

# **Contract Terminology**

**2013**

- **DISCLAIMER**

**The information provided is for informational purposes only, does not constitute legal advice or create an attorney-client relationship, and may not apply to all circumstances. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.**

# Negotiations

- Plan strategy.
- Negotiations don't have to be adversarial – parties want to do business with each other.
- Setting terms and conditions.
- Determine what is negotiable and what is not negotiable.

# Contractor Qualification Criteria

- Contractor qualification criteria considered by companies may include following factors:
- Name and address of Contractor, contact name, and phone number;
- Proximity, geographical considerations, number and size of facilities;
- Financial data;
- Personnel sources and availability;
- Previous performance (safety, quality, timeliness);
- Contractor's experience with projects similar in size and scope, including references;
- Availability to perform work;
- Contractor's experience with Company;
- Safety considerations;
- Unique skills;
- Licensing; and
- Insurance.

# Business NAICS Code and DUNS Number

- For SBA need North American Industry Classification System code (“NAICS”). Visit NAICS website - <https://eweb1.sba/naics>.
- Federal contractors or grantees need Data Universal Numbering System (DUNS) number. Nine digit business identification number. [www.dnb.com/us](http://www.dnb.com/us) or call 1-866-705-5711.

# Mail or Telephone Order Rule

- A Federal Trade Commission rule that requires a seller to ship goods ordered by mail, phone, computer or fax to you within the time promised or, if no time was stated, within 30 days. If the seller cannot ship within that period, the seller must send you a notice with a new shipping date and give you the option of canceling your order and getting a refund.

# Truth in Advertisement

- Requirement by the Federal Trade Commission as well as various state and local government agencies, that advertisements not make misleading, false, or deceptive claims. Also, the Native American Arts and Crafts Act of 1990 provides for criminal and civil penalties for passing art off as Indian made.

# Deceptive Trade Practices Act (Known as the “DTPA”)

- **The DTPA varies between states. In general it lists different wrongful acts that are actionable under the statute:**
- **1. FALSE, MISLEADING, OR DECEPTIVE ACT OR PRACTICE**
- These acts are specifically enumerated under Section 17.46 and are affectionately known as the “Laundry List”. The list includes 27 separate acts so we are not going to list them here. However, the most commonly pursued claims involve the following:
- Representations that goods possess characteristics that they do not possess;
- Representations that goods are of a certain quality that they are not;
- Representations that goods are new when they are used; and
- Failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose was intended to induce the consumer into a transaction into which the consumer would not have entered into had the information been disclosed



# Deceptive Trade Practices Act (Known as the “DTPA”) (con’t.)

- **2. BREACH OF WARRANTY**
- While the DTPA does not create warranties by itself, bringing a breach of warranty claim under the DTPA entitles Plaintiffs to the heightened collection powers provide by the DTPA, including damages, attorney’s fees, etc. Note that even if you have not expressly (in writing, etc.) created a warranty, it can be implied by your actions and established either by common law or statute.

# Deceptive Trade Practices Act (Known as the “DTPA”) (con’t.)

- **3. UNCONSCIONABLE ACT OR PRACTICE**
- The DTPA states that an unconscionable act takes advantage of the lack of knowledge, ability, experience, or capacity of a consumer to his detriment and to a grossly unfair degree. Such action must create an unfairness that was glaringly noticeable, flagrant, complete and unmitigated, though actual intent or knowledge of the results of the act is not required and reliance on the act need not be shown. While the act does not need to take place at the time of the transaction, it must happen within the same context as the interchange.

# Deceptive Trade Practices Act (Known as the “DTPA”) (con’t.)

- Damages under the DTPA

The DTPA allows for the collection of economic damages and in some situations mental anguish, treble damages, and actual damages. While exemplary or punitive damages are not collectible under the statute, prevailing DTPA Plaintiffs are entitled to costs and reasonable attorney’s fees. In order to achieve a trebling, or tripling, of economic damages, a Plaintiff must show that the conduct of the defendant was committed knowingly.

# Channel Conflict

- Manufacturers sell their products simultaneously through an array of channels – through dealers, retailers and online. Dealers and retailers find themselves competing with the manufacturer for the same set of customers. This is known as channel conflict which is virtually guaranteed.
- Manufacturers by a 2007 US Supreme Court ruling (which is being challenged in Congress by introducing new legislation) may set resale price minimums (RPMs) or minimum advertised prices (MAPs).
- Federal and state law declares illegal every contract in restraint of trade or commerce.
- Only recourse is to not deal with wholesalers who also retail their products. With the Internet, there are very few of these any more.
- Parties are concerned that language addressing this issue might be viewed as price-fixing and restricting free competition or trade or commerce which might be considered an anti-trust violation.

# Showrooming

- Consumers increasingly are using their mobile devices to find the lowest price on products after checking them out in brick-and-mortar stores. Merchants have some tools to fight this trend known as showrooming, including merchandising that compels customers to buy then and there and competitive pricing that helps ensure shoppers won't find better deals online.

