .

B. Related Provisions. **Intellectual Property Infringement**

CSA Provision: Prerequisites to Indemnification. Neither party will be required to indemnify the other party unless the party seeking indemnification: (i) notifies the other party promptly in writing of the claim; (ii) cedes sole control of the defense and all related settlement negotiations to the other party; and (iii) provides the other party with all necessary assistance in the defense (at the indemnifying party's expense).

Purpose. This provision allows the indemnifying party to respond to an indemnification claim in a timely manner, and to have access to all the resources it may need to effectively defend the claim.

Support. A party should not be required to indemnify the other party unless it is provided the opportunity to respond in a timely manner and to handle the defense as it deems necessary.

Request #1. **Remove this provision, because if a party seeking indemnification fails to give prompt notice, it might not be indemnified.**	***Approval:***	**2**

Fallback. Instead of removing this provision, Company could agree to include a provision in the CSA that specifies that a delayed notice from a party seeking indemnification will not void the other party's indemnification obligation if the party seeking indemnification can show that the delay was not prejudicial to the other party's ability to defend the claim.

Fallback Language. Neither party will be required to indemnify the other party unless the party seeking indemnification: (i) notifies the other party promptly in writing of the claim, provided, however, that a delayed notice from a party seeking indemnification will not void the other party's indemnification obligation if the party seeking indemnification can show that the delay was not prejudicial to the other party's ability to defend the claim, ...

Request #2. **Allow the party seeking indemnification to control the defense.**	***Approval:***	**4**

Fallback. Company should explain to the customer that the party who will ultimately be responsible for the payment of any damages award or settlement amount should be permitted to control the defense and settlement of the claim. Company could, however, agree to include language that provides the party seeking indemnification the right to reasonably approve a settlement agreement, and/or the right to participate through its own counsel and at its own expense in defense of a claim.

Fallback Language. . . (ii) cedes sole control of the defense and all related settlement negotiations to the other party, provided, however, that the party seeking indemnification may, at its own cost and expense, participate in the defense and all related settlement negotiations through its own counsel, and provided that any settlement that affects the rights or obligations of the party seeking indemnification will be subject to approval by such party, such approval not to be unreasonably withheld.

CSA Provision: Warranty and Remedy. A warranty against infringement is not provided in the CSA.

Purpose. Company chose to not include a warranty against infringement in the CSA because it would be impossible for Company to confirm that its services do not infringe a third party's intellectual property rights. For example, patent applications are secret for at least 18 months after they are filed, so Company would often not be able to learn if its services are infringing on a patent until the patent is issued, which could be after Company signs the contract with the infringement warranty. At that point, Company would be in a breach of the warranty even though it could not have avoided it.

Support. The exclusion of this warranty is reasonable because the customer is protected by the indemnification for infringement provision discussed above.

Request: **Include a warranty against infringement.**	***Approval:***	**2**

Fallback. Company could agree to include a warranty against infringement, provided:

- The warranty is "to Company's knowledge at the time of execution of the CSA"; and
- The customer's sole remedy for breach of the warranty is for Company to indemnify the customer as described in the infringement indemnification provision.

If the customer will not agree to both of the provisos discussed above, then Company could agree to make the warranty against infringement with just one of the provisos.

Fallback Language. Company warrants that, to Company's knowledge at the time of execution of this Agreement, the Services provided by Company do not infringe any copyright, trade secret, or United States patent right of any third party. Customer's sole remedy for breach of the foregoing warranty is for Company to indemnify Customer as described in this Agreement's provision on infringement indemnification.

Note: *If the warranty against infringement is made, the term "non-infringement" should be removed from the disclaimer of warranties, as discussed below.*

Note: *If Company agrees to indemnify the customer for trademark infringement, then the fallback language may include a reference to trademarks as follows:*

Company warrants that, to Company's knowledge at the time of execution of this Agreement, the Services provided by Company do not infringe any trademark, copyright, trade secret, or United States patent right of any third party. Customer's sole remedy for breach of the foregoing warranty is for Company to indemnify Customer as described in this Agreement's provision on infringement indemnification.

Note: *If Company agrees to remove "United States" from the infringement indemnification provision resulting in Company being obligated to indemnify Customer for patent infringement world-wide, then the term "United States" may be removed from the fallback language set forth above.*

CSA Provision: Disclaimer. **COMPANY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, ACCURACY, OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. COMPANY DOES NOT WARRANT OR REPRESENT THAT ACCESS TO AND USE OF ANY TECHNOLOGY SERVICES PROVIDED BY COMPANY WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ENJOYMENT OF SUCH TECHNOLOGY SERVICES WILL BE WITHOUT INTERFERENCE.**

Purpose. Company included the term "non-infringement" in this disclaimer because it helps to clarify Company's position that it will indemnify a customer for third party infringement claims, but that it does not warrant that the services are non-infringing. In addition, the term "non-infringement" could be necessary under some state laws that provide that if the warranty of non-infringement is not expressly disclaimed, then it is implied to be part of the CSA.

Support. Disclaimer of the warranty of non-infringement does not prevent the customer from seeking indemnification for infringement as discussed above. Indemnification in accordance with the procedures described in the CSA will result in the customer being protected to the extent of its losses.

Request. **Remove the term "non-infringement."**	***Approval:***	**2**

Fallback. Company could agree to remove the term "non-infringement" if a warranty against infringement is made in accordance with the instructions described above.

II. Indemnification by Customer.

An indemnification provision is intended to ensure that the party who caused damage to a third party pays for such damage. For example, if the customer has Company provide services that contain content that is subject to copyright protection by Business X, Business X (a "third party" because it is not a party to the agreement between Company and the customer) may sue Company because Company provided the services that contained the content. In such a case, the customer should step in and defend Company, and pay any damages because the customer caused the problem by providing the content to Company. This is what the indemnification provision requires. Note that indemnification obligations only apply when a third party makes a claim, not when one party to the contract alleges the other party breached the contract. This distinction can be important, because in some cases, indemnification claims are not subject to a limitation of liability, but claims by one party against another party to the contract are subject to the limitation of liability.

A. Main Provision.

CSA Provision: Indemnification by Customer. Customer will indemnify, defend, and hold Company (including its directors, officers, shareholders, and employees) harmless against any third party claim relating to:❶ (i) Customer's or its authorized users' use of the Services;❷ (ii) bodily injury or death of any person or damage to real or tangible property to the extent proximately caused by Customer's negligence or willful misconduct in the performance of this Agreement;❸ (iii) Customer's provision of materials that (a) actually or allegedly infringe on any patent, trademark, trade secret, copyright, or other proprietary rights of any third party;❹ (b) are defamatory, obscene, or improper; (c) invade any person's right to privacy or other personal rights; or (d) give rise to a claim of unfair competition; or❺ (iv) Customer's failure to pay sales, use, and similar taxes as required in this Agreement.❻

Sentence ❶ ***Indemnification by Customer***

Customer will indemnify, defend, and hold Company harmless against any third party claim relating to:

Purpose. This provision requires the customer to take full responsibility for third party claims that relate to certain things that are within the customer's control.

Support. The customer is in the best position to prevent the types of third party claims that are described in this provision.

Request #1. **Recognize that claims could be partially caused by Company.**	***Approval:***	**2**

Fallback. Company could agree to limit this indemnification provision so that it applies to third party claims only "to the extent relating to" the various causes described.

Fallback Language. Customer will indemnify, defend, and hold Company harmless against any third party claim to the extent relating to . . . .

Sentence ❷ ***Indemnification by Customer***

(i) Customer's or its authorized users' use of the Services;

Purpose. This provision protects Company if a third party (for example: someone who uses the services provided by Company) sues Company because the customer's use of Company's services was unlawful. It requires the customer to defend the lawsuit and to be responsible for the payment of any costs that Company might incur due to the lawsuit.

Support. This provision is reasonable because the customer alone determines how to use Company's services, and is in the best position to minimize any risks associated with such use.

Request #1. **Remove this provision.**	***Approval:***	**1**

Fallback. Company should explain that this provision is reasonable, for the reasons discussed above. If the customer persists, discuss with the customer whether there are specific uses it believes it is not responsible for, and consider carving them out instead of deleting the provision.

Sentence ❸ ***Indemnification by Customer***

(ii) bodily injury or death of any person or damage to real or tangible property to the extent proximately caused by Customer's negligence or willful misconduct in the performance of this Agreement;

Purpose. This provision protects Company if a third party sues Company because of injury or damage caused by the customer. It requires the customer to defend the lawsuit and to be responsible for the payment of any costs that Company might incur due to the lawsuit.

Support. This provision is reasonable because the customer alone controls whether it causes injuries or property damages, and it is in the best position to minimize any risks that may result in such injuries or property damages.

