Negotiating and Reviewing the Consulting Agreement by David Rintoul

Congratulations! You've just landed a great assignment with a new client. You want to just sign the ten-page boilerplate contract the client sent you so you can get the work done and get paid. Don't let the joy and anticipation of a new project lead you to neglect the terms of the agreement. If the deal goes sour, you want to make sure you get paid for the work you have done, and can freely do business in the future the way you want to, without interference from a former client. By keeping in mind some of the legal issues discussed below, you'll have a better chance of feeling just as good at the end of the assignment as you did when you landed it.

Statement of Work. This is the guts of the agreement. If the statement of work is right, you are far along the path of making sure the agreement will work for you. Do you know exactly what you need to do at each stage of the project, and what the client is obligated to pay you at each stage? If the client terminates the agreement early, do you have the right to be paid for the work you have done at cancellation? What are the consequences of missing a delivery date? If there are firm due dates for deliverables, are there similarly firm dates for payment? If you are being paid at an hourly rate, does the agreement specify whether travel or any overhead expenses are covered? If travel expenses are to be reimbursed, is pre-approval of expenses required, and what type of back up is required? Does the statement of work incorporate all material terms of any correspondence regarding the deal? It is likely that once you sign a formal agreement, any agreements in correspondence or made in conversations are likely to be unenforceable, so make sure everything is included in the statement of work or scope of work provisions.

Professional Considerations. If you are doing professional actuarial consulting, payment should not be conditioned on the client's approval of the services provided. Your application of professional standards may result in your reaching a conclusion the client does not like. For a great article addressing professional liability issues in actuarial consulting, see "Malpractice Claims: What You Can Do to Protect Yourself" by David Godofsky in The Independent Consultant, Issue 1, January 2003, page 6.

Non-Competition and Non-Solicitation. Non-competition agreements restrict your ability to compete with your client. Non-solicitation agreements restrict your ability to sell to or service your client's customers. If you are performing actuarial consulting services directly for a client, no such clause would be appropriate, since it's unlikely that you will be competing with clients in this area. Such agreements are commonly included in boilerplate contracts, so they may be in the agreement even if they are not appropriate. If you are being hired as a contractor by an actuarial firm to provide services to its clients, you can expect such a provision.

If the client won't remove it or there are potential issues of non-competition, you need to determine whether it is going to be enforceable. Each state's laws vary, but such provisions are enforceable in most states, depending on their terms. Non-solicitation clauses are more likely to be upheld than non-competition clauses, particularly if they last

only for the term of the agreement. Even if the provisions are probably not enforceable, the threat of even a baseless lawsuit can give your client an advantage in negotiating a resolution to any dispute, and can deter potential clients from doing business with you. The greater the restrictions on your right to do other business, either during the term of the agreement or on expiration of the term, the higher compensation you should receive to compensate you for any loss resulting from such restrictions.

Intellectual Property. If you are hired to create a deliverable, it will be considered a "work for hire" that will belong to the client. You will have no further rights in the deliverable, and the company will be able to modify it, sell it or license it to others at will. If this is not your expectation, you to need to negotiate a license and define the company's right to modify your product, sell it, or transfer it. Also, the agreement should set forth in an exhibit any existing intellectual property that is similar or related to the product you are developing for the client. You want to make sure that the client does not claim later that it is part of the "work for hire." If any of your preexisting intellectual property is used in the deliverable, you should expect to grant the company a non-exclusive, paid-up, perpetual and irrevocable license to use the intellectual property. You may want to try negotiating additional compensation to reflect the fact that the client is getting the use of this pre-existing intellectual property without having to pay for its development.

Choice of law and arbitration clauses. If the agreement has a choice of law provision that states that the law of another state will apply to the agreement, or that any dispute must be decided in a court of a distant jurisdiction, your cost to enforce the agreement will be much higher than if local law and courts will govern. If the agreement provides for arbitration of disputes, try to have the arbitration be local, and decided by a single arbitrator. If you don't specify a single arbitrator, three arbitrators may be appointed to decide the dispute, which would means that you will have to pay thousands of dollars of arbitration fees to even start the proceedings.

Term of the Agreement. Does the term of the agreement automatically renew unless notice is given prior to the conclusion of the term? What are your obligations and the client's obligations upon the expiration of the term of the agreement? If you will incur upfront costs, such as obtaining equipment or making financial commitments to other contractors, you should try to negotiate an "upset" payment if the client exercises a right to cancel the agreement early in the term.

Use of Contractors. If you are going to subcontract some of the work, the agreement may require that the company approve the contractor. If the subcontractor will be working at the company's site, you can expect to be required to provide evidence of liability insurance. Some clients may require that you have workers' compensation insurance, which is generally not difficult to obtain, but can be expensive for a new employer, depending on the state.

No contract can guarantee that you will feel as happy at the end of a project as you felt when you first got the business. In the end, success and profit depend on the individuals

involved. By keeping the issues discussed above in mind, though, the contract can contribute to making the deal successful and profitable for you and the client.

This is the first in a series of articles on business and legal issues confronting independent consultants. Feel free to send any comments or legal or business questions that you confront in your practice to drintoul@bpslawyers.com.

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