# Import/Export Requirements

- With the Internet, business is going global and is important to be aware of this highly-regulated area.
- US Customs Broker's specializing in textiles and apparel can assist in this area. There are licensed brokers that participate in the Automated Broker Interface which assist in faster clearance of merchandise.

# Import/Export Requirements (con't.)

- There are many US Trade Agreements with other countries. Some countries have quotas on how much they can import or export to the US or other countries as far as textiles and apparel are concerned.

# Anti-Trust Law

- **United States antitrust law** is a collection of federal and state government laws, which regulates the conduct and organization of business corporations, generally to promote fair competition for the benefit of consumers. The main statutes are the [Sherman Act 1890](#), the [Clayton Act 1914](#) and the [Federal Trade Commission Act 1914](#). These Acts, first, restrict the formation of cartels and prohibit other collusive practices, such as price-fixing and tying agreements, regarded as being in restraint of trade. Second, they restrict the mergers and acquisitions of organizations which could substantially lessen competition. Third, they prohibit the creation of a monopoly and the abuse of monopoly power.



# Payment Card Industry (PCI) Data Security Standard (DSS) Compliance

- Standards for credit card processors, etc.
- The PCI Security Standards can be found at:  
[www.pcisecuritystandards.org](http://www.pcisecuritystandards.org)

# Negotiations and Contracts

- **A contract is an agreement between two or more parties that creates an obligation.**
- **Four elements must be present for a contract to exist:**
- **Mutual Agreement**  
Agreement between two or more parties.
- **Competent Parties**  
Legally of age;  
Not mentally or physically incapacitated (e.g. sober).

# Negotiations and Contracts

- Lawful Subject Matter

A contract will be deemed void by a court of law if it involved acquisition of stolen goods, regardless of whether purchaser had any knowledge or not that goods had been stolen.

- Consideration

Most consideration is monetary (e.g., exchange of money for goods or services). Value derived from bartering is also consideration.

# Negotiations and Contracts

- Offer

- Proposal to enter into a contract;
- May be expressed by acts as well as by words;
- Must be definite as to terms and conditions so liability of parties can be ascertained;
- Cover essential elements such as site, time, work to be performed, materials to be provided, costs, etc.;
- Becomes a binding promise and results in a contract only when it is accepted;
- An offer may be revoked before acceptance by other party;
- If it has been accepted it can only be revoked by mutual agreement;
- An offer lapses by rejection, by a lapse of time, or by death or insanity of a party.

# Negotiations and Contracts

- Acceptance

- May be shown by words, conduct, or acquiescence indicating agreement;
- Must be communicated to offeror;
- To be sufficient, acceptance must meet and correspond with terms and conditions of offer;
- Under common law, there must be agreement on all essential terms;
- Although Uniform Commercial Code (commercial statute adopted in most states) does not require agreement on all essential terms, an agreement is advisable;
- A counteroffer is made if acceptance is conditional or introduces a new term;
- Other party may accept, reject, or further negotiate counteroffer.

# Negotiations and Contracts

- Consideration

- Again, this is also part of contract and for most purposes is typically monetary.
- Can also include barter/exchange of goods or services.
- Bargained for legal detriment – contract law does not cover antecedent debts or gifts.

# Negotiations and Contracts

- **Conditions**: set time and order of performance; manner of allocating risk – for example - I will pay you on satisfactory completion of performance.
- **Mistake**  
Mutual Mistake – rescind or reform contract.  
Unilateral Mistake – outcome will depend on knowledge of parties, patent or latent, undue advantage.

# Negotiations and Contracts

- Ambiguity

Mutual ambiguity – outcome uncertain.

Unilateral ambiguity - outcome will depend on knowledge of parties, patent or latent, undue advantage.

- Statute of Frauds

Written contract required for services that will be performed for a year or more; sale of goods of \$500 or more; or guaranty of a loan.



# Negotiations and Contracts

- Express Contracts

- Terms of contract are stated either orally or in writing.
- What is said or written can lead to a contract (e.g., a phone conversation).

- Implied Contracts

- These contracts are implied from circumstances (e.g., if material is delivered to you, which was not ordered, but you then use it, you are deemed to have accepted material and you will have to pay for it).

# Negotiations and Contracts

- Oral Contract

- Usually made in words although it may be created without a spoken word (e.g., head nod, wink, handshake, etc.).
- Use of oral contracts is not a good business practice because terms are difficult to ascertain when disputes arise.

- Written Contract

- Must be written in legible characters.
- Must be entirely in writing.
- Illegible changes to a contract may be disputable.

# Negotiations and Contracts

- **Void Contract**

- Of no force and effect because one of essential requirements was not met (i.e., competent parties, no consent, mutual mistake in understanding, etc.).

- **Voidable Contract**

- An agreement that one of parties is entitled to treat as never having been binding on him.
- Not void until option of wronged party is exercised.
- Could be voidable due to age (minor), mental incompetency, duress, fraud, etc.
- A voidable contract may be ratified (given full force and effect) by the party entitled to treat the contract as never having been binding on him when the disability is removed (e.g., age of majority is obtained).