Request #1. **Make this provision mutual (or make the entire indemnification obligation mutual).**	***Approval:***	**2**

Fallback. Company could agree to make this bodily injury/property damage provision mutual, because Company would be willing to take responsibility for bodily injury or property damage that it causes. Company should not make the entire indemnity provision mutual, however, because the risks each party faces and can control are different, and the indemnity provisions reflect that risk allocation. For example, Company does not pay sales taxes, so it would be unnecessary for Company to provide a tax indemnity.

Fallback Language. Delete item (ii) only from and add the following language to the CSA:
Each party will indemnify, defend, and hold the other party harmless against any third party claim relating to bodily injury or death of any person or damage to real or tangible property to the extent proximately caused by the indemnifying party's negligence or willful misconduct in the performance of this Agreement.

Note: *When making this change, ensure that the agreement contains a provision on prerequisites to indemnification.*

Request #2. **Change "negligence" to "gross negligence."**	***Approval***	**1**

Fallback. "Gross negligence" means that a person intentionally failed to do something in reckless disregard for the consequences. "Negligence" is less severe, in that it means a person failed to do something that a reasonable person would have done. The customer may prefer "gross negligence" to "negligence" in this provision because the customer would have to act recklessly in order to be considered grossly negligent. Company should reject this request, however, because it would result in Company not being made whole for damages that the customer caused.

Request #3. **Remove this provision.**	***Approval***	**1**

Fallback. Company could agree to remove this provision, if it is unlikely that the customer will be in a position to cause injuries or damage that could be attributed to Company, e.g., the customer will not be on Company's property and Company's representatives will not be on customer property.

Sentence 4 ***Indemnification by Customer***

(iii) Customer's provision of materials that (a) actually or allegedly infringe on any patent, trademark, trade secret, copyright, or other proprietary rights of any third party;

Purpose. This provision requires the customer to take responsibility for certain claims that a third party may bring against Company alleging that materials provided by a customer to Company for use in the performance of the services violates the third party's intellectual property rights.

Support. This provision protects Company from infringement claims that are within the customer's reasonable ability to investigate and remedy.

Request #1. **Make this infringement indemnity identical to that granted by Company.**	***Approval:*** **1**

Fallback. If the customer will only use the services in the U.S., Company could narrow the customer's obligation to be identical to Company's (i.e., copyright, trade secret, and U.S. patent rights), but a reference to "trademarks" should be added to Company's provision and remain in this provision also. If the services may be used outside the U.S., a more complete risk assessment should be done before changing this Section.

Fallback Language. Revise Company's provision to include a reference to "trademark,", and replace item (iii) above with the following:

. . . (iii) Customer's provision of materials that (a) actually or allegedly infringe on any trademark, copyright, trade secret, or United States patent right of any third party. . . .

Request #2. **Remove this provision.**	***Approval:*** **2**

Fallback. Company should explain that this provision is reasonable, for the reasons discussed above. If the customer is not providing materials or information to Company, removal of this provision might be acceptable.

Sentence 5 ***Indemnification by Customer***

b) are defamatory, obscene, or improper; (c) invade any person's right to privacy or other personal rights; or (d) give rise to a claim of unfair competition;

Purpose. These provisions protect Company if a third party sues Company based on materials provided by the customer to Company for use in the services. It requires the customer to defend the lawsuit and to be responsible for the payment of any costs that Company might incur due to the lawsuit.

Support. These provisions are reasonable because the customer alone controls the materials it provides to Company, and it is in the best position to minimize any risks related to the customer's materials.

Request #1 **Remove these provisions.**	***Approval:*** **2**

Fallback. Company should explain that these provisions are reasonable, for the reasons discussed above. If the customer is not providing materials or information to Company, removal of these provisions might be acceptable.

Sentence 6 ***Indemnification by Customer***

(iv) Customer's failure to pay sales, use, and similar taxes as required in this Agreement.

Purpose. This provision protects Company if a third party sues Company because the customer failed to pay sales, use, and similar taxes related to the services. It requires the customer to defend the lawsuit and to be responsible for the payment of any costs that Company might incur due to the lawsuit.

Support. This provision is reasonable because the customer is responsible for paying any sales, use, and similar taxes, and it is in the best position to ensure that such taxes are paid.

Request #1. **Remove this provision.**	***Approval:*** **3**

Fallback. Company should explain that this provision is reasonable, for the reasons discussed above. If the customer persists, discuss with the CFO whether the services and other items provided to the customer are taxable and assess the risk of removing this provision. Note that removing this provision does not mean the customer does not pay taxes on the services and other items.

B. Related Provisions. **Indemnification by Customer**

CSA Provision: Prerequisites to Indemnification. Neither party will be required to indemnify the other party unless the party seeking indemnification: (i) notifies the other party promptly in writing of the claim; (ii) cedes sole control of the defense and all related settlement negotiations to the other party; and (iii) provides the other party with all necessary assistance, information, and authority to perform the above (at the indemnifying party's expense).

See earlier commentary on this provision.

III. Exclusive Remedy and Limitation of Liability.

If Company inadvertently does something wrong while performing work for a customer, the customer may suffer damages. This provision describes what Company will do in such a case, and is related to the warranty provision discussed earlier in this Toolkit. This provision provides that Company will stand behind its work, and will either re-perform it or refund the customer's payments. Company's obligation to do so is only limited by the amount the customer paid for the service. This is reasonable because by setting the limit of liability at the amounts paid, the risk Company takes in doing the work (i.e., the amount it might be required to pay in damages) is balanced by its reward (i.e., the amounts paid by the customer). Customers sometime assume that Company has no risk if the limit of liability equals the fees paid, but such statements are mistaken because the fees paid cover Company's labor costs and other expenses plus profit. Thus, if Company had to pay damages equal to the fees, it would lose more than the profit from a job.

CSA Provision: Exclusive Remedy and Limitation of Liability. Customer will provide Company with prompt written notice of any claim arising out of this Agreement, and Customer's sole and exclusive remedy for any such claim will be for Company, in its sole discretion and subject to the limitations described in this section, to: (a) use commercially reasonable efforts at its expense to cure the breach or damage that gave rise to the claim; or (b) refund to Customer the amounts paid to Company for Services related to the claim.1 In no event will Company be liable for any indirect, punitive, special, or consequential damages, including lost sales or profits, even if it has been advised of the possibility of such damages.2 Company's liability to Customer for claims arising under this Agreement, regardless of form, will not exceed the amounts paid by Customer for the defective portion of the Services that is the subject of the claim, and in no event will Company's aggregate liability for all claims under this Agreement exceed the total fees paid by Customer for the specific portion of Services in dispute.3

Sentence 1 ***Exclusive Remedy and Limitation of Liability***

Customer will provide Company with prompt written notice of any claim arising out of this Agreement, and Customer's sole and exclusive remedy for any such claim will be for Company, in its sole discretion and subject to the limitations described in this section, to: (a) use commercially reasonable efforts at its expense to cure the breach or damage that gave rise to the claim; or (b) refund to Customer the amounts paid to Company for Services related to the claim.

Purpose. This provision allows Company the opportunity to cure any claim that arises out of the CSA.

Support. If a customer is not satisfied with the work that Company has performed, or otherwise feels that Company has not satisfactorily performed its obligations, then Company would like the opportunity to "make good" with the customer. If Company is not able to "make good" with the customer, then it will refund to the customer the fees it paid for the defective services. With either result, the customer is fairly compensated for Company's failure.

Request #1. **Remove this sentence.**	***Approval:***	**2**

Fallback. Company could agree to remove this sentence, in which event the customer could sue Company for damages.

Note: *If Company agrees to remove this sentence, it must ensure that its liability for direct damages remains capped at an amount that is reasonable given that Company will not be provided the opportunity to cure the claim. The liability cap is discussed below.*

Note: *If Company agrees to remove this sentence, it should consider that this has the effect of removing the sole remedies of cure or refund from breaches of the warranty.* **Be aware, however, that if this sentence is removed it is especially important that the liability cap is adequate.**

Request #2. **Remove the "sole discretion" language, so customer can identify the appropriate remedy.**	***Approval:***	**4**

Fallback. Providing the limitation of liability is at an acceptable level, and customer agrees to not unreasonably withhold approval of Company's proposed remedy, this change is permissible.

Fallback Language. Customer will provide Company with prompt written notice of any claim arising out of this Agreement, and Customer's sole and exclusive remedy for any such claim will be for Company, subject to the limitations described in this section and Customer's approval (which may not be unreasonably withheld), to: (a) use commercially reasonable efforts at its expense to cure the breach or damage that gave rise to the claim; or (b) refund to Customer the amounts paid to Company for Services related to the claim.

Sentence 2 ***Exclusive Remedy and Limitation of Liability***

In no event will Company be liable for any indirect, punitive, special, or consequential damages, including lost sales or profits, even if it has been advised of the possibility of such damages.

Purpose. This sentence states that Company will not be liable for damages that do not flow directly from a breach of the CSA. For example, if Company breaches the CSA by not providing services to a customer in time for the customer to be able to generate certain sales of its own, then Company will not be liable for any revenues the customer did not earn.

