

INSTITUTE OF PHYSICS CONSULTANCY GROUP

TERMS AND CONDITIONS FOR CONSULTANCY AGREEMENTS

Note: This document is intended as a guide to good practice for consultancy contracts. It does not, however, give a list of standard or "recommended" contractual clauses, but explains instead the purpose of contractual conditions and includes some sample clauses for illustrative purposes only. Consultants may use this guide to help them formulate their own contractual conditions, based on the needs of their particular business. If there are any doubts regarding the contractual provisions that are applicable or the wording that should be used, then legal advice should be sought. The information presented in this document is given in good faith, but neither the Consultancy Group nor the Institute of Physics can accept any liability for consequences arising from the use of this advice.

1 Introduction

Written Terms and Conditions (T's and C's) are used by consultants to clarify the "rules" which govern their business relationship with their client; to demonstrate the integrity of the consultant's approach to their work; and to avoid subsequent misunderstandings with the client. The aim of T's and C's should always be to avoid disputes and to minimise business risks. They are not intended to be used in litigation, but to prevent it. The client-consultant relationship has to be built on the basis of mutual trust and respect. T's and C's should support this trust, not undermine it.

All the conditions attaching to a consultancy assignment should be clear, fair, and reasonable. They should reflect the fact that a contract between two parties is intended to bring benefits to both sides in reasonably balanced proportion. (The client gets the work done and the consultant gets paid.) This is the essence of any contract: an agreement having a consideration on both sides.

Terms and conditions are negotiable, and particular clauses may sometimes have to be included in (or omitted from) an agreement on the insistence of the client. Sometimes clients will wish to use their own pro-forma conditions instead of those of the consultant. It is sensible for the consultant to be flexible and accommodating, but at the same time to recognise when a particular condition is unreasonable. Conditions that are especially favourable to only one side (those that don't have an element of "reciprocity") should be avoided wherever possible. Such conditions include the right to cancel the contract being held by only one party, or a requirement that the consultant shall be available to work for the client for a minimum specified period without that level of work being guaranteed.

T's and C's normally form only part of the consultancy contract. They are usually attached to a letter (or to a more detailed proposal with a separate covering letter) which summarises the work that the consultant proposes to undertake in response to the perceived needs of the client. This package constitutes the "offer" made by the consultant to the client which, if accepted by the client, will form the basis of the contract.

A contract, however, can be deemed to exist (and be recognised in law) even if it has no written form, and so it is important for the avoidance of disputes to ensure that as much as necessary is agreed and documented before work starts.

2 Verbal Agreements

Sometimes, especially for short assignments, consultancy agreements are made verbally. This can be satisfactory if the risk is considered low, but it is nevertheless advisable for the consultant to write to the client confirming what has been agreed and the essential conditions that will apply to the work. Beware, however, that verbal agreements can be binding. Once verbal agreement is deemed to have been reached, it can afterwards be *too late* to introduce any restrictions or conditions to the work (see Section 6: "Variations"). Common sense is needed here, of course, because it is often desirable to reach a verbal agreement before a formal written offer is made. *Intent* and *interpretation* are important. Informality between a consultant and a client can be a good thing provided both are playing by the same implicit rules. Be careful not to mislead or to be misled during preliminary discussions.

3 The Offer

The offer (comprising a letter, proposal, or formal tender) should outline the consultant's understanding of the client's requirement, describe the programme of work which the consultant proposes to undertake in order to satisfy that requirement (dividing it into stages or separate work tasks if appropriate), define the end-point of the programme and any *deliverables* (eg. a report, a design, or a prototype), give an indication of the timescales and specify the costs (or the basis on which charges will be made). If a total cost is quoted then a statement must be included as to whether this figure is firm or merely an estimate. Applicable T's and C's (see Section 4) should be included in the offer or attached as a separate document, in which case they should be referred to in the offer letter.

It is important that the complete offer package, including T's and C's, is drafted in such a way that the consultant is not contractually committed to deliver something or to produce results which are not certain to be achieved. Differentiate where necessary between the *effort* (the proposed programme of work) and the *outcome* (the aim or intent of the work programme).

Unless a period of validity is specified in the offer, it remains open for acceptance indefinitely.

4 Terms and Conditions

T's and C's need to fill in the detail which is not included elsewhere in the offer. They should cover the essential aspects which govern the relationship between the consultant and the client, and clarify matters which might subsequently give rise to misunderstanding. Most consultants will have their own set of clauses, but may occasionally vary them to suit particular circumstances. It is not possible to define a standard set of T's and C's suitable for every consulting assignment, but the main issues which should be considered are discussed below.

a) Charges

What is the basis of the consultant's fees and other charges?

Is the offer price fixed or dependent on the time spent?

What additional costs might arise (for travel expenses or materials) and on what basis will these be charged (at cost or with added profit)?

Will such additional charges be subject to prior agreement with the client?

Will VAT be added?

Example. Fees will be charged at the rate of £X per hour. Additional charges will be made for travel, subsistence, and any other costs necessarily incurred in the execution of the work programme. VAT will be added to all fees and other charges.

b) Invoicing

When will invoices be sent? (On completion of the work? On completion of defined stages? At monthly intervals?)