# Negotiations and Contracts

- Amended Contract

Contracts can be amended or changed.

- Extended Contract

Effective term of contracts can be extended.

- Terminated Contract

Contract termination will be discussed in depth later.

# Negotiations and Contracts

- Revived Contract

- Contracts can be revived if already terminated.

- Must use the word “revived.”

- Rescinded (Canceled) Contract

- Contracts can be rescinded by a court of law.

# Negotiations and Contracts

- Letter of Intent – document setting forth the parties intent to enter into agreement; may be binding; use cautiously.
- Pro Forma contract – standardized form contract which will be tailored to fit contracting needs.
- Confidentiality Agreement – may be stand alone agreement entered into prior to negotiations.

# Negotiations and Contracts

- Procurement - the process of obtaining goods, equipment, materials and services.
- Purchase Order – short form for purchasing goods - check terms and conditions.
- Invitation for Bid (IFB) – an IFB is also referred to as a “sealed bid”. It is competitive.
- RFP – Request for Proposal, letter submitted by corporation or government seeking bidders for particular project.

# Negotiations and Contracts

- Bid Package – document sent to and submitted by bidders.
- Competitive Bidding – contract offered to individuals or firms competing for privilege or right to supply specified goods, materials, equipment or services.



# Negotiations and Contracts

- Agent

- An agent is one who usually has authority to act on behalf of another and/or bind other to decisions made while agent has such power.
- Any business entity (e.g., companies, corporations, partnerships, etc.) or persons may be agents for another.

# Power of Attorney

- A power of attorney is a written authorization to act on someone else's behalf in a legal or business matter. The person authorizing the other to act is the principal and the one authorized to act is the agent or ***attorney-in-fact***. ***Person does not need to be an attorney***. The power of attorney may be very specific or broad. Record in each county where attorney-in-fact executes documents.

# Non-Circumvention Clause

- The Recipient shall not at any time prior to the expiration of three (3) years from the date of this Agreement, without the prior written consent of the Company, which consent the Company may withhold in its sole discretion, (a) attempt in any manner to deal directly or indirectly in any manner with any of the Contact Persons or other individuals or companies related to the Business Opportunity including by having any part of or deriving any benefit from the Business Opportunity or any aspect thereof, or (b) by-pass, compete, avoid, circumvent, or attempt to circumvent the Company relative to Business Opportunity including by utilizing any of the Confidential Information or by otherwise exploiting or deriving any benefit from the Confidential Information.

# Negotiations and Contracts

## Non-Compete Clause

A non-compete clause, or covenant not to compete (CNC), is a term used under which one party (usually an employee) agrees to not pursue a similar profession or trade in competition against another party (usually employer) for a specific time period and geographic area.

# Negotiations and Contracts

- Contractor Registration Numbers

- Contractors may be required to have a federal registration number. For sole proprietor this is Social Security Number. May have to have state tax identification number; in New Mexico – CRS#. If have employees, need federal number – EIN.

# Applicable Law

- **Common Law (Except Louisiana)**
  - Based on custom, usage, and prior case law;
  - Not legislated.
  
- **Uniform Commercial Code**
  - Usually applies to goods;
  - Can apply to mixed transactions (goods and services) where dominant factor is sale of goods (e.g., delivery and installation of bronze statue);
  - Will fill some important terms if not specified - even price;
  - Intended to safeguard against unscrupulous business practices; and
  - Adopted by almost all states, but may vary between jurisdictions based on modifications made by particular states.
  - UCC provides that creditors have rights in consigned goods.

# Benefits of Having a Written Contract

- Establish Rights and Duties of Parties
  - Ensures that contracting parties clearly know what each party is obligated to do.
- Avoid Misunderstandings
  - If any aspect of agreement isn't clear, disputes could arise and problems will result.

# **Benefits of Having a Written Contract**

- **Enforcement of Rights and Duties of Parties as Intended**
  - When a dispute occurs, contract helps to pursue enforcement of rights and duties of parties.
  - Courts and other third parties (e.g., arbitrators) could construe agreement between two parties as something that wasn't intended.
- **Prudent Business Practice**
  - It is in parties' best interests to have contracts in writing.



# Payment Options

- Turn-Key – set amount.
- Cost-reimbursement – based on actual costs to perform.
- Cost-plus – actual costs plus premium.
- Incentive contracts – bonuses for early completion or meeting safety targets.

# Payment Options

- “Favored nation” provision requires Contractor to perform services at lowest rate given to other parties.

# Implied Warranties

- In common law jurisdictions, an implied warranty is a term for certain assurances that are presumed to be made in the sale of products, due to the circumstances of the sale. These assurances are characterized as [warranties](#) irrespective of whether the seller has expressly promised them verbally or in writing. They include an implied warranty of merchantability for products and an implied warranty for fitness for a particular purpose.

