

# Memorandum

Subject: Common Contract Language of Concern

The following “cheat sheet” outlines contract language problems commonly encountered in client originated agreements. Be aware that these examples are not comprehensive of all potential concerns. The issues/possible solutions are not always applicable due to possible modifying language within a particular contract clause or in other location within the agreement. In addition, there may be several alternatives to the “possible solution” language provided below.

<b><u>OFFENDING LANGUAGE</u></b>	<b><u>WHY IT'S BAD</u></b>	<b><u>POSSIBLE SOLUTION</u></b>
CONSULTANT shall indemnify CLIENT for its acts, errors or omissions (or performance)	Infers protection from "non-negligent" acts or performance	Insert "negligent" prior to acts or performance (a)
CONSULTANT shall be liable and indemnify CLIENT for damages caused, in whole or in part, by CONSULTANT'S negligent acts	CONSULTANT may be 1% negligent but responsible for 100%	Delete "in whole or in part"(a)
CONSULTANT shall name CLIENT as additional insured on all insurance policies	Cannot name CLIENT as additional insured on workers compensation or professional liability insurance policies	Provide exception for workers compensation and professional liability insurance (a)
CONSULTANT shall procure insurance that protects from its acts and those of its subconsultants	Professional liability insurance does not cover acts of subconsultants	Delete subs or provide requirement for subs to maintain their own insurance (a)
CLIENT may require complete certified copies of insurance policies	Policies include information that should be kept confidential (i.e. application and premiums)	Insert "relevant sections" of insurance policies
Ownership of all work product, including copyrights, will vest to the CLIENT	Need to maintain ownership to our designs for our reuse/modification on other projects and protect CONSULTANT from reuse which CONSULTANT could be held responsible	Insert limitations on ownership, particularly intellectual property. Insert “reuse” clause limiting use to current project only (with indemnity, if possible).
CONSULTANT shall maintain: Contractors Protective Coverage Contractual Coverage Extended Reporting “All Risk”	Most CONSULTANT's don't have these for professional liability insurance	Delete (a)
CLIENT may distribute or reuse the work product in any way	Could use in other unrelated projects	Insert “reuse” clause (a).
CONTRACTOR shall correct any defective work	"Defective" may be too broad; may require CONSULTANT to correct non-negligent work	Replace "defective" with "negligent"

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Any dispute will be settled by binding arbitration	Mediation is preferred. "Arbitration" needs more specifics, such as making sure all parties are subject, discovery is allowed, and decisions are consistent with state laws	Insert ", mediation or other method of alternative dispute resolution when both parties agree". Arbitration may be acceptable with certain additional provisions.
CONSULTANT to indemnify CLIENT for all except the sole negligence of CLIENT	CONSULTANT responsible for client's negligence	Delete "sole" (a)
CONSULTANT will use it best efforts (highest quality)	Higher standards of care	Delete "best" or "highest"; insert "perform to the professional standard of care " (a)
CONSULTANT will require any subconsultants to maintain the same level of insurance	All subs likely will not have minimum insurance	Make sure subs can comply
CONSULTANT will require all subconsultants....	Must pass down to subs	Can you? Will sub agree?
CONSULTANT will conduct the work in the safest possible manner	"Safest" may constitute higher standard of care	Insert perform to the professional standard of care
CONTRACTOR warrants that Goods & Services are free from defects	Warrants/warranty impose requirements above the professional standard of care. "Defects" may be interpreted beyond negligent	Insert perform to the professional standard of care
CONTRACT will be interpreted by laws of the State of "insert your favorite"	CONSULTANT may not be familiar with laws in many States	Replace with "state in which the work is performed"
CONSULTANT will indemnify CLIENT for its negligence and intentional acts	All acts can be considered "intentional"	Replace "intentional" with "willful misconduct"
Copies of all documents, notes and any other work product shall be transferred to CLIENT	<u>ALL</u>	Exclude internal documents and non-final notes, documents and work products. We must be able to retain copies of all documents.
CONSULTANT shall keep all information confidential	Too broad	Insert limitations to confidentiality; at a minimum, must be able to respond to court order or subpoena.
CONSULTANT shall maintain professional liability insurance with limits of \$1 million per occurrence	Professional liability insurance is written on a claims made basis	Replace "per occurrence" with "on a claims made annual aggregate basis"

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Any claims made policies shall provide extended reporting coverage or cover negligent acts for a period of 3 years following project completion	Extended reporting or future coverage is a specific rider to a professional liability insurance policy which costs more	Replace with "Consultant shall maintain professional liability insurance for a minimum of 3 years following projection completion"
CONSULTANT shall proceed with any CLIENT directed change while an equitable adjustment is negotiated	One sided authorizations to modify scope without agreement of CONSULTANT	Modifications to scope/terms can only be effected upon written agreement of CLIENT & CONSULTANT

<sup>(a)</sup> may be a "deal breaker"