When does payment become due?

Will interest be charged on overdue accounts?

Example. Invoices will be submitted at monthly intervals and payment shall be made within 30 days of the invoice date. The consultant reserves the right to levy interest charges on amounts which remain unpaid 30 days after the invoice date.

c) Termination

On what basis can either party terminate the contract?

How much notice is required?

Costs incurred up until the time of termination (and not just until the time of notice) should be payable (otherwise the consultant could be left with a sudden hole in their workload having deferred, or even turned down, opportunities from other clients).

Example. This agreement may be terminated by either party giving fourteen days notice in writing to the other party. Payment shall be made for all work carried out and all costs reasonably incurred up to the time of termination.

d) Client responsibilities

Will progress of the work depend on the timely availability of information to be supplied by the client, on decisions to be made by the client, or on the availability of the client's personnel or other resources? A general clause (as in the following example) may be used, or a more specific clause used instead.

Example. The client shall provide all necessary instructions and information, shall permit such use of its facilities as may be needed, and shall ensure such availability of its staff as may be necessary in order for the consultant to carry out his/her obligations under the agreement.

e) Timing

Unless the consultant is very confident about timescales, these should not be contractually binding. See also Force majeure.

Example. While the consultant will make all reasonable endeavours to ensure that the work programme is completed in a timely manner, any timescales or work completion dates that are specified are estimates only and are not guaranteed.

f) Confidentiality

The consultant should undertake to respect the confidentiality of any information received from the client which is not in the public domain, including incidental details concerning the client's business. The consultant may wish to impose a reciprocal responsibility on the client.

Clients may often require a consultant to sign a separate and more detailed confidentiality or non-disclosure agreement, in which case the consultant should first check to ensure that it is a fair agreement and does not unreasonably constrain the consultant's independence.

Example. Both parties to the agreement shall take all reasonable measures to keep secure any confidential information or ideas obtained from the other party which are not in or pass into the public domain other than through the fault of the first mentioned party, or are not otherwise rightfully obtained from a third party.

g) Ownership of intellectual property

This can sometimes be a contentious issue, and the consultant needs to adopt a considered position on it, but should be prepared to negotiate where necessary. The first essential, however, is that the client should have no rights or ownership whatsoever until the consultant has been paid in full.

The desirable option from the consultant's perspective is that the consultant retains ownership of any intellectual property (IP), but the client is permitted free use solely for the purposes for which the work was carried out for the client by the consultant. Where significant IP is anticipated, then such purposes should be carefully defined in the contract. (The justification for retaining ownership is that the consultant is not an employee, and is bringing considerable experience and expertise to the work which would not be possible if the consultant were prohibited from any use of previous work for other clients.)

Quite often, however, a client will not accept this condition, especially if the work has an impact on the design of a product or process which the client may wish to patent. The consultant may

have to give up IP ownership, but should only agree to do so if on balance the overall rewards are fair. It may sometimes be possible to agree a royalty income in lieu of (or even as well as) a consultancy fee.

The most satisfactory solution may be to include a default clause to ensure that IP ownership remains with the consultant unless otherwise agreed.

Example. The client may, for purposes directly connected with the work programme carried out under the agreement and provided that all fees and other charges due to the consultant are paid, but not otherwise, freely use all intellectual property created by the consultant in the course of the work carried for the client. Unless otherwise expressly agreed in writing, ownership of such intellectual property, including designs, drawings, written reports and other works, shall be retained by the consultant.

h) Liability

This is another contentious issue! The consultant should undertake to use all reasonable endeavours to ensure that the work carried out meets the client's requirements and is of a sufficiently high standard. Nevertheless, the consultant may disclaim responsibility for any loss or damage arising from the results of their work, and should require the client to indemnify him or her against any claims for damages arising from third parties.

This position can appear unreasonable (especially to the client), but it is nevertheless normal business practice and is often required by professional indemnity insurers. Without such limitation the consultant could find themselves facing huge liabilities arising from a very small piece of work. Furthermore, they could be misused by an unscrupulous client, by being called in to recommend (and thereby take responsibility for) a course of action that had already been decided.

Example. While all reasonable endeavours will be made by the consultant to ensure that the work satisfies the purposes for which it is carried out, and that any recommendations which are made represent the consultant's best professional opinion, no warranty is expressed or implied and the consultant accepts no responsibility for any loss or damage arising from the use of its information, advice, recommendations, designs, or of any hardware or software that is supplied. The client shall indemnify the consultant against any claims or penalties which it may be under to any third party as a consequence of any work carried out for the client by the consultant.

i) Right to work for other clients

The consultant should declare any potential conflict of interest that may arise in undertaking work for a particular client, but should not be restricted unreasonably from carrying out work for a competitor of the client.

Example. The consultant undertakes to declare to the client any potential conflict of interest which might reasonably be considered to prejudice his or her ability to perform the work in an unbiased and professional manner, but reserves the right to undertake assignments for any other client where, in the reasonable opinion of the consultant, no such conflict exists.

j) Subcontracts and assignments

Can the client assign the contract to a third party without permission of the consultant?