# Implied Warranties

- Merchantability
- An implied warranty of merchantability is a warranty implied by law that if a merchant (meaning someone who makes an occupation of selling things) sells something, that merchant is guaranteeing that the goods are reasonably fit for the general purpose for which they are sold. To be merchantable (salable), goods must meet the following conditions:

# Implied Warranties

- Merchantability (con't.)
- The goods must conform to the standards of the trade as applicable to the sales contract.
- They must be fit for the purposes such goods are ordinarily used, even if the buyer ordered them for use otherwise.
- They must be uniform as to quality and quantity, within tolerances of the sales contract.
- They must be packed and labeled per the sales contract.
- They must meet the specifications on the package labels, even if not specified by the sales contract.

# Implied Warranties

- Merchantability (con't.)
- This warranty will apply to one who is a merchant and regularly deals in the type of merchandise sold.
- In the United States, this subject is governed by Article 2 of the Uniform Commercial Code (UCC). The UCC allows sellers to [disclaim](#) the implied warranty of merchantability, provided the disclaimer is made conspicuously and the disclaimer explicitly uses the term "merchantability" in the disclaimer. Some states, however, have implemented the UCC such that this can not be disclaimed.

# Implied Warranties

- Fitness for a Particular Purpose
- An implied warranty of fitness for a particular purpose, sometimes referred to simply as a warranty of fitness, is a warranty implied by law that *if* a seller knows or has reason to know of a *particular purpose* for which some item is being purchased by the buyer, the seller is guaranteeing that the item is fit for that particular purpose. This differs from a warranty of merchantability in two ways:
  - First, the warranty of fitness applies to all sellers, not just professional merchants; and
  - Second, the warranty of fitness requires the seller to know or have reason to know of a specific purpose to which the property sold is going to be put.

# Implied Warranties

- Disclaimer of an Implied Warranty

An implied warranty can be expressly disclaimed in a sales contract by the use of specific language, such as the words, "[as is](#)" or "with all faults". Such language must be conspicuous in the contract, e.g., in a different kind of print or font that makes it stand out. New Mexico allows such a disclaimer. (NMSA 1978 § 55-2A-214. Colorado allows such a disclaimer. (C.R.S. 1963 § 155-2-316). North Dakota allows such a disclaimer if it is conspicuous and bargained for.



# Standard Contract Terms

- Independent Contractor

- Establishes Contractor's independence and that Contractor is not to be considered an employee, agent, partner, or joint venturer of Company retaining Contractor.
- Company may be liable for any injury or damage to Contractor, employees or property if Contractor loses its independent status.

# Standard Contract Terms

- **Independent Contractor (con't.)**
- Not employees. Worker engaged in business of his own and provides services to businesses.
- File IRS Form MISC-1099 to report payment amount.
- Factors considered in determining whether worker is an employee or independent contractor:
  - Permanency of relation.
  - Amount of worker investment in facilities and equipment.
  - Nature and degree of control by principal.
  - Worker's opportunities for profit and loss.
  - Level of skill of worker.
  - Non-payment of employee benefits and withholding of tax by principal.

# Standard Contract Terms

- **Outsourcing** became part of business vocabulary during the 1980s and refers to the delegation of non-core operations from a company to an external entity specializing in that operation. **Outsourcing** is utilizing experts from outside the entity to perform specific tasks that the entity once performed itself. Examples include accounting, data processing, computer services.

# Risk Allocation

- Risk Management

- Objective is to protect Company's assets from loss.
- Risk management is a key part of contracting process.

Companies have a preferred risk management strategy which is in their standard forms, but there is room for negotiation.

# Risk Allocation

- Risk Assessment

- Accurate assessment of risks involved must be made to properly manage risks associated with work. Risks to which Company is commonly exposed from its perspective include:
  - Damage to Company, Contractor, or third-party property.
  - Injury to or death of Company or Contractor employees, or third parties.
  - Environmental impairment or sudden pollution.
  - Loss of production or loss of use of facilities.
  - Liens on Company property due to nonpayment by contractors, subcontractors, etc.
  - Default or bankruptcy of contractors, subcontractors, etc.
  - Poor, incomplete, or inadequate performance.

# Risk Allocation

- Risk Handling

- Risk handling can be separated into four categories: risk avoidance, risk transfer, risk assumption, and risk reduction. Risk is allocated in a manner which is most cost effective for Company.

- Risk Avoidance

- Risk can be avoided by electing not to participate in a given activity or not to do business with a particular party.

# Risk Allocation

- Risk Transfer

- Transfer of risk may be accomplished through indemnification articles of a contract and through contractual requirement that Contractor maintain an insurance program which meets Company standards.

- Risk Assumption

- Company should generally assume or retain risk when transfer of risk is too costly.

# Risk Allocation

- Risk Reduction

- Risk reduction involves taking actions to minimize possibility of occurrence of an incident. Typical actions include (1) implementation of safety and security programs, (2) implementation of project control procedures, and (3) hiring safe and financially sound contractors qualified to perform work.



# Payment Security

- Bond

- Performance bond in certain amount drawn on a recognized financial institution to guarantee payment for any costs, losses or damages suffered in the event of non-performance or other breach of the contract.

