

**Overview of Consulting Agreements**

Forms of consulting agreements vary greatly. They can range from one page to 20 or more pages depending on the subject matter of the agreement and whether other agreements between the parties are included or are incorporated by reference. This summary will discuss in more detail the terms of *Information File C5-84, Sample Consulting Agreement* and the legal rights and obligations created under the agreement, as well as provisions that could be adapted to specific circumstances and arrangements.

The terms detailed below, however, should be considered as basic requirements for any consulting agreement. With the key terms detailed in a written agreement, the parties will have reasonable expectations about services to be performed under the agreement and the consequences if those expectations are not met.

This summary does not constitute legal advice. Parties negotiating and contemplating entering into consulting agreements should consult with competent legal advisors.

**Provisions of the Agreement and Duties and Obligations Created**

The consulting agreement is an agreement between a consultant and a client who wishes to retain certain specified services of the consultant for a specified time at a specified rate of compensation. As indicated previously, the terms of the agreement can be quite simple or very complex. Following is a discussion of the more important issues to be considered in every consulting agreement.

**1. Scope of Work, Compensation.** It is critical that the consulting agreement specifically states what services the consultant is to provide. Without this specificity it will be difficult, if not impossible, to determine whether the consultant has performed his or her obligations. The typical consulting agreement will use an exhibit, which may be amended from

time to time, to list the services that are to be provided. This allows the parties to adjust services as the relationship evolves without amending the entire agreement.

The time allowed for the consultant to perform the services must also be provided. *Information File C5-84, Sample Consulting Agreement*, contemplates the consultant devoting a specified number of hours per month to performing the services. This arrangement is typically used when the consultant is providing services that are more general in nature. Alternatively, when the services are more specific in nature, the client may pay for services as they are performed and pay a flat fee for completion of each specified service. The client should also consider whether to negotiate a “hold-back” pending completion of the services. If a hold-back is negotiated, it should be significant enough to keep the consultant engaged to complete the services or not used at all.

Consultants also typically request that certain “expenses” be reimbursed. Some of the items a client might find objectionable are secretarial services, copying services, messenger services, phone calls, some meals, limited transportation, etc. The consultant’s rates should include at least some of the consultant’s overhead expenses. Where to draw the line is a point of negotiation.

The client should always require the consultant to perform the services with high professional standards and business ethics, maintain the confidentiality of the client and, if appropriate, require the consultant to obtain prior written approval before engaging any other person to assist with performing the services under the agreement. Without these requirements, the client is jeopardizing his or her assets (confidential information of the client, for example) without recourse against the consultant.

**2. Independent Contractor.** The agreement must indicate that the consultant’s status is that of an

independent contractor. While important for tax reasons (withholding, etc.), it is also important from the perspective of the consultant not being able to contractually bind the client to third parties and may limit the client's liability for acts committed by the consultant, even if committed while performing services under the agreement.

**3. Term and Termination.** The term of the agreement is typically quantified in months or years. Most likely it will coincide with the compensation schedule. The client should protect his or her interests by allowing the termination of the agreement under certain conditions. Typically these conditions are (1) breach of confidentiality or non-solicitation provisions of the agreement, or (2) illegal activities that affect the consultant's performance under the agreement. Without this right to terminate the agreement, the client is obligating himself or herself to the consultant even if the consultant has taken actions contrary to the client's interest.

**4. Rights and Data.** The consulting agreement should address the use of the consultant's work. Some agreements allow the client complete use of the physical product delivered by the consultant and may not include an assignment of copyright on the assumption that the consultant will want to retain the copyright. Clauses like the one included in *Information File C5-84, Sample Consulting Agreement*, do include an assignment of copyright. The best position for the client is to get complete ownership of not only the tangible documents that the consultant prepares, but also the copyrights to those documents. However, the consultant may demand considerably more compensation to assign this right, making it impractical. It is very important, however, for the parties to clearly understand their respective rights relating to not only the physical documents but the copyrights as well.

**5. Conflict of Interest, Non-Solicitation.** Clients should consider including a non-competition clause in the agreement, at least for the term of the agreement

and within the market area of the client. Any non-competition clause must be reasonable to be enforceable. Most consulting agreements also include a statement that the consultant will not solicit the client's employees for at least the term of the agreement.

**6. Miscellaneous Provisions.** After spending considerable time negotiating the services to be performed, the compensation, the ownership rights to the work product, etc., it is often easy for parties to neglect the miscellaneous provisions that one typically finds at the end of the agreement. The parties should always pay careful attention to what law will govern the agreement, how disputes will be resolved, and, probably most importantly, the assignability of the rights and obligations under the agreement. Typically, the rights and obligations are not assignable since the client is hiring the consultant because of the consultant's specific expertise and the consultant is agreeing to perform the services only for the client. There may be situations, however, where an assignment may be necessary, i.e., the client merges with or into another entity.

### **Consequences of Breaching a Consulting Agreement**

Breach by the consultant subject the consultant to remedies available to the client. These remedies include equitable relief and monetary damages. An injunction against the breaching consultant helps prevent any further breach of the agreement. It may also be possible to enforce performance under the agreement - especially if the consultant was hired to perform specific duties that only he or she has the knowledge and ability to complete. However, if a court does not require specific performance because the services can be performed by another party or for other reasons, the court will likely grant injunctive relief and award monetary damages.

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