

# Professional Services Agreement (TX)

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Standard Document for the provision of professional services that can be adapted for a specific project, for ongoing services, or for use as a master services agreement under Texas law. This model agreement is drafted in a manner that aims to be reasonable and includes provisions that are common to many types of negotiated services agreements. This Standard Document has integrated notes with important explanations, alternative provisions and drafting and negotiating tips.

## Professional Services Agreement

between

**[PARTY NAME]**

and

**[PARTY NAME]**

dated as of

**[Date]**

## Professional Services Agreement

### DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Agreements for the provision of services vary widely in length and complexity depending on a variety of factors, such as:

- The nature of the services and industry.
- The state law or regulations applicable to the services being rendered (for example, the Professional Services Procurement Act (Tex. Gov't Code

Ann. §§ 2254.001 to 2254.007) or the Texas Administrative Code generally). State agencies, for example, the Texas Health and Human Services Commission, may also impose certain requirements specific to the type of service being rendered (for more information, see Texas Health and Human Services Policies and Rules).

- The size of the transaction.
- The duration of the engagement.
- The bargaining power of the parties.

This Standard Document contains provisions commonly found in a long-form professional services agreement governed by Texas law. It is drafted in a manner that aims to be reasonable to reduce the time and expense it takes to get to the final version. For examples of a short-form services agreement, see Standard Documents, Services Agreement (Pro-Customer) (TX) ([W-000-8923](#)) and Services Agreement (Pro-Service Provider) (TX) ([W-001-4069](#)).

## ASSUMPTIONS

This Standard Document assumes that:

- **The agreement solely covers the provision of services and not the sale of goods.** Agreements for the provision of services are typically governed by state common law contract principles, while transactions for the sale of goods are generally governed by Article 2 of the **Uniform Commercial Code (UCC)** (Tex. Bus. & Com. Code Ann. §§ 2.101 to 2.725). In resolving contract disputes related to services agreements:
  - some courts, including Texas, have applied Article 2 principles to mixed goods and services transactions where the court found the goods aspect of the contract to be the “predominant focus” of the transaction (see, for example, *Tarrant County Hosp. Dist. v. GE Automotive Services, Inc.*, 156 S.W.3d 885, 893 (Tex. App.—Fort Worth 2005); *Cont’l Casing Corp v. Siderca Corp*, 38 S.W.3d 782, 787-88 (Tex. App.—Houston [14th Dist.] 2001, no pet.); and *Westech Eng’g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 197 (Tex. App.—Austin 1992, no writ)); and
  - other courts, exercising their equitable power, have looked to Article 2 principles for guidance.
- Although they are largely similar, aspects of both common law contract principles and Article 2 of the UCC may vary from state to state. If Texas does not apply, always refer to the specific law of the jurisdiction chosen by the parties to govern the agreement (for an

example of a governing law provision, see Section 18.12) if there are any questions about the enforceability or effect of a particular contract provision.

- **There are only two parties to the agreement.** If there are additional parties, adjustments must be made. For example, multiple service providers or customers need to determine whether their obligations are joint, several or joint and several and amend the agreement accordingly. For more information on joint and several liability, see Standard Clauses, General Contract Clauses: Joint and Several Liability (TX) ([W-000-0384](#)).
- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or any part of the transaction takes place in a foreign jurisdiction, this agreement may need to be modified to comply with applicable laws in the relevant foreign jurisdiction.
- **The service provider and the customer are corporate entities.** This Standard Document can be adapted for parties that are individuals, limited liability companies, partnerships or other types of business entities. For an example of an agreement between an individual consultant or independent contractor and a corporate client, see Standard Document, Independent Contractor/ Consultant Agreement (Pro-Client) (TX) ([7-555-5406](#)).
- **This agreement is being used in a business-to-business transaction.** This Standard Document should not be used in a consumer contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **This agreement is not industry-specific.** This Standard Document does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services unless otherwise noted.
- **The transaction does not involve the sharing of any personally-identifiable information (PII) between the parties.** The transfer, storage and use of personally-identifiable information of third parties (whether of employees,

customers or other third parties) may be subject to specific privacy and data security laws and regulations above and beyond a party's customary confidentiality obligations. The parties should consider and agree on what steps should be taken and contract provisions included to comply with any applicable privacy and data security rules and regulations. For an overview of:

- US data privacy and security laws, see Practice Notes, US Privacy and Data Security Law: Overview ([6-501-4555](#)) and Breach Notification ([3-501-1474](#));
  - the EU General Data Protection Regulation's (GDPR) accountability principle and the obligation to demonstrate compliance with its requirements, see Practice Note, Demonstrating Compliance with the GDPR ([W-005-2644](#)); and
  - data breach notification laws specific to Texas, see State Q&A: Data Breach Notification Laws: Texas ([8-578-9457](#)).
- For sample clauses for use in a services agreement that involves the service provider using, storing, or otherwise processing personal information on behalf of customers, drafted with terms favorable to the provider, see Standard Clause, Data Security Contract Clauses for Service Provider Arrangements (Pro-Provider) ([W-011-7793](#)), and with terms favorable to the customer, see Standard Clause, Data Security Contract Clauses for Service Provider Arrangements (Pro-Customer) ([2-505-9027](#)). Organizations can incorporate these clauses into a services agreement or attach them as a schedule to the agreement.
  - **This agreement is not industry-specific.** This Standard Document does not account for any industry-specific laws, rules, or regulations that may apply to certain transactions, products, or services. It may need to be modified for a particular transaction to be more or less extensive because certain industries and particular kinds of services may be subject to specific legislation or regulatory controls. For example, if the customer is a financial institution, the professional services agreement must be revised to account for applicable federal and state regulations and increased privacy and data security

concerns. Where an agreement is to be used in connection with such services, always take account of any relevant laws and regulations. A detailed consideration of the issues that apply in preparing services agreements subject to specific industry regulations is outside the scope of this document, and specialist advice should always be sought when dealing with such agreements.

Other assumptions related to specific sections of this Standard Document are discussed in the drafting notes to the relevant sections.

## OTHER CONSIDERATIONS

### Negotiating Dynamics

Significant differences in size and bargaining power often separate the parties to various types of services agreements. Very large service providers with considerable experience in their field often require use of their fairly one-sided standard terms and conditions and refuse to make any material changes except possibly for important customers or to accommodate state law. Small, specialized consultants, on the other hand, must deal with large, powerful corporations as customers who also insist on using their own standard terms drafted strongly in the favor of the customer.

In practice, it is not always in the long-term interest of the more powerful party to insist on a very one-sided contract because this can increase the time it takes to reach a final version of the contract and can contribute to disputes between the parties. Additionally, where contract terms are patently unfair, courts may be more likely to use their equitable powers and apply common law principles in favor of the weaker party.

In services arrangements, the most heavily negotiated issues tend to be:

- **Ownership of deliverables.** The customer, who is paying for the services, including the development of the resulting deliverables by the service provider, often wants to own outright all of the rights in such deliverables. The service provider, on the other hand, may want to retain ownership of the rights in all or some of the deliverables, as well as any of its existing know-how or materials that may

be incorporated in such deliverables, for re-use in performing services for other customers.

- **Representations and warranties.** The customer will want the service provider to give extensive representations and warranties among other things relating to the quality of the services and deliverables, while the service provider will often offer only a limited warranty with the sole remedy being repair or re-performance of the defective services (see Standard Clauses, General Contract Clauses: Representations and Warranties ([2-519-9438](#))).
- **Indemnities.** Each party will seek to allocate as much risk as possible to the other party by requesting broad indemnities from the other party (see Practice Note, Indemnification Clauses in Commercial Contracts (TX) ([W-004-5777](#))).
- **Limitations on liability.** The service provider will want to exclude most consequential, incidental and special damages and otherwise contractually limit its potential monetary liability to the customer to a fixed amount (usually the amount of fees it received from the customer) while the customer would prefer to have no contractual exclusions or limitations on liability (see Standard Clauses, General Contract Clauses: Limitation of Liability (TX) ([W-000-0751](#))).
- **Assignment.** Each party typically wants the flexibility to be able to assign its rights or delegate its obligations under the agreement, particularly to its affiliates and successors, while restricting the other party's right to do the same (see Practice Note, Assignability of Commercial Contracts ([1-525-3176](#))).