- Letter of Credit

- Irrevocable standby letter of credit with a recognized bank in a certain amount to secure payment.

# Payment Security

- Escrow Agreement

- Deposit of funds and/or documents with bank to assure monies available for contract performance. Bank distributes funds pursuant to written instructions of parties.

- Guaranty

- Third party guarantees performance of or payment of party due and/or owing under contract.

# Breach of Contract

- Breach of Contract

- Occurs when one or more parties is not performing.

- Anticipatory breach occurs when a party indicates that they don't intend to perform.

# Resolution of Breach of Contract

- Resolution Through Negotiation

- Occurs when parties amicably try to resolve problem.

- Mediation

- A substitute for litigation;
- Occurs when a mediator or third party is brought in to assist in resolving problem;
- Will be binding if an agreement is reached;
- Costs less than litigation and arbitration;
- Less time consuming;
- Any information shared during mediation is not protected from public disclosure.

# Resolution of Breach of Contract

- Arbitration

- A substitute for litigation.
- Arbitrator(s) resolve problem.
- Can be binding or non-binding.
- Can cost less than litigation.
- Generally resolves disputes quicker than litigation.

- Litigation

- Issue can't be resolved and is disputed in court.

# Resolution of Breach of Contract

- Arbitration
- CAVEAT AS TO TRIBES AND TRIBAL ENTERPRISES
- Consent to arbitration in a contract may result in a waiver of sovereign immunity as to disputes arising under that contract. *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) (Supreme Court held an arbitration provision requiring resolution of all disputes by binding arbitration and providing that ensuing arbitration awards may be reduced to judgment in accordance with applicable law in any court with jurisdiction constituted a clear waiver of tribal sovereign immunity).

# Resolution of Breach of Contract

- Jane Doe v. Santa Clara Pueblo, 154 P.3d 644 (N.M. 2007)
- *Jane Doe* arose from two cases in which casino patrons filed suit in New Mexico state court alleging negligence and other causes of action for damages for personal injuries, and asserted that the state court had jurisdiction by virtue of the waiver of immunity and forum selection clauses of the gaming compacts each Pueblo had signed with the State.

# Remedies for Breach of Contract

- Damages

- Damages in contract disputes related to compensation for losses. May be compensatory, consequential or, very rarely, punitive.

- Treble Damages

- Allowed by statute in certain cases. Deceptive Trade Practices Act: recover for false, misleading, or deceptive acts. May also recover legal fees if successful.

- Liquidated Damages

- When amount of damages may be difficult to ascertain, the parties may agree in advance to a set amount. For example, it may be an amount due for failure to complete work within a specified time. May be daily until completion of work.

- Specific Performance

- Relates to goods and most services, except for personal services.
- When a court requires non-performing party to perform as provided in contract.



# Remedies for Breach of Contract

- Rescission

- A contract may be rescinded (i.e., canceled) in certain cases such as mutual mistake, incompetent parties, inadequacy of consideration, invalidity of assent, fraud, duress, etc.

- Reformation

- Court rewrites a contract to comply with law.

# Attorney - Client Privilege

- A privileged communication is one made between an attorney and client at client's request for purpose of rendering legal advice.
  - Protected from involuntary disclosure.
  - Clients can waive privilege of keeping communication confidential, but attorneys can not.
  - All relevant documents should be marked "Attorney-Client Privilege - Privileged and Confidential".
  - Individuals who have access to such documents should also keep documents confidential.
  - Excessive distribution of copies or discussion of privileged communication may result in losing privilege.
- Work products of an attorney are also privileged from involuntary disclosure.
- Clients having access to an attorney's work product should not disclose such information without consent of attorney.

# See an Attorney

- Claims

- See a lawyer ASAP.
  - It will be important for a lawyer to review facts, issues, and law to assess validity of claims and potential for damages.

- Service of Process

- A written notice or summons and complaint and other legal documents related to litigation.
- Defendant must be served with process to give notice that action is being brought and to subject defendant to power of court.
- Contact your attorney:
  - A summons is a document by which a legal proceeding is commenced;
  - An answer to a summons must be filed within a certain time period set by federal or state law or a default judgment will be entered against the non-responding party.

# Duties of Owners and Occupiers of Land

- Adult trespasser: none if unaware; if aware, duty to warn of known dangers.
- Licensees: duty to warn of known dangers.
- Invitees: inspect and make safe.
- Attractive nuisance doctrine: artificial dangerous condition, children unable to appreciate danger, cost of protecting children slight in comparison to danger – owner/occupier will be required to remedy danger.

# Negligence

- **Conduct that falls below a reasonable standard established by law to protect public from unreasonable risk of harm which results in harm to another.**

**Act, breach, causation, damages.**

# Negligence

- Duty owed to foreseeable plaintiff.
- Breach, Harm  
Reasonable prudent standard;  
standards for professionals.
- Automotive guest – duty to warn of known defects or dangerous conditions.
- Innkeepers and common carriers - highest duty of care.
- Bailor for hire - inspect and make safe.

