



# Risk Management Services

## PHLY SMART CONTRACTING

### What is a contract?

According to the Restatement (Second) of Contracts, "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Basically, a contract is a legally-binding promise.

### Introduction

Contracts are woven into the daily operations of all organizations and businesses. Virtually all organizations and business will find themselves on both sides of this equation – as a party contracting for goods or services and as a contractor providing goods or services. A well-executed contract should clearly state the expectations and consequences of all parties. Also, your organization may be able to reduce your operational risk through favorable terms, or at least through equitable terms where each party is responsible for what is within their span of control. Philadelphia Insurance Companies has developed this document as a risk management guide for your organization, to help you make informed and fair agreements.

### Common Contract Provisions

Note: The sample language provided in this section is meant for reference only. In constructing your contracts, seek the assistance of a local contract lawyer, who will ensure that they will be enforceable in the state where your organization is located.

Provision	Description	Sample Language
Scope of Services	Detailed overview of the services to be provided by the contractor, including what deliverables are expected. This section will also include specific due dates and deadlines, requirements or standards for length or quality of the service, and how the service will be approved and accepted.	<i>The Contractor will complete the following tasks</i> a. <i>Create two design options for a new website homepage. This task will be completed within 20 days of the contract start date, and will be presented in PDF format.</i> b. <i>Once the design is approved by the Client, the Contractor will finalize the website design, provide HTML coding and styling, and provide a 4-hour training session for the Client. This work will be completed within 90 days of the contract start date.</i>
Payment	In this provision, the specific flat fee or hourly rate is outlined, including any maximum amounts or limits. When the payment will be made is also an essential element (e.g. Upon delivery of service? Installments over a set period of time? Reimbursement for expenses as they are incurred?).	<i>The Client will pay the Contractor a fee no greater than \$8,000, plus actual expenses including airfare (economy), lodging and meals. All expenses must be documented with receipts. Payment will be made in two installments: \$4,000 on the date the contract is signed, and \$4,000 upon conclusion of the service or project. Expenses will be paid within 45 days of the submission of an invoice with receipts.</i>
Changes in Work Product or Scope	During the course of a contract, the scope or timeframe may need to change. This provision will detail when and how changes can be made.	<i>If either party wishes to amend this contract, it must be done in writing and signed by both parties.</i>
Assignment or Subcontracting	For some contracts, your organization may want to limit the ability of the contractor to subcontract or assign the duties outlined to another party. This may be the case when a contractor is hired for a specific talent. At a minimum, you may want to require that any subcontractors be designated prior to the start of the contract for approval	<i>The Contractor agrees that the services and obligations of this contract may not be assigned or delegated to another party without the express written consent of the Client.</i>
Ownership of Work Product	Your organization will want to make clear who owns the intellectual property rights to a product/project developed by a contractor, and when (if ever) the rights transfer	<i>The Contractor agrees that any products developed under this agreement are the sole and exclusive property of the Client, excepting the use of pre-existing works that are the property of the Contractor.</i>

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Confidentiality	When a service or product requires sharing of confidential information about your organization or its clients, a confidentiality provision can ensure that the information remains confidential outside the contractual relationship with the contractor.	<i>The Contractor will not share any confidential information (including financial records, personnel information and client data) about the Client with any other party, except when necessary to complete the requirements of this agreement and approved in advance by the Client.</i>
Status and Relationship	Especially in contracts with independent contractors, a common provision outlines the status of the contractor as such. This provision is meant to reinforce that the service provider is not an employee of the organization, and thus is not entitled to employee benefits or pay benefits, and the organization is not responsible for taxes or tax penalties due to the misclassification.	<i>For the purpose of this agreement, the Contractor is an independent contractor, and not an employee of the Client. The Contractor is solely responsible for obtaining any insurance required under this agreement, and no benefits or insurance coverage will be provided by the Client. The Contractor may determine the time and place at which the work will be performed.</i>
Termination or Abandonment	Many contracts include a provision detailing when the contract can be terminated. This is useful because sometimes the relationship is not working as expected and both parties agree that ending the contract prior to its resolution would be the best decision for both. In these situations, it is important to outline what pay will be received and what duties are still owed by each party to the other.	<i>This contract may be terminated by the Client for any reason. Notice of termination must be in writing and will be effective fifteen (15) days after receipt. The Contractor shall be entitled to collect any fees agreed to for work completed under this agreement and expenses incurred as a result, determined at the discretion of the Client.</i>
Indemnification	Agreeing to indemnify another party is agreeing to cover the legal costs and losses incurred by that party. Basically, these clauses shift risk from one party to another. The trick with indemnification clauses is that each party should be indemnifying the other only for those actions or inactions that are under the control of the party agreeing to provide indemnification. Be extremely cautious of overly broad indemnification provisions that shift liability to your organization. For example, if yours is not the only program or activity taking place in a city park on a particular day, don't agree to indemnify the city for all losses occurring in the park. If you do not have control over a particular program or service, you should not agree to indemnify another party for losses suffered in association with that program or service. Indemnification can be <b>mutual</b> , where each party agrees to indemnify the other, or <b>one-way</b> , where only one party agrees to do so.	<p><b>Mutual Indemnification</b>  <i>Each party agrees, to the fullest extent of the law, to hold harmless and indemnify the other party from and against liability, but only to the extent caused by, arising out of, or relating to... [specific description of the scope of the contract].</i></p> <p><b>One-Way Indemnification</b>  <i>The Contractor agrees, to the fullest extent of the law, to hold harmless and indemnify the Client from and against liability caused by, arising out of, or relating to... [specific description of the scope of the contract].</i></p>
Law and Venue	One way to reduce cost when a contract dispute arises is to include provisions detailing what law will apply to the dispute, and in what venue any legal claim must be brought.	<i>This agreement shall be governed by and construed in accordance with the laws of Oregon. Any lawsuit or legal claim arising under this agreement shall be brought in the courts of the state of Oregon.</i>
Dispute Resolution	Many contracts include provisions that detail how disputes will be handled. Often, a contract will require that the parties attempt to resolve the disagreement for a period of time prior to filing a legal claim. Alternatively, some contracts require that the parties enter into <b>mediation</b> , where an impartial third-party will help the disagreeing parties reach a middle ground, or <b>arbitration</b> , where an arbitrator decides the outcome of the dispute.	<p><b>Good Faith Resolution</b>  <i>The parties agree to work in good faith to amicably resolve disputes arising under this contract for a period of at least twenty (20) days prior to instituting legal action.</i></p> <p><b>Arbitration</b>  <i>Any controversy or dispute arising under this contract shall be settled by binding arbitration pursuant to [Rules of Procedure].</i></p>
Entire Agreement	Most contracts have some provision titled "Entire Agreement," "Integration" or "Merger Clause." This provision states that the contract as written is what will be enforced, and any preliminary conversations or notes are not part of the agreement.	<i>This contract constitutes the entire agreement between the parties, and it supersedes all prior agreements or discussions on this subject, if any exist. This contract may not be amended except by a written amendment signed by both parties.</i>