Support. This sentence is reasonable because Company should not be held liable for losses that are far removed from a breach of the CSA. Company cannot predict, and be prepared to be held responsible for, every possible loss that may stem from a breach of the CSA.

Request #1. **Make this sentence mutual.**	***Approval:***	**2**

Fallback. Company could agree to make this sentence mutual, thus protecting both parties from liability for indirect losses.

Fallback Language. In no event will either party be liable for any indirect, punitive, special, or consequential damages, including lost sales or profits, even if it has been advised of the possibility of such damages.

Sentence 3 ***Exclusive Remedy and Limitation of Liability***

Company's liability to Customer for claims arising under this Agreement, regardless of form, will not exceed the amounts paid by Customer for the defective portion of the Services that is the subject of the claim, and in no event will Company's aggregate liability for all claims under this Agreement exceed the total fees paid by Customer for the specific portion of Services in dispute.

Purpose. This provision caps the amount for which Company will be held liable for damages that flow directly from a breach of the CSA. Company would only be liable, however, up to the liability cap contained in this provision.

Support. It is prudent that Company limit its exposure to an amount that is related to the value of the services being provided. The services are priced by taking into account the liability that Company may be exposed to in the event of a breach of the CSA. If Company expected to be exposed to a greater limit of liability (or no limit of liability), then it would price its services much higher.

Request #1. **Increase (or remove) this limit of liability, or exclude certain damages from it (e.g., those related to breach of confidentiality obligations or indemnification).**	***Approval:***	**8**

Fallback. Company could agree to increase its limit of liability, perhaps to two times the fees paid for the services at issue. Company could also consider excluding indemnification obligations from the limit, as described in the following Request. Company should not, however, agree to remove this limit of liability or carve other types of damages out of it.

Fallback Language. Company's liability to Customer for claims arising under this Agreement, regardless of form, will not exceed two times the amounts paid by Customer for the defective portion of the Services that is the subject of the claim, and in no event will Company's aggregate liability for all claims under this Agreement exceed two times the total fees paid by Customer for the specific portion of Services in dispute.

Request #2. **Make this sentence mutual.**	***Approval:***	**8**

Fallback. If Company agrees to make this sentence mutual, then it must take into consideration that the cap would apply to the customer's obligation to indemnify Company for third party claims, and the customer's obligation to make payments due under the CSA (and any other unique obligations the customer might have in a particular matter). Therefore, Company could agree to make this sentence mutual, but the cap should not apply to the customer's payment obligations and Company must determine whether it should apply to indemnification obligations. If both Company and the customer are equally likely to seek indemnification, the cap generally should not apply. If, however, the customer is more likely to seek indemnification from Company (which is likely, given Company's general reticence to pursue legal action against customers), the cap should apply to indemnification claims.

Fallback Language. In general, the indemnification obligations should remain capped. If Company determines that the indemnification obligations should not be capped in a particular deal, also add the language in brackets and italics below:

Each party's liability to the other party for claims arising under this Agreement, regardless of form, will not exceed the amounts paid by Customer for the defective portion of the Services that is the subject of the claim, and in no event will either party's aggregate liability for all claims under this Agreement exceed the total fees paid by Customer for the specific portion of Services in dispute; provided, however, the foregoing limitations of liability will not apply[: (a)] to Customer's payment obligations under this Agreement[; or (b) to either party's indemnification obligations under this Agreement].

Request #3. **Create an exception from the limitation of liability for indemnification claims.**	***Approval:***	**8**

Fallback. Providing indemnification is only available for third party claims (not for claims by one contract party against the other), it is permissible to specify that the liability cap does not apply to indemnification claims. This position is reasonable because the indemnitee's liability to the third party is probably not limited, so the indemnitor's liability should not be limited either.

Fallback Language. Company's liability to Customer for claims arising under this Agreement, regardless of form, will not exceed the amounts paid by Customer for the defective portion of the Services that is the subject of the claim, and in no event will Company's aggregate liability for all claims under this Agreement exceed the total fees paid by Customer for the specific portion of Services in dispute; provided, however, the foregoing limitations of liability will not apply to limit Company's indemnification obligations under this Agreement.

IV. Warranty.

A Warranty is a promise about the quality of Company's work for a customer. Company's standard warranty is that it will perform its work in a "workmanlike manner." This essentially means that Company will perform the work using a level of care and skill that companies doing the same work in the same situation would use. Customers on occasion ask for warranties that Company will use the highest standard of care possible, which would hold Company to an "expert" standard of care, which is much higher than the "reasonable person" standard of care suggested by the "workmanlike" warranty. Because the warranty imposes on Company an obligation to correct problems, the customer is required to give Company notice of such problems within a specific time period, so that these obligations are not open-ended. The warranty relates to the limitation of liability because the actions Company will take in response to a warranty claim are described in that section (correct the problem or refund the fees).

CSA Provision: Warranty and Remedy. Company warrants that it will perform the Services in a workmanlike manner, and that any Technology Services will conform materially to their written specifications contained in this Agreement. Customer's sole and exclusive remedy for any breach of Company's warranty is set forth in the exclusive remedy and limitation of liability section of this Agreement.1 Customer must bring any warranty claims within 30 days of Company's provision of any non-conforming portion of the Services, and failure to do so will constitute irrevocable acceptance of such Services and waiver of any related claims.2

Sentence 1 ***Warranty and Remedy***

Company warrants that it will perform the Services in a workmanlike manner, and that any Technology Services will conform materially to their written specifications contained in this Agreement. Customer's sole and exclusive remedy for any breach of Company's warranty is set forth in the exclusive remedy and limitation of liability section of this Agreement.

Purpose. If Company breaches the warranty contained in this section, then the customer can only seek the remedies of cure or refund outlined in the exclusive remedy provision.

Support. The customer's remedy for breach of warranty should be the same as for other breaches of the CSA. Also, as discussed above, if a customer is not satisfied with the work that Company has performed, then Company would like the opportunity to "make good" with the customer. The limited remedy permits Company this opportunity.

Request #1. **Remove this sentence.**	***Approval:***	**2**

Fallback. Company could agree to remove this sentence, in which event the customer could sue Company for damages.

Approval Process #2 applies if the agreement disclaims Company's liability for consequential damages and limits Company's liability for direct damages to a hard cap. Approval Process #4 applies in all other circumstances.

Sentence 2 ***Warranty and Remedy***

Customer must bring any warranty claims within 30 days of Company's provision of any non-conforming portion of the Services, and failure to do so will constitute irrevocable acceptance of such Services and waiver of any related claims.

Purpose. This sentence limits the time period in which a customer may bring a breach of warranty claim to 30 days.

Support. This sentence requires the customer to identify, and notify Company of, any problems with the services in a timely manner. By learning of a problem early, Company is in a better position to correct the problem.

Request #1. **Increase (or remove) the 30 day warranty period.**	***Approval:***	**2**

Fallback. Company could agree to increase the warranty period to 60 or 90 days. Company should not, however, agree to remove the warranty period because Company then could be faced with a warranty claim many months from the time of performance of the services when (due to the lapse in time) it may be difficult for Company to determine the cause of the problem or correct it.

Fallback Language. Failure to make a written warranty claim within [60/90] days of completion of any non-conforming portion of the Services (or such other period as may be specified in an Appendix) will constitute irrevocable acceptance of such Services and waiver of any related claims.

CSA Provision: Third Party Products. If Company provides Customer with third party products under this Agreement, Company will use reasonable efforts to assign any warranty on such third party products to Customer, but will have no liability for such third party products. All third party products provided under this Agreement are provided "as is," with all faults, as between Company and Customer.

Purpose. If Company purchases products from a third party that it then passes on to the customer, Company provides the products to the customer without making any warranties regarding them. Company will, however, to the extent reasonably possible, pass through any warranties made by the seller of the third party products.

Support. It would be unreasonable for Company to have to provide a warranty for products over which it has no control.

Request #1. **Provide a warranty for third party products.**	***Approval:***	**4**

Fallback. Company should not provide a warranty for third party products, because Company has no control over the quality of the third party products. Further, it provides them as a customer convenience, not as a main component of the business model. Company could, however, agree to attach to the CSA a copy of any warranties that the third party agrees can be passed through to the customer (this will require review of the third party warranties and possibly discussion with the third party).

Fallback Language. All third party products provided under this Agreement, including without limitation software, hardware, or other equipment, are provided "as is," with all faults, as between Company and Customer. Company represents that Customer is entitled to make warranty claims regarding the third party products specified in Exhibit 1 against the third party specified in Exhibit 1, under the terms of the warranty provisions set forth in Exhibit 1. Such claims shall be Customer's sole and exclusive remedy with regard to such third party products.

CSA Provision: Disclaimer. COMPANY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, ACCURACY, OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. COMPANY DOES NOT WARRANT OR REPRESENT THAT ACCESS TO AND USE OF ANY TECHNOLOGY SERVICES PROVIDED BY COMPANY WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ENJOYMENT OF SUCH TECHNOLOGY SERVICES WILL BE WITHOUT INTERFERENCE.