These issues should be addressed as early as possible in the negotiation process. They are discussed in more detail in the relevant drafting notes.

#### Drafting Considerations

It is simpler to prepare the agreement if all the variables are put into a separate statement of work (SOW) (see Standard Document, Statement of Work (Goods or Services) ([9-576-4705](#))), or if the services are not project-based, one or more schedules.

This professional services agreement assumes that the parties enter into one or more statements of work relating to individual projects. For more on drafting a statement of work, see Practice Note, Drafting and Negotiating an Effective Statement of Work: Business Briefing ([9-572-7586](#)). If the services are **not** project-based, all references in this agreement to a SOW should be deleted and replaced with a reference to the appropriate schedule.

In addition to the contract terms and conditions and any statements of work, consider whether the following items should be included as schedules or exhibits, if applicable:

- If the customer is using a competitive bid process, the customer's request for a proposal and the service provider's response. The customer should consider having these documents form part of the agreement if possible, as they may contain representations that the customer relied on in selecting the service provider. However, the parties should carefully review such documents for any conflicts with the negotiated agreement. The parties must also ensure that any potential conflict between the provisions of these documents and the agreement is dealt with by specifying an order of precedence between them in Section 18.6. If such documents are included, it is advisable to add them as an exhibit and ensure that the agreement incorporates them by reference.
- All relevant functional specifications or documentation relating to the services and any deliverables.
- A service level agreement setting out specific service levels that must be met by the service provider and providing remedies to the customer for service provider's failure to meet such levels. For example:
  - credits or refunds of the fees for the services (some customers might insist on the right to withhold payment of any amounts otherwise due to the service provider in the event of any damages caused to the customer as a consequence of the service provider's failure to meet specific service levels);
  - the right to terminate the agreement or the relevant SOW or, alternatively, the

right to suspend the service provider's right and obligation to complete its performance of the services until such time as the service provider is able to demonstrate to the customer's reasonable satisfaction that it can meet its obligations under this Agreement (including possibly assigning one or more of the customer's representatives to supervise and work with the service provider to correct and mitigate the effects of the service provider's inability to meet specific service levels); or

- the right of the customer to provide and/or engage a replacement service

provider to provide any or all of the delayed or unsatisfactory services.

- For more information on service levels in the outsourcing context, see Practice Note, Service Levels and Service Credit Schemes in Outsourcing ([6-500-9422](#)).

#### BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices to be selected, added, or deleted at the drafter's discretion.

This Professional Services Agreement (this "**Agreement**"), dated as of [DATE] (the "**Effective Date**"), is by and between [SERVICE PROVIDER NAME], a [STATE OF ORGANIZATION OR FORMATION] [ENTITY TYPE], with offices located at [ADDRESS] (the "**Service Provider**") and [CUSTOMER NAME], a [STATE OF ORGANIZATION OR FORMATION] [ENTITY TYPE], with offices located at [ADDRESS] (the "**Customer**").

WHEREAS, [Customer desires to retain Service Provider to provide certain [DESCRIPTION OF SERVICES] services upon the terms and conditions hereinafter set forth, and Service Provider is willing to perform such services].

#### DRAFTING NOTE: RECITALS

Recitals are not legally required and generally do not have any direct legal consequences, but it is advisable to include them. They are used to provide information about the basic background and purpose of the agreement as well as the parties' intent. In Texas, recitals in a contract generally do not control the operative clauses unless a court finds the operative clauses ambiguous, but courts may look at them to determine the proper construction of the contract and the parties' intention (*Furmanite Worldwide, Inc. v. NextCorp, Ltd.*, 339 S.W.3d 326, 336 (Tex. App.—Dallas 2011, no pet.) (citing *Gardner v. Smith*, 168

S.W.2d 278, 280 (Tex. Civ. App.—Beaumont 1942, no writ)).