# Liability

- **Joint and several liability**: if there are mutual contractors, they may be jointly or individually (severally) liable for damages.
- **Vicarious liability**: one party responsible for damages of another. Example is employer responsible for acts of employee.
- **Strict liability**: harm resulting from wild animals, abnormally dangerous activities, defective products. No need to prove negligence, only harm.
- **Exculpatory clause**: relieves one party to the agreement of liability as a result of actions (or lack of actions) performed in the course of executing the terms of the contract.

# Intellectual Property

- Patents, Trademarks, Copyrights

Contract will address who will own any new inventions or have the right to trademark or copyright material. Party paying for contract performance will usually own intellectual property right as invention, or creative property will have been performed as a “work-for-hire.”



# E-Tailing; Option

- **E-tailing** (less frequently: **etailing**) is the selling of retail goods on the Internet.
- **Option** – a right to do something, but not an obligation, e.g., an option to purchase land or an option to renew a contract.

# License

- License

- Right to use property of another, without granting any permanent interest in property. It is merely a privilege, revocable at will of licensor. A license is personal to licensee and, thus, inalienable. Any attempt to transfer a license results in revocation by operation of law. A license, being personal to licensee, does not descend to his heirs upon his/her death.
- May be exclusive or non-exclusive. Perpetual or for term. Revocable or non-revocable. Terms in license will control.

# Consignment

- Act of placing property in possession of another, but retaining ownership until property is sold. This may be done for shipping, or for sale in a store.
- Consignee (party with whom goods are left) pays consignor (person with items to sell) only after sale, from its proceeds.
- Consignment creates bailment. Party with possession of property who is paid a fee or has financial benefit has high standard of care with respect to property.

# Standard Contract Terms

- Contract Terminology

- Explanations are intended to promote a general understanding of:
  - 1) purpose for including article in a contract, and
  - 2) broad concepts contained in article.

- Introduction of Contract

- Establishes effective date and identifies contracting parties. (It is important that contracting parties' full legal names be used.)

# Standard Contract Terms

- Scope of Work/Purpose

- Defines work to be performed and materials to be provided by Contractor.
- If deadline for performance is important, contract will state “Time is of the essence.” If not completed on time, there may be liquidated damages.

# Standard Contract Terms

- Changes and Extra Work

- Unless otherwise agreed, changes, additions, or deletions must be in writing and are typically made with change orders.
- Also requires Contractor to get approval prior to performing extra work so that items such as cost and schedule can be finalized before work is performed.

# Standard Contract Terms

- Satisfaction Clause
- If there is a satisfaction clause in the contract without any qualification, it means that a dissatisfied party that requested the work may reject the work even if they should have been reasonably satisfied. It should, therefore, be avoided.

# Standard Contract Terms

- Term

- Defines time period during which contract is effective.
- A specific term for contract is defined by inserting a specific date.
- Contract may be evergreen if no date is specified:
  - Evergreen means contract has no specific end date;
  - Evergreen contract ends when it is terminated using termination provision in the contract.



# Standard Contract Terms

- Termination

- Allows either party to terminate contract.
- Specifies time, such as thirty days advance written notice required prior to effective date of termination.
- Specifies how termination may be accomplished:
  - Contractor may terminate contract if Company commits a material breach, becomes insolvent or makes a general assignment for benefit of creditors (For Default).
- For Convenience (at desire of party).

# Standard Contract Terms

- Invoicing and Payment

- Describes:
- Responsibilities for invoicing.
- Responsibilities and rights regarding payment.
- Cancellation fees.
- Advances.
- Retainage: a set percentage (normally 10% - 15%) withheld from each payment until work is completed and accepted.
- Interest due on late payments. Not required if not specified in contract. Interest is a creature of contract or statute.

# Standard Contract Terms

- Accounting

- Requires an accounting at set time (e.g., semi-annually).

# **Standard Contract Terms**

- **Exceptions**
  - List of items that contracting party does not agree to. Need to provide alternative language and explanation for exception.

# Standard Contract Terms

- Warranty

- Specifies warranties (guarantees) that Contractor will give regarding quality of work and quality of materials and equipment used in producing work.
- Specifies warranty period.
- Have right to exclude warranty and sell property as-is, where-is.

# Standard Contract Terms

- Permits and Licenses

- Requires that Contractor obtain documentation necessary for Contractor's performance of work.
- Documents must be acquired prior to beginning work to avoid delays.
- Acquisition must be done at Contractor's expense.

# Standard Contract Terms

- Insurance

- Parties may be required to secure insurance. This provision would specify type and amount.

- Indemnification

- Requires one party to incur by way of compensation the loss(es) of another. Party paying compensation may or may not be responsible for the loss(es). Better to omit and let applicable law control.

# Insurance Coverages

- **Commercial General Liability**
  - **Bodily Injury/Property Damage combined single limits**
    - Commercial General Liability covers liability for third-party bodily injury and property damage claims excluding automobile liability incidents (*e.g.*, damage to third-party plant or equipment). This insurance should also cover contractual liabilities, including contractual indemnification given to another party.
- **Automobile Liability**
  - Bodily Injury/Property Damage combined single limits.
- **Umbrella**
  - Extra insurance for all claims.