Purpose. This provision clarifies that Company only makes the warranties that are included in the CSA, and that all other warranties (including the implied warranties of merchantability and fitness for a general or particular purpose that are implied by the Uniform Commercial Code) are disclaimed. This disclaimer protects Company from a claim that it has made other express warranties, such as in proposals or promotional materials, or that it intends for any implied warranties to apply.

See discussion of the disclaimer of a warranty of non-infringement.

Support. This provision protects both Company and the customer in that it clarifies that all warranties must be specified in the CSA. Thus, both parties know what to expect regarding Company's services.

Request #1. **Make this provision mutual.**	***Approval:***	**2**

Fallback. Company could agree to make this provision mutual, so that both parties would be disclaiming all other warranties.

Fallback Language. EACH PARTY DISCLAIMS ALL WARRANTIES NOT EXPRESSLY SET FORTH IN THIS AGREEMENT, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE.

Note: The non-infringement warranty should not be disclaimed by the customer if it is providing materials, such as ad copy, unless the customer agrees to a non-infringement indemnity.

V. Ownership of Intellectual Property.

Although there is not a provision in the CSA that addresses ownership of works created by Company for a customer, this issue is addressed in several of the appendices to the CSA. Generally, these provisions establish the following:

The customer's rights are as follows:

- The customer owns any original content created by Company for the customer (e.g., original website content).
- The customer retains ownership of any content it provides to Company (e.g., customer designs, logos, and similar content).
- The customer owns any changes made by Company to content provided by the customer (e.g., changes by Company to customer designs, logos, and similar content).
- The customer receives a limited license to use works that were developed by Company not in connection with the services provided to the customer, but that are incorporated into original work product created by Company for the customer, or otherwise provided to the customer as part of the services (e.g., software programs and website templates).
- The customer receives a limited license to use any changes made by Company to works owned by Company (e.g., software customization), regardless of whether such changes were requested by the customer and paid for by the customer as part of the services.

Company's rights are as follows:

- Company retains ownership of any works that Company developed not in connection with the services provided to the customer (e.g., software programs and website templates).
- Company owns any changes made by Company to works owned by Company, even if such changes were requested and paid for by a customer as part of the services.

Purpose. The ownership provisions preserve Company's ability to re-use on other projects software, design components, and similar items that Company develops for use with many customers. Company may not, however, re-use unique items that it develops specifically for a particular customer.

Support. The ownership provisions allow Company to continue its business of providing services to many different customers. It is important that Company maintain the flexibility to re-use certain products. If Company did not retain this flexibility, then it would have to create each new item from scratch, which would cost Company money and time. On the other hand, the ownership provisions protect a customer's ability to retain Company to create original works that will not later be used by Company in connection with other customers of Company. The provisions also protect a customer's rights in works that the customer has created and has provided to Company for use in providing the services.

Request #1. **Grant to the customer ownership rights to all works provided by Company to a customer.**	***Approval:***	**4**

Fallback. A customer may feel that if it does not receive ownership of all work product provided by Company to the customer, that its competitors may be able to benefit from this work product in the future. Customers also often feel that if they pay for something, they should own it outright. In response, Company should explain that the customer will receive ownership of original works; thus, Company could not re-use these items on projects for other customers. Company must, however, retain the ability to re-use certain base elements, and changes to those base elements, or Company would be hampered in its ability to continue its business. A fallback position may be available depending on the specific nature of the services to be provided to the customer. For example, Company could in certain circumstances agree to joint ownership, or that the customer receives ownership but grants a broad license back to Company. These must be considered on a case by case basis, and the fallback language below is provided only as a starting point. If you use it, tailor it to your situation (e.g., consider whether to impose limits on the joint owner's use).

Fallback Language. All proprietary rights, including without limitation all trade secrets, trademarks, trade names, patents, and copyrights, in and to the _____ will be jointly owned by Company and Customer. Neither party will owe an accounting to the other party for the proceeds of any revenues that are derived from the jointly owned _____.

Fallbakck Language. All proprietary rights, including without limitation all trade secrets, trademarks, trade names, patents, and copyrights, in and to the _____ belong exclusively to Customer. Customer grants to Company a non-exclusive, transferable, worldwide, royalty-free, irrevocable license to perform, display on the Internet, use, make, improve, sublicense, and create derivative works from the _____, excluding any trademarks, logos, or confidential information of Customer.

[Terms Favorable to a Seller]

TERMS AND CONDITIONS

These Terms and Conditions apply to all *[describe/list]* services ("**Services**") described in an attached document ("**Document**") and performed by _____ ("**Company**") or its affiliated companies for you ("**Customer**"). Such Document, these Terms and Conditions, and any attachments constitute the "**Agreement**."

1.0 Formation of Contract. By signing the Document, providing the Document to Company, or submitting any orders under the Document, Customer is making an offer under these Terms and Conditions, and no other terms and conditions will apply. Company may accept Customer's offer by issuing a confirmation letter and/or commencing the Services specified in the Document or requested in Customer's order.

2.0 Services.

2.1. Materials. All materials furnished by Customer ("**Customer-Furnished Materials**") will meet Company's specifications and will be delivered on a schedule acceptable to Company. Company may charge Customer additional amounts for the use, handling, storage, transportation or transmission of Customer-Furnished Materials and, except as set forth in Section 7, will not be liable for any loss or damage to the Customer-Furnished Materials. Unless otherwise agreed in writing, Company will retain Customer-Furnished Materials for up to 30 days following the Services, and then may dispose of them without notice or liability.

2.2. Customer's Delay. If Customer fails to provide Company with Customer-Furnished Materials in time to meet a scheduled release date or by the due date for such materials as provided to Customer, Company shall not be responsible for meeting Customer deadlines and may attempt to re-schedule the Services to a mutually-acceptable date and/or may, in its sole discretion, charge Customer for any unused materials or services ordered or purchased in preparation for the Services.

2.3. Delivery. Unless otherwise agreed in writing, delivery will be FCA Company's dock (Incoterms 2000). Unless otherwise specified in the Document, Company will choose the carrier and will ship each portion of the Services to Customer upon completion (without storage at Company's facility). Title and risk of loss pass to Customer on delivery to carrier. Partial shipments by Company are permitted. If Company delivers a quantity of ordered materials that varies 5 percent either way from the total quantities ordered, or delivers the ordered materials up to 10 days earlier or later than the mutually agreed delivery date, Company will be deemed in compliance with this Agreement.

3.0 Payment Terms.

3.1. Payments, Credit, and Taxes. If Company extends credit to Customer, each payment is due within 30 days of the invoice date; otherwise, payment is due in advance or on delivery (as specified by Company). Customer will pay late fees equal to 1 ½ % per month (or the amount allowed by law, if less) on all past due amounts, and reimburse Company for all collection costs incurred (including without limitation attorneys' fees). Company may retain any Customer property as security until full payment is received. Company will determine whether to extend credit to Customer, and such decision may be modified or this Agreement terminated at any time on notice to Customer if Company determines (in its sole discretion) that Customer's creditworthiness is unacceptable. Customer will provide Company with financial information on request, to enable Company to evaluate Customer's creditworthiness. Customer will pay directly or reimburse Company for all taxes on Services, except taxes on Company's income.

3.2. Price Changes. Prices are based on the specifications in the Document, and unless otherwise specified in the Document any prices quoted for Services will remain valid for only 30 days. Prices are subject to change if Customer requests changes in the specifications or schedule or otherwise causes a delay in the Services, or if Customer-Furnished Materials do not conform to Company's specifications. Company may increase or decrease prices at any time to reflect changes in the market for materials. In addition, on 60 days' prior written notice to Customer, Company may increase prices on an annual basis on the anniversary of this Agreement by an amount equal to any increase in the Consumer Price Index (U.S., All Items, Not Seasonally Adjusted, as published by the U.S. Department of Commerce, and any successor index) that occurred in the prior calendar year. Customer will have no right to setoff any amounts due to Company under this Agreement against any amounts claimed by Customer against Company, whether such claimed amounts are the result of Company's breach or otherwise.

4.0 Claims. Customer must provide written notice of any defect, damage, shortage or breach of this Agreement as soon as it is discovered, but in any event no later than 10 days after delivery of the affected portion of the Services.