The parties should not include language in the recitals that adds legally binding obligations or contradicts the wording contained in an operative provision of the contract. The recitals in this Standard Document provide a basic description, but they can be revised to include more specific information (such as the specific types of services contemplated by the agreement). For more information on drafting recitals, see Practice Note, Drafting or Reviewing a Commercial Contract: Recitals ([2-531-1345](#)).

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the parties agree as follows:

#### 1. Definitions.

When used in this Agreement, the capitalized terms listed below shall have the following meanings:

**DRAFTING NOTE: DEFINITIONS**

Section 1 provides specific meanings to particular words used in the agreement to avoid ambiguity. Texas courts find a contract is ambiguous when it is subject to two or more reasonable interpretations (*Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); see also *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 258 (Tex. 2017)).

Some terms are defined in the body of the document; these are included in Section 1 with

a cross-reference to the section where the term is defined. After each round of revisions, review the definitions carefully to see if any defined terms have been added or deleted or if any cross-references have changed. It is important to be consistent throughout the document. Where a capitalized term is used in the document, do not:

- Use it without capitalizing it later on.
- Introduce a different word or phrase to mean the same thing.

["**Action**" has the meaning set forth in Section 11.1.]

"**Affiliate**" of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

**DRAFTING NOTE: AFFILIATE**

Each party should review the various contexts in which this defined term may be used in the agreement. A broad definition might be advantageous to a party when used in the context of its right to assign the agreement to its own affiliates or in the context of the other party's confidentiality obligations, if such obligations also extend to such party's affiliates, but less advantageous when used in the context of the other party's right to assign the agreement to its affiliates or, in the case of the service provider, when used to define the additional persons who are entitled to receive services under the agreement.

The parties should also consider whether any temporal modifiers are necessary. For example, without temporal modifiers, past or future indemnified parties could

be unintentionally excluded from the indemnification protection (see *WesternGeco, L.L.C. v. Input/Output, Inc.*, 246 S.W.3d 776, 786 (Tex. App.—Houston [14th Dist.] 2008) ("future affiliate" did not include company that was not in existence at the time the contract was entered into)).

For a more narrow definition for corporate entities, consider limiting the term "control" to the ownership of an agreed upon percentage of an entity's voting securities. Language to that effect is as follows:

"The term "control" (including the terms "controlled by" and "under common control with") means the ownership, beneficially or of record, of more than [fifty percent (50%)] of the voting securities of an entity."

["**Authorized Service Recipients**" means the [Affiliates of Customer as may be notified by Customer to Service Provider from time to time/Persons identified as such in [the/a] Statement of Work].]

**DRAFTING NOTE: AUTHORIZED SERVICE RECIPIENTS**

Include this optional definition with appropriate modifications if the services will be provided to persons other than customer (for example, customer's affiliates) pursuant to Section 2.1.

**"Agreement"** has the meaning set forth in the preamble.

**"Change Order"** has the meaning set forth in Section 5.2.

**"Confidential Information"** means any information whether written or oral that is treated as confidential by a party, including, without limitation, trade secrets, technology, information pertaining to business operations and strategies, [OTHER ITEMS RELEVANT TO THE TRANSACTION,] and information pertaining to customers, pricing, and marketing. Confidential Information shall not include information that: (a) is already known to the Receiving Party without restriction on use or disclosure prior to receipt of such information from the Disclosing Party; (b) is or becomes generally known by the public other than by breach of this Agreement by, or other wrongful act of, the Receiving Party; (c) is developed by the Receiving Party independently of, and without reference to, any Confidential Information of the Disclosing Party; or (d) is received by the Receiving Party from a third party who is not under any obligation to the Disclosing Party to maintain the confidentiality of such information.