Can the consultant assign all or part of the work programme to a subcontractor without the permission (or knowledge) of the client?

(Where subcontractors are employed by the consultant, whether with the agreement of the client or not, the consultant retains full responsibility to the client for the execution of the contract. If it is necessary to sub-contract a large proportion of the work, the consultant should instead consider transferring the enquiry to an appropriate third party in return for a "finder's fee" and, where necessary, an agreement to work for the third party as subcontractor. Any agreement between one consultant and any other consultant or agency, whether for transferring enquiries in return for a fee or for joint working as main contractor and sub-contractor(s), should be subject to its own agreed terms and conditions.)

Example. The agreement between the client and the consultant is personal to both parties and shall not be assigned by one party to a third party without the prior written consent of the other party. The consultant undertakes to carry out personally the work programme defined in the (proposal, offer letter), and will not subcontract all or part of the work without the prior written consent of the client.

k) Force Majeure

A consultant should expressly disclaim responsibility for adverse consequences arising from causes beyond their control. This is simply sound business sense. It may already have been done in the case of delays, and it is also partly covered under liability, but a more general clause may also be useful.

Example. Neither party to this agreement shall be liable for any failure to perform any or all of its obligations under the agreement where such failure arises from any cause whatsoever beyond its reasonable control.

5 Acceptance

Ideally, both parties will be fully in agreement with all aspects of the terms and conditions attaching to a consultancy assignment prior to starting work. Where a dispute or disagreement does subsequently arise, however, the most finely crafted T's and C's are of little value unless it can be demonstrated that they have been accepted by the client.

On receipt of an offer by a consultant (in whatever form it is made), the client may do one of three things.

i) Decline the offer completely (or do nothing throughout the period of validity of the offer, which amounts to the same thing).

ii) Accept the offer unconditionally. This may be done verbally or in writing, but it can also happen by default (if the client behaves as though the offer had been accepted, such as by giving instructions to the consultant concerning the work programme).

iii) Make a "counter offer." This is a conditional acceptance, in which the client proposes changes to some aspect of the work programme described by the consultant, to its costs or timescales, or to the T's and C's. The consultant must then decide whether to decline this counter offer, to accept it unconditionally, or to make a "counter-counter offer". Starting work in response to a counter-offer made by the client will be deemed to be acceptance by the consultant of the counter offer.

Quite often a client will send a purchase order to the consultant to confirm acceptance. If the client's own T's and C's appear on the Purchase Order this then constitutes a counter offer (whether intended as such or not), and will take precedence over the consultant's T's and C's. (Clearly this cannot be the case if the T's and C's are printed on the reverse of the Purchase Order but only the front page is sent to the consultant by fax!) The clauses contained in a Purchase Order may not necessarily present a problem, but they can contain provisions which conflict with the consultant's preferred conditions. The consultant must then take action to prevent this counter-offer from being accepted by default (which will happen if work is started in response to the Purchase Order).

Be careful of "catch all" clauses (whether used by the client or the consultant), which attempt to negate any alternative or additional conditions imposed by the other party. If both parties adopt this ploy it can turn out that no agreement exists (since neither side has accepted the T's and C's of the other), even though the work may go ahead in ignorance of this fact.

Once accepted, the offer, including any counter offers, however made and however accepted, becomes "the contract", recognisable as such in law.

6 Variations

Once an offer (or counter-offer, etc) has been accepted, whether explicitly or by default, then amendments or additions to the conditions applying to the contract can only be made by mutual agreement. Neither party can unilaterally impose changes to the contract on the other party (although one party can, of course, invoke the cancellation clause and start negotiations all over again).

Any variation proposed by the client after acceptance (or, for practical purposes, once work has started) should be considered on its merits and "reasonableness". Be flexible and helpful. T's and C's are there to facilitate working relationships, not to constrain them.

7 Non-compliance

What happens when one party to the agreement fails to meet their obligations under the terms of the contract?

Firstly, damage limitation should be the aim. Among the factors to be considered must be the value of the client's continued goodwill. Discuss the problem and try to resolve it amicably. Is the act of noncompliance deliberate, or has it simply arisen out of ignorance? Is it, indeed, that important? Clients may not always appreciate just what they have agreed to (although the consultant should never intentionally try to "hide things in the small print"), and will often respond sympathetically if the obligations they have openly entered into are politely pointed out to them.

However, where a disagreement cannot be resolved, it can be a very risky business to insist on one's legal rights against an unco-operative client. Is there not a compromise position that can be reached? Can some sort of informal arbitration be agreed? Is it simply best to count the cost and walk away? To take (or indeed merely to threaten) legal action is not something to be done lightly. It may precipitate a counter-action by the client, however insubstantial the grounds for this may seem. The law is an uncertain ally, and to seek its protection can be time-consuming, expensive, and quite often unproductive. The consequences of *not* taking legal action have to outweigh the very real risks involved before such a course of action is considered.