5.0 Limited Warranty and Liability. Company warrants that it will perform the Services in a workmanlike manner. Customer's sole and exclusive remedy for any claim arising out of this Agreement will be for Company, in Customer's commercially reasonable discretion to (a) to use commercially reasonable efforts to cure the breach, or (b) to refund the price paid to Company for the non-conforming portion of the Services. **COMPANY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. FOR ALL CLAIMS REGARDLESS OF FORM, WHETHER BASED ON BREACH OF CONTRACT, TORT, OR OTHERWISE (INCLUDING NEGLIGENCE OR LOST SALES OR PROFITS), COMPANY'S AND ITS CONTRACTORS' AGGREGATE LIABILITY WILL NOT EXCEED THE AMOUNTS PAID BY CUSTOMER FOR THE PORTION OF THE SERVICES THAT GAVE RISE TO THE CLAIM(S). COMPANY AND ITS CONTRACTORS AND CUSTOMER WILL NOT BE LIABLE UNDER ANY CIRCUMSTANCES FOR INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES FOR ALL CLAIMS REGARDLESS OF FORM, WHETHER BASED ON BREACH OF CONTRACT, TORT, OR OTHERWISE (INCLUDING NEGLIGENCE OR LOST SALES OR PROFITS).** Neither party is liable for delays or failures in performance of any obligations under this Agreement, other than payment obligations, due to a cause beyond its reasonable control.

6.0 Indemnification. Customer will defend, indemnify, and hold Company harmless against all claims, losses, costs, expenses, and damages related to: (a) Customer's use of the Services; or (b) Customer's provision of materials that actually or allegedly violate third-party proprietary rights, contain illegal or improper material, or invade privacy or other personal rights.

7.0 Insurance. Company will maintain its standard fire, extended coverage, vandalism, malicious mischief and sprinkler leakage insurance on all Customer-Furnished Materials and completed Customer work in Company's possession. Company's liability for loss or damage to such property will not exceed the lesser of: (a) the amount recovered from such insurance; or (b) the amount set forth in Section 5.

8.0 Term and Termination. This Agreement expires on the date specified in the Document (if any), or if not specified, when all Services described in the Document are completed, unless earlier terminated in accordance with this Section. If Customer fails to make payments when due, becomes bankrupt or has a receiver appointed for a substantial part of its assets, or if either party fails to cure any material default within 30 days after written notice, the other party may suspend or terminate performance and exercise any other legal rights or remedies. Upon any termination, all unpaid charges for Services completed or in process, and any other costs or charges reasonably incurred or committed by Company for Customer's benefit, will become immediately due and payable. The provisions of this Agreement that by their nature are intended to survive expiration or termination will survive, including without limitation Sections 4, 5, 6, 7, 8, 9, and 10.

9.0 Interpretation and Enforcement. This Agreement will be governed by and construed in accordance with the laws of the State of New York, without regard to its conflicts of laws principles. If any provision is declared invalid, illegal or unenforceable, the validity of the remaining provisions will not be affected. The parties agree that this Agreement will not be presumptively interpreted for or against any party by reason of that party having drafted or negotiated, or failed to draft or negotiate, all or any portion of any provision of this Agreement. Senior managers of each party will attempt to resolve by negotiations any disputes prior to engaging in litigation, except when seeking injunctive relief. Venue for any dispute between the parties arising out of this Agreement or pertaining to the subject matter hereof may be had in the District Court for the Southern District of New York or in the state courts of New York sitting in New York County. The parties specifically disclaim application of the United Nations Convention on Contracts for the International Sale of Goods. EACH PARTY EXPRESSLY WAIVES ALL RIGHTS TO A TRIAL BY JURY.

10.0 Miscellaneous. Customer will perform those tasks and assume those responsibilities specified in this Agreement, and will provide Company with decisions and approvals upon Company's request. Waiver of any default or breach of this Agreement will not constitute a waiver of any other default or breach. This Agreement is the complete and exclusive statement of the terms of the contract for the Services, and can be modified only by a written amendment signed by both parties. Except as expressly provided in this Agreement, Company is an independent contractor, not an agent of Customer. All notices will be in writing and will be deemed to have been given when delivered personally, when mailed by certified or registered mail, return receipt requested and postage prepaid, when sent via a nationally recognized overnight carrier, or when sent via facsimile confirmed in writing to the recipient. Customer may not assign its rights or obligations under this Agreement without the prior written consent of Company. This Agreement will be binding upon and inure to the benefit of the parties' successors and permitted assigns. To the extent a Document or confirmation letter is inconsistent with these Terms and Conditions, unless expressly provided otherwise, these Terms and Conditions will govern.

[Terms Favorable to a Buyer]

TERMS AND CONDITIONS OF PURCHASE

1. DEFINITIONS. As used in these Terms and Conditions of Purchase ("Terms and Conditions"), the term "goods" means the goods, pieces, merchandise, materials, equipment, supplies, and products or services ordered.

2. LOWER PRICE. Should Seller during the term of this agreement reduce its selling, list or market price for goods of equal quality and quantity, Purchaser shall receive the benefit of the lower price on all goods shipped while the lower price is in effect.

3. DELIVERY. The goods shall be delivered on the dates set forth in this Purchase Order unless written authorization for an earlier delivery is given. Time shall be of the essence. If no delivery date is shown for any goods, delivery of such goods shall be made within a reasonable time; and delivery within a reasonable time shall be considered to be the time specified in this Purchase Order for delivery. Purchaser's count shall be accepted as conclusive on all shipments not accompanied by a packing slip.

4. PACKAGING. Goods shall be packed to meet carrier requirements and to ensure the lowest transportation rates consistent with adequate protection. Any extra expenses affecting delivery of goods not so shipped will be charged to the Seller. No charge will be allowed for packing, crating, storage, or other extras unless authorized beforehand in writing by the Purchaser. All goods, wrappers, and containers must bear markings and labels required by applicable federal, state, and municipal laws and regulations.

5. SHIPPING DOCUMENTS AND CONTAINERS.
5.1 The shipping destination for the goods must appear on all shipping containers and on all documents, invoices, and correspondence. Seller shall forward to Purchaser with the invoice the express receipt or bill of lading signed by the carrier, evidencing the fact that shipment has been made.

5.2 All expenses incurred by Seller's failure to furnish necessary shipping documents shall be charged to Seller.

6. SHIPPING. Seller shall prepay transportation charges when goods are to be shipped f.o.b. destination. When goods are to be shipped f.o.b. shipping point, Seller should make shipment by the least expensive of (i) parcel post (insured) or (ii) express (no excess valuation) when shipment by either of these methods would be less expensive than alternate methods. If Purchaser should direct prepayment of transportation charges for Purchaser's account, Seller shall itemize transportation charges separately on its invoice and give Purchaser documentation subtracting payment.

7. PAYMENT AND TERMS. 2 Percent 10 Days, 60 Days Net. Payment and cash discount periods shall start with the date of receipt of proper invoice or date of delivery, whichever is later. Purchaser shall not, by making prompt payment or payment prior to inspection, be deemed to have accepted any goods or to have waived any claim for adjustment or any other claim against Seller.

8. INSPECTION. The goods shall be subject to inspection, test, and count by Purchaser after receipt at destination. If any of the goods shall be defective in material or workmanship or otherwise not in conformity with the requirements of this Purchase Order, Purchaser, in addition to its other rights, may reject same for full credit or require prompt correction or replacement thereof at Seller's expense, including transportation. Goods which are defective or of an unauthorized quantity or not in accordance with specifications will be held for thirty (30) days from and after date of discovery of defect by Purchaser for Seller's instruction at Seller's risk; and if Seller so directs or if no instructions are sent within thirty (30) days, the goods will be returned at Seller's expense. If inspection discloses that part of the goods received are not in accordance with Purchaser's specifications, Purchaser shall have the right to cancel any unshipped portion of its order.

9. QUANTITY. Shipments must equal exact amounts ordered unless otherwise agreed to by the Purchaser.

10. CONFIDENTIAL INFORMATION. All drawings, data, designs, specifications, tools, materials, and other property furnished by Purchaser shall be confidential, shall remain Purchaser's property, shall be used by Seller only in the performance of this Purchase Order, and together with all copies thereof, shall be redelivered to Purchaser or destroyed by Seller as Purchaser specifies. Seller assumes all risks of loss or damage to any such drawings, specifications, tools, materials, or other property, and shall redeliver the same to Purchaser (when specified by Purchaser) in the same condition as when received by Seller except for reasonable wear and tear of utilization in the performance of this Purchase Order. This Purchase Order is confidential between the Purchaser and the Seller, and it is agreed by the Seller that none of the details connected herewith shall be published or disclosed to any third party without the Purchaser's written permission.

11. WARRANTIES. Seller expressly warrants that all goods will conform to any applicable specifications, drawings, samples, or other descriptions and will be merchantable, of good workmanship and material, fit for the purpose for which intended, and free from defect. Such warranties shall survive inspection, test, acceptance, and payment. Acceptance of this order shall constitute an agreement upon Seller's part to indemnify and hold the Purchaser harmless from all liability, loss, damage, and expense including reasonable counsel fees incurred or sustained by Purchaser by reason of the failure of the goods to conform to such warranties. Such indemnity shall be in addition to any other remedies provided by law.