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## Common Mistakes

1. **Failing to create a comprehensive and enforceable contract**—Sometimes you may be tempted to go forward with a project with a contractor you use regularly. Even if you are familiar with the work done by a contractor, take the time to think through the specifics of the project or services at hand, and create a contract outlining specific expectations and responsibilities. Investing this time up front could save you a lot of time, money, and stress in the future if the relationship sours.
2. **Accepting another party's contract without reading it**—Take the time necessary to read through every draft contract presented to your organization. Reading through each provision will help you identify areas of potential concern, or provisions that you need more information about prior to agreeing to be bound by them. If you come across a provision that doesn't seem to make sense, ask about it!
3. **Authorizing work before contract negotiations are concluded**—Don't allow work to begin under a contract until the contract is finalized and signed—remember, until that point, it isn't yet legally binding. Taking the time to negotiate all the provisions in the contract and waiting until everything is ironed out and agreed upon will allow you and your contractor to understand one another's goals and expectations. Then, if something goes awry during the performance, you will be able to turn to the contract to determine what happens next.
4. **Failing to consider what will happen if the contract is breached**—Some of the most important provisions to include in a contract are those that outline what process will be followed if the contract is breached or not completed as anticipated. Understanding and incorporating these provisions into your contract will help you save time and money later on when you are struggling to find a solution to a contract gone wrong. Important provisions include: who will bear costs of the breach, what jurisdiction's laws will apply, whether an alternative dispute resolution method is required prior to filing a lawsuit, and in what court a lawsuit must be brought.
5. **Signing and moving forward with a vague or unclear contract**—Since contracts are legally binding documents, it is very important to take the time to understand each provision, and to clarify any language that seems vague or ambiguous. If you have difficulty understanding the meaning of language in your contract, get help from counsel, or confer with other individuals in your organization that have experience reading and writing contractual language. You do not want to be surprised later when you realize the meaning of one of the provisions you agreed to is actually against your best interest!

## Contracting Strategies

- **Take time to read through every contract signed by your organization.** By becoming familiar with your contracts—both the ones you have created, and those provided by vendors and contractors—you will have an enhanced appreciation of what types of provisions are important, and when there is something missing. If practical, include a simple dispute resolution process in your contracts, such as a time period in which either party may cure nonperformance or address concerns expressed by the other.
- **When possible, ask for help.** Reading and understanding your contracts is very important. However, there is no substitute for experienced legal counsel. After your initial review, consider turning your contracts over to a lawyer experienced in contract review to fill in any gaps or point out areas where you may be exposed to unnecessary risk.
- **Create a contracting process in your organization.** To ensure that all contracts are being reviewed and assessed on a level playing field, put a process in place that each contract must go through. Determine when a contract should be used, who is authorized to sign it, and what terms are essential.

## Contracting Checklist

1. Why are you purchasing this good or service? Why from this particular vendor?
2. What services are expected to be provided or performed under the contract?
3. What are the expectations for the quality of the performance?
4. What are the names of the parties agreeing to the contract?
5. How much payment is expected, and on what schedule?
6. Is assignment of the contract to another party permitted?
7. Whose insurance will cover which parts of the performance under the contract?
8. Who will be liable and to what extent if problems lead to a lawsuit or other legal action?
9. Who will own the assets that are produced (if any) under the contract?
10. When will the contract obligations be completed? Are there interim deadlines?

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11. How will confidential information be handled?
12. Where will the obligations be completed? Where will disputes be resolved?
13. Under which state laws will disputes be resolved?
14. How will the other party pay for any liability or indemnification owed to you?
15. How will you pay for any liability or indemnification owed to the other party?
16. How will termination occur, by which parties, under what circumstances, and with what terms?

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