**DRAFTING NOTE: CONFIDENTIAL INFORMATION**

If either party has particularly valuable confidential information, it should consider deleting the exception concerning independent development because an assertion of independent development may be difficult to disprove. In addition to the items listed, a party can add other items relevant to the transaction that they want to keep confidential (for example, specifications, samples, designs, drawings, or other documents).

For more information on defining confidential information, see Practice Note, Confidentiality and Nondisclosure Agreements (TX): Definition of Confidential Information ([W-007-0568](#)).

Some confidential information may rise to the level of a trade secret and receive automatic protection under state or federal law (see Practice Note, Confidentiality and Nondisclosure Agreements (TX): Trade Secrets ([W-007-0568](#)) and State Q&A, Trade Secret Laws: Texas: Definition of Trade Secret ([4-506-3556](#))). Texas has adopted a version of the Uniform Trade Secrets Act (TUTSA) ((Tex. Civ. Prac. & Rem. Code Ann. §§ 134A.001 to 134A.008).

While a trade secret has to meet the statutory definition for a court to protect it, confidential information is not defined by statute. Confidential information may generally mean whatever the parties to an agreement define it to be, which may or may not include trade secrets. Texas courts give effect to confidentiality provisions regardless of whether the information covered by the provisions achieves trade secret status (see *Corp. Relocation, Inc. v. Martin*, 2006 WL 4101944, at \*15 n.17 (N.D. Tex. Sept. 12, 2006); *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 471 n.18 (Tex. App. – Austin 2004, pet. denied) (citing *Simplified Telesys, Inc. v. Live Oak Telecom, L.L.C.*, 68 S.W.3d 688, 692-93 (Tex. App. – Austin 2000, pet. denied)). Best practices in Texas, however, include the incorporation of trade secrets in the definition of confidential information.

Congress also enacted the Defend Trade Secrets Act of 2016 (DTSA) (18 U.S.C. §§ 1831 to 1839), which creates a federal civil cause of action for trade secrets misappropriation. The DTSA substantially overlaps with various state versions of the Uniform Trade Secrets Act, including



the TUTSA, in terms of elements and definitions, but it preempts no state laws (18 U.S.C. § 1838).

For further discussion of trade secrets under the TUTSA, see Standard Clauses, General Contract Clauses: Confidentiality (Long

Form) (TX): Drafting Note: Trade Secrets ([W-000-0595](#)). For a standard clause incorporating DTSA language, see Standard Clauses, General Contract Clauses: Confidentiality Agreement Clauses After the Defend Trade Secrets Act ([W-002-9194](#)).

“**Customer**” has the meaning set forth in the preamble.

“**Customer Contract Manager**” has the meaning set forth in Section 4.1(a)

[“**Customer Equipment**” means any equipment, systems, cabling or facilities provided by Customer and used directly or indirectly in the provision of the Services.]

#### DRAFTING NOTE: CUSTOMER EQUIPMENT

This definition should be included if the customer is supplying any such equipment in connection with the services. As an alternative to the general definition, and

to achieve greater certainty, the applicable SOW or schedule could include a specific list of any customer equipment.

“**Customer Materials**” any documents, data, know-how, methodologies, software and other materials provided to Service Provider by Customer[, including computer programs, reports and specifications].

#### DRAFTING NOTE: CUSTOMER MATERIALS

The nature of the customer materials varies widely depending on the type of services being provided, so this definition may need to be modified for a particular transaction.

As an alternative to the general definition, and to achieve greater certainty, the applicable SOW or schedule could include a specific list of customer materials.

“**Deliverables**” means all documents, work product and other materials that are delivered to Customer hereunder or prepared by or on behalf of Service Provider in the course of performing the Services[, including any items identified as such in [the/a] Statement of Work].

#### DRAFTING NOTE: DELIVERABLES

The nature of the deliverables will vary widely depending on the type of services being provided. Specific deliverables can be described here or in the applicable SOW or schedule.