12. INDEMNIFICATION.
12.1 If any work or services are to be performed on any premise of Purchaser pursuant to this Purchase Order, Seller shall indemnify Purchaser and hold Purchaser harmless against and from any and all losses, liabilities, and claims, including costs and expenses for property loss or damage or bodily injury or death resulting directly or indirectly from the performance of such work or services. Seller shall give Purchaser a policy or certificate of public liability insurance, with such insurance carrier and with such limits as Purchaser may reasonably require, insuring Purchaser, primary to any other insurance available to Purchaser, against any and all such losses, liabilities, and claims.

12.2 If Seller is furnishing any goods, or products which become a part of any goods or product of Purchaser or others, then Seller will further indemnify and save harmless Purchaser, its employees, agents, and representatives from and against any and all demands of every nature and kind including without limitation reasonable attorneys' fees, and disbursements incurred in defense of any claim or demand arising out of injury to or death of or property damage to any third person if said injury, death, and/or property damage is in any way caused from any act or omission on the part of Seller, its agents, employees, or subcontractors except to the extent that any loss or damage is due solely and directly to the gross negligence of the Purchaser. This indemnification includes but is in no way limited to any defect in goods, materials, products, or services in either manufacture or design.

12.3 Seller agrees to indemnify and hold Purchaser harmless against any and all losses, liabilities and claims that may be brought or assessed by any party whatsoever against Purchaser as a result of Seller's failure to complete its performance of this Purchase Order in full on or before the delivery date set forth in this Purchasing Order.

13. PATENTS, COPYRIGHTS, AND TRADE SECRETS. Seller shall save Purchaser harmless from liability or suit of any nature, including costs and expenses, or on account of any infringement of any patent, copyright trademark, servicemark, certification mark, tradename, or trade secret in the manufacture, use, or sale of the goods, notwithstanding that Seller may have manufactured the goods in accordance with specifications or drawings given to Seller by Purchaser. Purchaser shall have no liability to Seller on account of any infringement or claim of infringement of any patent, copyright, trademark, servicemark, certification mark, tradename, or trade secret, notwithstanding that Purchaser may have given Seller the specifications or drawings for the goods.

14. DEFAULT. Purchaser may, by written notice to the Seller, terminate the whole or any part of this Purchase Order if (i) Seller fails to make delivery of any goods within the time specified, or (ii) Seller delivers any goods that do not conform to contractual requirements, or (iii) Seller fails to perform any other provision of this Purchase Order, or (iv) so fails to make progress as to endanger performance of this Purchase Order in accordance with its terms, or (v) Seller becomes insolvent or subject to proceedings under any law relating to bankruptcy or the relief of debtors. Purchaser may in addition to its other rights procure upon such terms and in such manner as Purchaser may deem appropriate goods or services similar to the goods so terminated; and Seller shall be liable to Purchaser for any excess costs of such similar goods or services, except that Seller shall not be liable for such excess costs if Seller's default is due to a cause beyond its control and without its fault or negligence including flood, fire, act of any government, or catastrophe. Acceptance of any part of the this order does not bind Purchaser to accept future shipments nor deprive it of the right to return goods already accepted.

15. SET-OFFS. All claims for money due or to become due from Purchaser shall be subject to deductions by Purchaser for any set-off or counterclaim arising out of this or any other of Purchaser's purchase orders or agreements with Seller, whether such set-off or counterclaim arose before or after any assignment by Seller.

17. TAXES. The prices for the goods include all federal, state, and local taxes imposed on the goods or the sale thereof; but no such tax shall be included for which an exemption is available. Seller shall separately state on each invoice the amount of any such tax and shall indemnify Purchaser against liability for any tax not so stated on Seller's invoice. In the event that it shall be determined that any tax included in any price was not required to be paid, Seller will notify Purchaser, will make prompt application for the refund thereof, and will make prompt payment to Purchaser of the amount of any refund.

18. ASSIGNMENT. No obligation under this Purchase Order shall be delegated or assigned by Seller without the prior written consent of Purchaser, and any purported delegation or assignment without such consent shall be void. In case of any assignment by Seller of the right to receive monies due or to become due hereunder, Purchaser will, at its option, make no further payments until furnished reasonable proof that the assignment has been made; and Purchaser may assert against the assignee any defense or claim that it is entitled to assert by law.

19. ACCEPTANCE. Acceptance of this order constitutes agreement by the Seller to these Terms and Conditions and agreement by the Seller to deliver as specified under the terms and conditions of this Purchase Order. Notwithstanding provisions of [applicable UCC section 2-207], no term or condition included in any writing of acceptance by the Seller shall be deemed to be part of the agreement between the parties unless the Seller has requested and received written assent thereto by an authorized representative of the Purchaser.

20. VARIATION OR MODIFICATION. No variations or modifications in the provisions of this Purchase Order including without limitation the delivery schedule, price, quantity, specifications of the terms of the Terms and Conditions will be effective against the Purchaser unless agreed to in writing and signed by Purchaser's authorized representative.

21. ENTIRE AGREEMENT. This Purchase Order, including the Terms and Conditions, and any document referred to herein constitute the entire contract between the parties relating to the subject matter hereof and supersede all prior understandings, transactions, communications, or writings in respect of such subject matter. It may not be modified or terminated orally; and no claimed modification, termination, or waiver shall be binding unless in writing and signed by the party against whom such claimed change, termination, or waiver is sought to be enforced. This contract and performance hereunder shall be construed and governed by and according to the laws of New York

22. CHANGES BY PURCHASER. Purchaser shall have the right , by giving notice to Seller, to make changes in the drawings, designs, specifications for the goods, or the method of shipment or packing or the place of inspection, delivery, or acceptance. Upon receipt of any such notice, Seller shall proceed promptly to make such changes in accordance with the terms of such notice Seller shall deliver to Purchaser, within fifteen (15) days, a statement showing the effect of any such change in the cost of, or the time required for, performance of this Purchase Order, and an equitable adjustment shall be made in the price or delivery schedule or both.

23. DISCREPANCIES. In case of any discrepancies or questions, Seller shall refer to Purchaser for decision, instruction or interpretation.

[Sample Policy]

[Company Logo Here]	**Effective Date:**	
	Last Revised Date:	
	Approved By:	
	Policy Number:	

Contract Review and Signing Authority Policy: Sales Contracts

Purpose

The purpose of this policy is to provide procedures to the company's sales force regarding required approval(s) related to sales proposals and sales contracts provided by the customer or issued by the company.

This policy is in effect on the Effective Date reflected above.

Scope

This policy covers all sales proposals, RFPs and contracts with customers that:

1. have forecasted revenue of $_____ or more; or

2. contain any business, legal or operational term or condition that is outside the scope of the established terms contained in the company's standard terms and conditions (for example, _____, _____).

Policy Procedures

A. Sales Responsibilities

1. The Sales Representative with direct responsibility for the customer must initiate the approval process for any sales proposal or sales contract by filling out the applicable template in the Contract Support Database.

2. The Sales Representative will manage the process of developing the elements of the business deal with the assistance of the Contract Management Group ("CMG") and will then work with CMG to coordinate the contract drafting, negotiation and execution process.

3. The Sales Representative will communicate the sales proposal or sales contract back to the customer after CMG approval. All RFPs, sales proposals and contracts covered under this policy must be approved by CMG prior to their release to a customer.

B. CMG Responsibilities

CMG is responsible for:

1. taking the information from the Contract Support Database, evaluating it for ***[insert relevant criteria here, e.g., pricing]***, requesting any additional information needed from the Sales Representative, and then routing the contract to the Legal Department for review;

2. negotiating contract terms from time to time, as directed by the Legal Department;

3. gathering relevant information to assist Sales in completing RFPs and sales proposals; and

4. obtaining necessary approvals within the company, including ***[insert appropriate departments/groups/individuals here, e.g., Credit Department]***, as set forth in the guidelines for approvals maintained by the CMG.

C. Procedures for Sales Contracts Outside of the Scope of This Policy

If a contract or sales proposal is outside the scope of this policy, the Sales Representative should work with the appropriate Sales Manager for approval on the business terms. To the extent needed, the Sales Representative or Sales Manager should involve ***[insert appropriate departments/groups/individuals here, e.g. Risk Management]***. Sales should utilize the company's standard terms and conditions for these sales proposals. Any request by a customer to change the company's standard terms and conditions or to have the customer's terms and conditions govern cannot be agreed to without the Legal Department's approval, and the Sales Representative or Sales Manager will promptly involve the Legal Department upon receipt of any such request.

D. Contract Administration

It will be the responsibility of CMG to determine and track all of the actions required to "perform" under a sales contract (e.g., ***[insert examples here]***).

E. Sales Contract Signing Authority

The following individuals are authorized to sign contracts with customers (all amounts are for the full-term value of the contract):

[insert applicable officers, e.g. President]	Unlimited as to amount
[insert applicable officers, e.g. Sr. Vice President]	Less than $_____
[insert applicable officers, e.g. Vice President]	Less than $_____

F. Signed Contracts

Original signed contracts with customers covered by this policy must be sent to the CMG by the Sales Representative promptly after full execution of the contracts. CMG will maintain a file of all such executed contracts.