# Insurance Coverages

- Property Insurance
- Business Interruption: To pay your fixed expenses during a period of time when business is not operational.
- Officer and Director: For Company officers and directors who may be personally liable for their actions on behalf of Company.
- Home Office: Includes coverage for office equipment. Not automatically included in standard homeowner's policy.

# Insurance Coverages

- Statutory Worker's Compensation

- Covers injuries to employees on a no-fault basis;
- Benefits are prescribed on scheduled basis;
- Purchased commercially, through state fund or self-insured; and
- In New Mexico, applies to employers with three or more employees. (NMSA § 52-1-2).
- In Colorado, applies to employers with one or more employees.
- In North Dakota, applies to employers with one or more employees.

# Insurance Coverages

- Employer's Liability

- Covers injuries to employee when liabilities arise outside of statutory workers' compensation.

# Insurance Coverages

- Insurance Specifics

- **Additional insured:** Generally Company requires that it be listed as an additional insured under all liability policies except worker's compensation and employers' liability. Allows Company to become an insured under Contractor's policy.
- **Waiver of subrogation:** Contractor must require its insurers and its subcontractors' insurers to waive all rights of subrogation against Company. A waiver of subrogation is a policy endorsement by which Contractor's insurers agree not to pursue recovery against Company for claims paid by insurer on behalf of Contractor.
- Required of subcontractors as well.

# Standard Contract Terms

- **Non-Destruction/Alteration:** No intentional destruction or altering of work or equipment without prior written consent of Company.
- **Ownership of Work, Documents and Models; Return of Work:** Drawings, specifications, and models which relate to work are property of Company following termination of contract.

# Standard Contract Terms

- Taxes

- Be aware of state tax rules applicable in Indian country.
- Establishes obligations of parties regarding payment of taxes related to work.
- Lump-sum compensation should include all applicable taxes.

- Audits

- Gives Contractor right to audit Company's records, to verify compliance with obligations under contract.
- Requires Company to keep records after date of final payment for period for bringing suit for breach of contract under a written contract. New Mexico's statute of limitations is six years for written contracts. Colorado's statute of limitations may be three or six years for written contracts. North Dakota's statute of limitations is six years for written contracts. Consult an attorney.

# Standard Contract Terms

- Notices

- Establishes proper channels and methodology for transmitting notices and demands required or permitted by contract.

- Confidentiality

- Obligates parties not to disclose any information received under contract.

# Standard Contract Terms

- **Governing Law**
  - Specifies governing law.
- **Force Majeure**
  - Performance may become impossible due to circumstances beyond control of parties, such that excuse of performance is warranted. Does generally not include economic causes – bid was too low to cover to work performed, etc.
  - Nonperforming party is required to resume performance as soon as practically possible.



# Standard Contract Terms

- Compliance with Laws

- Requires Contractor to comply with and ensure that its subcontractors comply with all applicable laws, rules, and regulations while performing work.
- Specifies if Contractor is responsible for paying any fines or penalties imposed on Company because of violations caused by Contractor or its subcontractors.

# Standard Contract Terms

- Safety, Health, and Environmental (SHE)
  - Intended to ensure that Contractor performs work safely and in a manner consistent with laws and Company rules pertaining to safety, health, and environment.
  - Substance abuse: -Allows Company to search people, personal effects, and vehicles on its premises.
  - Persons refusing to be searched will be required to leave Company site.
  - Company can require Contractor to perform drug tests when it has a reasonable concern about substance abuse.

# Standard Contract Terms

- Assignment and Subcontracting
  - Provides that contract may not be assigned or transferred without prior written consent of non-assigning party.
  - Allows for evaluation and qualifications of subcontractors and assignees.

# Standard Contract Terms

- Binding Agreement

- Contract is binding on successors and permitted assignees and heirs.

- Conflicting Documents

- Sometimes there may be conflicts among contract documents. This provision ensures that conflicts are resolved in favor of approved contract terms. Beware of conflicting terms on back of invoices, delivery tickets, or other correspondence.

# Standard Contract Terms

- Entire Contract and Contract Modification
  - Establishes contract as entire agreement between parties.
  - Excludes all oral or written representations not covered in contract.
  - Also describes how to modify contract.
  - To avoid misunderstandings which may arise as a result of oral agreements, modifications must be in writing.

# Standard Contract Terms

- Parol Evidence Rule
- The parol evidence rule enacts a principle of the common law of contracts that presumes that a written contract embodies the complete agreement between the parties involved. The rule therefore generally forbids the introduction of extrinsic evidence (i.e., evidence of communications between the parties which is not contained in the language of the contract itself) which would **add or change terms** of a later written contract.
- In order for extrinsic evidence to be admitted, it must involve either (1) a **written or oral communication** made prior to execution of the written contract; or (2) an oral communication made contemporaneous with execution of the written contract.