Each party must review this definition carefully because it is used in the provisions allocating ownership of the deliverables (including related intellectual property (IP) rights) set out in Section 8.



“**Disclosing Party**” means a party that discloses Confidential Information under this Agreement.

“**Force Majeure Event**” has the meaning set forth in Section 17.1.

“**Intellectual Property Rights**” means all (a) patents, patent disclosures and inventions (whether patentable or not), (b) trademarks, service marks, trade dress, trade names, logos, corporate names and domain names, and other similar designations of source or origin, together with all of the goodwill associated therewith, (c) copyrights and copyrightable works (including computer programs), [mask works,] and rights in data and databases, (d) trade secrets, know-how and other confidential information, and (e) all other intellectual property rights, in each case whether registered or unregistered and including all applications for, and renewals or extensions of, such rights, and all similar or equivalent rights or forms of protection in any part of the world.

#### DRAFTING NOTE: INTELLECTUAL PROPERTY RIGHTS

The bracketed phrase “mask works” in subclause (c) refers to the layout of an integrated circuit and can be deleted if not relevant to the type of services being provided. For an overview of the various types of IP rights arising under US law,

see Practice Note, Intellectual Property: Overview ([8-383-4565](#)); see also Practice Note, Intellectual Property Rights: The Key Issues ([2-500-4365](#)). For information specific to trademarks, see State Q&A: Trademark Laws: Texas ([8-534-9166](#)).

[“**Key Personnel**” means any Service Provider Personnel who is identified as being key in [the/a] Statement of Work.]

“**Law**” means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree, other requirement or rule of law of any federal, state, local or foreign government or political subdivision thereof, or any arbitrator, court or tribunal of competent jurisdiction.

“**Losses**” mean all losses, damages, liabilities, deficiencies, actions, judgments, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable attorneys’ fees and the cost of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers.

“**Permitted Subcontractor**” has the meaning set forth in Section 3.1(h).

“**Person**” means an individual, corporation, partnership, joint venture, limited liability company, governmental authority, unincorporated organization, trust, association or other entity.

[“**Pre-Existing Materials**” means [the pre-existing materials specified in [the/a] Statement of Work/all documents, data, know-how, methodologies, software and other materials[, including computer programs, reports and specifications,] provided by or used by Service Provider in connection with performing the Services, in each case developed or acquired by the Service Provider prior to the commencement [or independently] of this Agreement].]

#### DRAFTING NOTE: PRE-EXISTING MATERIALS

This definition is used in optional Section 8.2 in the event the customer is to own the IP rights in the deliverables by means of the short-form assignment in Section 8.1, and the service provider needs to retain ownership of all rights in a portion of such

deliverables (for example, most commonly those materials that the service provider owned or licensed prior to the particular services arrangement or generic materials not developed specifically for the customer that the service provider needs to use to

provide its services to other customers). In such case, review this definition carefully to ensure that all items for which the service provider intends to retain ownership are clearly excluded.

If, on the other hand, the service provider is to own all IP rights in any deliverables, and is only granting the customer a license to those IP rights as necessary to use the deliverables, delete this definition and modify Section 8 as appropriate (see Drafting Note, Intellectual Property Rights; Ownership).

The parties may also consider tailoring this language to address ownership or licensing rights with respect to derivative materials created from one party's IP, or ownership of any jointly-developed IP if it is likely to be created.

#### CUSTOMER

For a more pro-customer agreement and for clarity, use the first clause in brackets, which requires the service provider to specifically list in the applicable SOW or schedule any materials that are deemed to be Pre-Existing Materials of the service provider.

["**Project**"] means [the/a] project as described in [the/a] Statement of Work.]

#### DRAFTING NOTE: PROJECT

If the services will involve an identifiable project or projects, consider including this definition. Where the services are instead ongoing and remain the same throughout the lifetime of the agreement:

- Delete all references in this agreement to a project or project milestones.