G. Violations of Policy

If any employee witnesses any mistakes or errors that result in a violation of this policy, the employee should report the violation immediately to a supervisor or a member of senior management so that the company can take immediate corrective steps. In contrast, if an employee violates this policy, the company may take disciplinary action, up to and including termination, as well as exercise any legal rights to seek redress against the violator.

SERVICES AGREEMENT

THIS SERVICES AGREEMENT (the "**Agreement**") is entered into as of _____, 2005 (the **"Effective Date"**) by and between [COMPANY], a _____ corporation ("**Company**") and [CUSTOMER], a _____ corporation ("**Customer**"). Company and Customer agree as follows:

1.0 Services. Company will perform for Customer the services specified in the attached Appendices referencing this Agreement (the "**Services**").

2.0 Term. The initial term of this Agreement begins on the Effective Date and expires on the date ___ years later, unless earlier terminated in accordance with this Agreement. This Agreement will be renewed automatically for successive 1 year terms unless written notice of non-renewal is given by either party to the other party at least 90 days before the start of the next 1 year term. The initial term and any renewal terms constitute the "**Term**."

3.0 Payment.

3.1. Pricing, Expenses, and Taxes. Customer will pay Company for the Services (and any related out-of-pocket expenses) as set forth in the attached Appendices. Customer will pay directly or reimburse Company for all sales, use, and similar taxes on Services and expenses. Prices are based on the specifications and schedules in the Appendices. If Customer requests changes in the specifications or schedules, or if materials provided by Customer do not conform to Company's specifications, Company may change the prices to reflect its revised costs, including costs reasonably incurred by Company for overtime, alterations, delivery, storage, and materials ordered by Company that it cannot reasonably utilize for other work.

3.2. Payment Terms. Each Customer payment is due within 30 days of the invoice date. If Customer disputes an invoice, Customer will, within 30 days of the date of the invoice, pay all amounts not in dispute and provide Company with written notice of the dispute together with substantiating documentation. The parties will cooperate to promptly resolve such dispute. Customer will pay late fees equal to 1½% per month (or the amount allowed by law, if less) on all past due amounts except those it has successfully disputed, and reimburse Company for related collection costs incurred (including reasonable attorneys' fees). Unless Customer has in good faith notified Company of a payment dispute and the parties are working to resolve such dispute, Company may retain any Customer property as security and suspend Services until full payment is received. Customer will have no right to setoff any amounts due to Company under this Agreement against any amounts claimed by Customer against Company, whether such claimed amounts are the result of Company's breach or otherwise.

3.3. Credit Terms. Company may in its sole discretion change the credit terms or terminate this Agreement due to adverse changes in Customer's financial status or payment performance. Customer will provide Company with financial information on request to enable Company to evaluate Customer's creditworthiness.

4.0 Customer Commitments and Acknowledgements.

4.1. Customer Responsibilities. Customer will perform those tasks and assume those responsibilities specified in this Agreement, and will provide Company with decisions and approvals upon Company's request ("**Customer Responsibilities**"). Customer understands that Company's performance of the Services is dependent on Customer's timely and effective satisfaction of Customer Responsibilities. This Agreement also may contain assumptions by Company related to Customer's business, hardware, software, equipment, facilities, or otherwise. Company may rely on all decisions and approvals of Customer, and all assumptions set forth in this Agreement.

4.2. Non-permitted Activities. Customer will not, and will ensure that its authorized users, if any, do not: (i) permit any unauthorized use of any Services; or (ii) provide to Company or others any materials or data that are infringing, disruptive, or illegal.

5.0 Confidential Information.

5.1. Definitions. "**Confidential Information**" means all information disclosed by a party, and includes any modifications or derivatives that contain or are based upon Confidential Information. Company's Confidential Information also includes all tools, methodologies, and other items used or developed by Company in the performance of the Services. The party disclosing Confidential Information is the "Disclosing Party" and the party receiving the Confidential Information is the "**Recipient**."

5.2. Use and Protection of Confidential Information. Confidential Information of the Disclosing Party may be used by the Recipient only as authorized under this Agreement, and may not be copied without the Disclosing Party's prior consent (except by Company as necessary to perform the Services). During the term of this Agreement and for a period of 1 year after the termination of this Agreement, the Recipient will protect the confidentiality of the Disclosing Party's Confidential Information in the same manner it protects the confidentiality of its own proprietary and confidential information of like kind, but in no event will use less than a reasonable standard of care. The Recipient will be responsible for any breach of this section by its employees, representatives, and agents.

5.3. Return. Upon the first to occur of (i) termination or expiration of this Agreement or (ii) request by the Disclosing Party, the Recipient will return to the Disclosing Party or destroy (at the Disclosing Party's discretion) all Confidential Information of the Disclosing Party.

5.4. Exceptions. Confidential Information does not include information (i) known to the Recipient prior to disclosure by the Disclosing Party; (ii) independently developed by Recipient, without reference to the Disclosing Party's Confidential Information; (iii) acquired by Recipient from a third party that was not to Recipient's knowledge prohibited from disclosing the information; or (iv) that is or becomes publicly available through no breach by Recipient of this Agreement. In the event Recipient receives a subpoena or other administrative or judicial process demanding Confidential Information of the Disclosing Party, the Recipient will promptly notify the

Disclosing Party and tender to it the defense of such demand. Unless the demand is timely limited, quashed, extended, or stayed, the Recipient is entitled to comply with such demand (on the afternoon of the last day for compliance) to the extent required by law.

6.0 Ownership of Intellectual Property. As between Customer and Company, Customer owns all intellectual property rights in any materials provided by Customer or created by Customer using the Services, and any modifications thereto, and Company owns all intellectual property rights in or employed by Company in connection with the Services, and any modifications thereto. Except for rights expressly granted in this Agreement, no other rights are granted by either party. Nothing herein will restrict Company's rights to use or reuse any ideas, concepts, or methodologies inherent in the provision of its Services.

7.0 Company Warranty.

7.1. Warranty and Remedy. Company warrants that it will perform the Services in a workmanlike manner. Customer's sole and exclusive remedy for any breach of Company's warranty is set forth in the exclusive remedy and limitation of liability section of this Agreement. Customer must bring any warranty claims within 30 days of Company's provision of any non-conforming portion of the Services.

7.2. Third Party Products. If Company provides Customer with third party products under this Agreement, Company will use reasonable efforts to assign any warranty on such third party products to Customer, but will have no liability for such third party products. All third party products provided under this agreement are provided "as is," with all faults, as between Company and Customer.

7.3. Disclaimer. **COMPANY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, ACCURACY, OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE.**

8.0 Termination. If either party fails to cure any material breach (including failure to make a payment when due) within 30 days after written notice, the other party may suspend performance of or terminate this Agreement or any Service and exercise any other legal rights. Upon the expiration or termination of this Agreement, Customer will pay Company all unpaid fees for Services completed or in process, and any other expenses, charges, or costs reasonably incurred or committed by Company for Customer's benefit.

9.0 Indemnification.

9.1. Indemnification by Company. Company will indemnify, defend, and hold Customer (including its directors, officers, shareholders, and employees) harmless against any third party claim: (a) relating to bodily injury or death of any person or damage to real or tangible property to the extent proximately caused by Company's negligence or willful misconduct in the performance of this Agreement; or (b) that any Services provided by Company misappropriate a trade secret or infringe a copyright or United States patent right of such third party. Company will not be liable to Customer to the extent a claim of infringement is based on: (i) Customer's misuse or modification of the Services; (ii) Customer's failure to use corrections or enhancements made available by Company; (iii) Customer's use of the Services in combination with any service, product, software or hardware not expressly directed by Company in writing to be used with the Services; (iv) information, direction, specifications, or materials provided by Customer or any third party; (v) Customer's distribution or marketing of the Services to third parties; or (vi) any third party items provided under this Agreement. If any portion of the Services is, or in Company's opinion is likely to be, held to constitute an infringing item, Company will at its expense and option either: (a) procure the right for Customer to continue using it; (b) replace it with a non-infringing equivalent; (c) modify it to make it non-infringing; or (d) direct the return of the item and refund to Customer the fees paid for such item, less a reasonable amount for Customer's use of the item up to the time of return. **THE PROVISIONS OF THIS SECTION CONSTITUTE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES AND COMPANY'S ENTIRE OBLIGATION TO CUSTOMER WITH RESPECT TO INFRINGEMENT.**

9.2. Indemnification by Customer. Customer will indemnify, defend, and hold Company (including its directors, officers, shareholders, and employees) harmless against any third party claim relating to: (i) Customer's or its authorized users' products or services or their misuse of the Services; (ii) bodily injury or death of any person or damage to real or tangible property to the extent proximately caused by Customer's negligence or willful misconduct in the performance of this Agreement; (iii) Customer's provision of materials that (a) actually or allegedly infringe on any patent, trademark, trade secret, copyright, or other proprietary rights of any third party; (b) are defamatory, obscene, or improper; (c) invade any person's right to privacy or other personal rights; or (d) give rise to a claim of unfair competition; or (iv) Customer's failure to pay sales, use, and similar taxes as required in this Agreement.