# Standard Contract Terms

- Boilerplate (Common Terms)

- Severability

- Purpose is to maintain enforceability of contract even though one or more provisions may be deemed unenforceable.

- Waiver

- Excusing non-performance of contract provisions may negate their future validity. Waiver clause prevents this.

# Standard Contract Terms

- Execution

- Written contract should be executed by authorized representatives of parties.
- A signature block for each party is placed at end of body of approved contract.
- When contract is fully executed, contract will be deemed to represent final written expression of parties' agreement.
- Contract should be executed in multiple originals so that each party can receive an original for its files.



# Standard Contract Terms

- Witnessing

- Good idea.

- Acknowledgment

- Declaration of one's own act in executing contract, to give it legal validity.
- Not required but helpful if execution of contract is contested. If acknowledged, due execution is conclusively established.
- Notary required.

# Litigation (Claims)

- Lawsuits usually arise from property damage claims, personal injury claims, or breach of contract claims.
- When claims are filed, plaintiff must present a “summons” and “complaint” commanding defendant to appear and answer allegations made in complaint.

# Statute of Limitations (Claims)

- A statute of limitations is a law which places a time limit on pursuing a legal remedy in relation to wrongful conduct. After the expiration of the statutory period, unless a legal exception applies, the injured person loses the right to file a lawsuit seeking money damages or other relief.

# Statute of Limitations (Claims)

- There may be an exception to the standard limitations period that applies to any given situation. If you wish to know how the statute of limitations applies to a specific situation, you should verify the statutory time period and its relevance to your situation with a qualified lawyer.
- Personal injury/property damage claims must be filed within specific time limits.
  - In New Mexico it is 4 years.
  - In Colorado it is 2 years for personal injury, 2 years for property damage or 3 years for property damage if caused by a motor vehicle.
  - In North Dakota it is 6 years.
- Breach of contract claims under written contracts must be also be filed within specific time limits.
  - In New Mexico it is 6 years.
  - In Colorado it may be 3 or 6 years.
  - In North Dakota it is 6 years.

# Statute of Limitations (Claims)

- Time to file a claim begins to run when injury, damage, or breach of contract occurs.
- Claim must usually be filed on or before last day of limitations period.

# Standard Contracts

- Construction Contracts.
- Technical Service Agreements.
- Consulting Agreements.
- Work Orders.
- Equipment Leases.

# Standard Contracts

- Business Lease.
- Business Lease Assignment.
- Business Lease Sublease.

# Master Service Agreements (“MSA”)

- MSA is a contract between a Company and its many providers of goods and services, which may be supplemented by work orders. Key issues are risk allocation and insurance matters. Work performed under a MSA may vary from painting stripes in parking lot of an office, to analyzing geophysical data at a desk, to installing equipment for wells. Value of MSA varies from de minimis to very high. Type of risk varies from that associated with common labor, to desk work, to possibly destroying an oil and gas reservoir or causing a blow out of a well or major underground and surface pollution. Size of contractor may vary from a major service provider, such as Halliburton or Schlumberger, to a mom-and-pop small business.



# Master Service Agreements (“MSA”)

- Long form for high risk services.
- Moderate form for medium risk services.
- Work order for low risk services.

# Alliance Agreement

- Agreement to use one company for particular services. Parties work to ensure benefits to both sides.

# Tribal Law

- Increased reliance on tribal traditions and customs governing relationships and dispute resolution.

# Barriers to Indian Contractors

- Insurance and Indemnity obligations imposed on Contractor.
- Cost of insurance may be too high.
- Indemnities may involve Contractor assuming sole responsibility for loss of or damage to property and injury to or death of employees. Certain states have anti-indemnity statutes in limited areas, such as construction or pertaining to contracts related to any well for oil, gas, or water, or mine for any mineral.
- Complex safety management programs. Standardized Safety Questionnaire may be 44+ pages long.

# Native American Chamber of Commerce (“NACC”)

- Houston, Texas, NACC consists of members of Native American business community, Native American community at-large and members of business community who have an interest in using Native American contractors. NACC has hundreds of member companies from many branches of industry, including most major US corporations. Each member company has a delegate to NACC. Delegate is usually coordinator for minority business section of procurement department.

# Native American Chamber of Commerce (“NACC”)

- Contact information is NACC, 7457 Harwin, Suite 307, Houston, Tx 77036, Phone: 832-251-6367, Fax: 832-251-6312.
- In March 2006, NACC hosted fundraiser for Native American college scholarships and improved housing on reservations, with Willie Nelson gratuitously providing entertainment. Included golf tournament, along with arts and crafts festival.
- Sponsors: Coca-Cola, Coors, IBM, Marathon Oil Company, Armstrong Group, Continental Airlines, Corporate Express, Dakota Integrated Systems, Entergy, Museum of Natural Science, Rush Trucking and Stan Corbitt Associates.

# Thank You For Coming!!

- Please fill out evaluation form.
- Please let us know what other subjects you are interested in.