- If variable terms are set forth on one or more schedules instead of a SOW, replace all references in this agreement to a SOW with a reference to the appropriate schedule.

"**Project Milestone**" means an event or task described in [the/a] Statement of Work which shall be completed by the relevant date set forth in the Statement of Work.

#### DRAFTING NOTE: PROJECT MILESTONES

The SOW for a particular type of service or project will typically identify any project milestones. The applicable SOW or schedule should clearly set out the process by which

the parties assess and agree when, and whether, the project milestones have been reached (for example, through an acceptance testing procedure).

"**Receiving Party**" means a party that receives or acquires Confidential Information directly or indirectly under this Agreement.

"**Service Provider**" has the meaning set forth in the preamble.

"**Service Provider Contract Manager**" has the meaning set forth in Section 3.1(a)(i).

["**Service Provider Equipment**"] means any equipment, systems, cabling or facilities provided by or on behalf of Service Provider and used directly or indirectly in the provision of the Services.]

**DRAFTING NOTE: SERVICE PROVIDER EQUIPMENT**

This definition should be included if the service provider is supplying any equipment in connection with the services. As an alternative to the general definition, and to

achieve greater certainty, a SOW or schedule could include a specific list of any service provider equipment.

**“Service Provider Personnel”** means all employees and Permitted Subcontractors, if any, engaged by Service Provider to perform the Services.

**“Service Provider Proposal”** means Customer’s Request for Proposal for the Services and Service Provider’s response[, attached as Exhibit [A],] describing how Service Provider proposes to carry out [the Services/a Project].]

**“Services”** mean any professional or other services to be provided by Service Provider under this agreement, as described in more detail in [the/a] Statement of Work, and Service Provider’s obligations under this Agreement.

**DRAFTING NOTE: SERVICES**

The specific details of each service (such as the description of the service, the term, and often the fee for the service) are often set out in a separate SOW or schedule. If a particular agreement involves the provision of only one service, consider

instead including the details of the services and other terms and conditions typically included in the SOW in one or more schedules or within the body of the agreement. The description of the services should be clear and unambiguous.

**“Statement of Work”** means [the/each] Statement of Work entered into by the parties and attached to this Agreement, substantially in the form of Exhibit [B].

**DRAFTING NOTE: STATEMENT OF WORK**

For more information, see Drafting Note, Drafting Considerations and Practice Note, Drafting and Negotiating an Effective Statement of Work: Business Briefing

([9-572-7586](#)). For a model document, see Standard Document, Statement of Work (Goods or Services) ([9-576-4705](#)).

**“Term”** has the meaning set forth in Section 6.

2. Services.

2.1 Service Provider shall provide the Services to Customer [and the Authorized Service Recipients] as described in more detail in [the/each] Statement of Work in accordance with the terms and conditions of this Agreement.

2.2 [The/Each] Statement of Work shall include the following information, if applicable:

- (a) a detailed description of the Services to be performed pursuant to the Statement of Work;

- (b) the date upon which the Services will commence and the term of such Statement of Work;
- (c) [the names of the Service Provider Contract Manager and any Key Personnel;]
- (d) the fees to be paid to Service Provider under the Statement of Work;
- (e) [the Project implementation plan, including a timetable;]
- (f) [Project Milestones and payment schedules;]
- (g) any criteria for completion of the [Services/Project];
- (h) [procedures for the testing and acceptance of the Services and Deliverables by Customer;] and
- (i) any other terms and conditions agreed upon by the parties in connection with the Services to be performed pursuant to such Statement of Work.

#### DRAFTING NOTE: SERVICES

If any entities in addition to the customer will be receiving services (for example, the customer's affiliates), include the definition of Authorized Service Recipients in Section 1.

If including Authorized Service Recipients, check that their rights and obligations are specifically referred to where necessary throughout the contract, including identifying such parties as third-party beneficiaries in Section 18.8. For a discussion of third-party beneficiaries, see Standard Clause, General Contract

Clauses: Third-Party Beneficiaries ([6-519-7630](#)).