9.3. Prerequisites to Indemnification. Neither party will be required to indemnify the other party unless the party seeking indemnification: (i) notifies the other party promptly in writing of the claim; (ii) cedes sole control of the defense and all related settlement negotiations to the other party; and (iii) provides the other party with all necessary assistance in the defense (at the indemnifying party's expense).

10.0 Exclusive Remedy and Limitation of Liability. Customer will provide Company with prompt written notice of any claim arising out of this Agreement, and Customer's sole and exclusive remedy for any such claim will be for Company, in Customer's commercially reasonable discretion and subject to the limitations described in this section, to: (a) use commercially reasonable efforts to cure the breach or damage that gave rise to the claim; or (b) refund to Customer the amounts paid to Company for Services related to the claim. **IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY INDIRECT, PUNITIVE, SPECIAL, OR CONSEQUENTIAL DAMAGES, WHETHER BASED ON BREACH OF CONTRACT, TORT, OR OTHERWISE (INCLUDING NEGLIGENCE OR LOST SALES OR PROFITS), EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. COMPANY'S AND ITS CONTRACTORS' LIABILITY TO CUSTOMER FOR CLAIMS ARISING UNDER THIS AGREEMENT, WHETHER BASED ON BREACH OF CONTRACT, TORT, OR OTHERWISE (INCLUDING NEGLIGENCE OR LOST SALES OR PROFITS), WILL NOT EXCEED THE AMOUNTS PAID BY CUSTOMER FOR THE DEFECTIVE PORTION OF THE SERVICES THAT IS THE SUBJECT OF THE CLAIM, AND IN NO EVENT WILL COMPANY'S OR ITS CONTRACTORS' AGGREGATE LIABILITY FOR ALL CLAIMS UNDER THIS AGREEMENT EXCEED THE TOTAL FEES PAID BY CUSTOMER FOR THE SPECIFIC PORTION OF SERVICES IN DISPUTE.**

11.0 Resolution of Disputes.

11.1. Process. Any dispute, controversy, or claim related to this Agreement (a "**Dispute**") will be resolved first through good faith negotiations between Company and Customer. If the parties are unable to resolve the Dispute through negotiations, they will submit it for mediation in New York City (except that payment disputes need not be mediated). If the Dispute cannot be resolved through mediation, either party may commence an action to resolve the Dispute solely in the District Court for the Southern District of New York or in the state courts of New York sitting in New York County, it being agreed that the parties submit to the exclusive jurisdiction of such courts (except that interim injunctive relief may be sought in any court of competent jurisdiction). Each party consents to service of process upon it by sending such service to it by nationally recognized overnight courier to the address specified above such party's signature to this Agreement. THE PARTIES EXPRESSLY WAIVE AND FOREGO ANY RIGHT TO TRIAL BY JURY. Nothing in this section requires either party to engage in negotiation or mediation before seeking interim injunctive relief and the parties waive the requirement of posting any bond in connection with such relief.

11.2. Governing Law and Interpretation. This Agreement will be governed by the laws of the State of New York, without regard to its conflicts of laws principles. The parties specifically disclaim application of the United Nations Convention on Contracts for the International Sale of Goods. This Agreement may not be presumptively interpreted for or against either party by reason of that party having drafted or negotiated, or failed to draft or negotiate, all or any portion of this Agreement. The word "including" means "including, without limitation."

12.0 Miscellaneous.

12.1. Relationship of Parties. Company is an independent contractor. Nothing in this Agreement will be construed to create a joint venture, partnership, employment, or agency relationship between the parties for any purpose.

12.2. Force Majeure. Neither party is liable for delays or failures in performance of any obligations under this Agreement, other than payment obligations, due to a cause beyond its reasonable control.

12.3. Notices. Notices, consents, demands, and other communications required or permitted under this Agreement will be given in writing, either by: (i) personal delivery; (ii) nationally-recognized overnight courier; or (iii) facsimile transmission with receipt confirmed (with a copy of the original of the facsimile transmission sent by certified or registered mail or nationally-recognized overnight courier), sent to the party at the address specified above its signature to this Agreement. A notice will be deemed received on the actual date of receipt.

12.4. Assignment and Subcontracting. Neither party will assign this Agreement or any right or obligation hereunder without the prior written consent of the other party, and such consent will not unreasonably be withheld, except that Company may subcontract performance of the Services without consent from Customer, providing that Company remains responsible for the performance of any subcontractor. In addition, Company may assign its rights and obligations to a corporate affiliate or to an entity that acquires Company by way of merger, stock purchase, or purchase of substantially all of Company's assets. Any assignment made in contravention of this section will be void. This Agreement is binding on the parties to this Agreement and their respective successors and permitted assigns.

12.5. Entire Agreement; Counterparts, Amendments; Severability; Conflicts. This Agreement constitutes the entire understanding between the parties as to the Services and supersedes all prior and contemporaneous discussions and agreements between them relating thereto (including any nondisclosure agreements governing Confidential Information). This Agreement may be executed in counterparts, all of which when taken together constitute a single Agreement. This Agreement (including each attachment) may not be modified, amended, or waived in whole or in part except by written agreement of the parties. Company will not be obligated to perform any additional or different Services unless agreed to in writing by the parties. If any provision of this Agreement is declared invalid, illegal or unenforceable, the validity of the remaining provisions will not be affected. In the event of a conflict between the terms and conditions of this Agreement and the terms and conditions of an attachment, the attachment will prevail, unless otherwise expressly provided.

12.6. Survival. The provisions contained in this Agreement and its attachments that by their context are intended to survive termination or expiration will survive, including sections on payment terms, confidential information, ownership of intellectual property, warranty, indemnification, exclusive remedy and limitation of liability, resolution of disputes, and this section on survival.

[COMPANY]	**[CUSTOMER]**
(Address)_____	(Address)_____
(Address)_____	(Address)_____
Telephone No.: _____	Telephone No.:_____
Facsimile No.: _____	Facsimile No.:_____
By:_____	By:_____
Name:_____ Printed	Name:_____ Printed
Title:_____	Title:_____

[Sample Policy]

[Company Logo Here]	**Effective Date:**	
	Last Revised Date:	
	Approved By:	
	Policy Number:	

Contract Review and Signing Authority Policy: Contracts Other Than Sales Contracts

Purpose

The purpose of this policy is to describe the types of contracts that require review by the Legal Department and to specify the individuals in the company who are authorized to sign those contracts on behalf of the company.

Scope

This policy applies to all company employees, including but not limited to company officers, exempt and non-exempt personnel, and full and part-time employees, and temporary and independent contract personnel.

The legal review by the Legal Department under this policy is in addition to any other internal review that may be required under other policies.

This policy does not cover the signing or issuing of purchase orders, nor sales proposals or contracts with the company's customers, as such activities are covered by other policies.

Policy Procedures

Contract Review:

1. It is the responsibility of the person submitting a contract for signature, as well as the person who will be signing the contract, whether or not the contract requires review by the Legal Department under the guidelines set forth below, to make sure that all internal approvals required for that type of contract have been received prior to execution of the contract. The Legal Department is not responsible for inquiring as to whether necessary internal approvals have been obtained.

2. The Legal Department is responsible for reviewing the following contracts (unless the Legal Department has specifically delegated that responsibility in writing), and all such contracts must be submitted to the Legal Department for review before they are signed:

   (a) ***[insert types of contracts here, e.g. NDAs, M&A deals, employment agreements]*** that
      i. ***[insert relevant criteria here, e.g., dollar value, length of term, volume of business, subject matter]***
   (b) ***[insert other types of contracts]*** that
      i. ***[insert relevant criteria here]***
   (c) ***[etc.]***

3. Contracts not requiring review by the Legal Department under this policy should not be submitted to the Legal Department for review.

Contract Signing Authority:

1. All contracts may be signed only by an authorized person within the company as set forth in this policy.

2. The following individuals are authorized to sign the following types of contracts:

Type of Contract	**Persons Authorized to Sign** ***[insert appropriate officers into the table, e.g., President]***
Nondisclosure Agreements	
Agreements with Vendors	(1) _____ (unlimited as to amount and duration) (2) _____(up to $_____ and no more than _____ in duration)
Agreements with Employees	

Violations of Policy

If any employee witnesses any mistakes or errors that result in a violation of this policy, the employee should report the violation immediately to a supervisor or a member of senior management so that the company can take immediate corrective steps. In contrast, if an employee willfully or intentionally violates this policy, the company may take disciplinary action, up to and including termination, as well as exercise any legal rights to seek redress against the violator.