Section 2.2 should list the items to be specified in each SOW. The parties should carefully draft each SOW to ensure that all key elements of the services and/or a particular project are set out in as much detail as possible, including identification of any project milestones, completion requirements, and acceptance testing procedures. For more information and a sample SOW, see Standard Document, Statement of Work (Goods or Services) ([9-576-4705](#)).

### 3. Service Provider's Obligations.

#### DRAFTING NOTE: SERVICE PROVIDER'S OBLIGATIONS

Section 3 sets out the service provider's main obligations under the professional services agreement. All obligations require consideration of:

- The particular project.
- Type of services being provided.

- Any applicable state or federal law (for example, the Texas Administrative Code imposes more stringent standards of conduct on service providers when engaging in contracts with the Comptroller (34 Tex. Admin. Code § 6.4)).

#### 3.1 The Service Provider shall:

- (a) [subject to the prior written approval of Customer, [not to be unreasonably withheld or delayed]] appoint:
  - (i) a Service Provider employee to serve as a primary contact with respect to this Agreement and who will have the authority to act on behalf of Service Provider in

connection with matters pertaining to this Agreement (the “**Service Provider Contract Manager**”); and

(ii) [[Key Personnel/Service Provider Personnel], who shall be suitably skilled, experienced and qualified to perform the Services;]

(b) maintain the same Service Provider Contract Manager [and other Key Personnel] throughout the Term of this Agreement except for changes in such personnel due to:

(i) Customer’s request pursuant to Section 3.1(c); or

(ii) the resignation or termination of such personnel or other circumstances outside of Service Provider’s reasonable control;

(c) upon the [reasonable] written request of Customer, promptly replace the Service Provider Contract Manager and any other Service Provider Personnel;

#### DRAFTING NOTE: PROJECT MANAGEMENT

Section 3.1(a), Section 3.1(b) and Section 3.1(c) are project management terms relating to the service provider’s contract manager and personnel.

##### CUSTOMER

It is important, in a project where the service provider’s personnel may be on the customer’s premises and working with the customer’s staff, that the customer has the right to approve the personnel who are

to work on the project and to have particular personnel replaced. The service provider may strongly resist this clause or request a similar veto over the customer’s manager.

##### SERVICE PROVIDER

For a pro-service provider agreement, delete Section 3.1(a), Section 3.1(b), and Section 3.1(c) in order to maintain maximum flexibility in assigning and replacing service provider personnel.

(d) before the date on which the Services are to start, obtain, and at all times during the Term of this Agreement maintain, all necessary licenses and consents and comply with all relevant Laws applicable to the provision of the Services;

#### DRAFTING NOTE: LICENSES AND CONSENTS

##### CUSTOMER

This obligation could refer, for example, to obtaining a consent from a software licensor to allow new software to be used in conjunction with its software or from a landlord for alterations to the premises. Where the customer is aware of the

need for any consents, include a specific reference to them in this clause. Consider adding in the date by which specific consents must be obtained. Be prepared for a request for a reciprocal obligation in relation to the customer (for example, see Section 4.1(f)).

(e) prior to any Service Provider Personnel performing any Services hereunder: (i) ensure that such Service Provider Personnel have the legal right to work in the United States; and (ii) at its sole cost and expense, conduct background checks on such Service Provider Personnel, which background checks shall comprise, at a minimum, a review of credit history, references and criminal record, in accordance with state, federal and local law;

(f) comply with, and ensure that all Service Provider Personnel comply with, all rules, regulations and policies of Customer that are communicated to Service Provider in writing, including security procedures concerning systems and data and remote access thereto, building security procedures[, including the restriction of access by Customer to certain areas of its premises or systems for security reasons,] and general health and safety practices and procedures;

(g) maintain complete and accurate records [relating to the provision of the Services under this Agreement, including records] of the time spent and materials used by Service Provider in providing the Services in such form as Customer shall approve. During the Term [and for a period of [two] years thereafter], upon Customer's written request, Service Provider shall allow Customer or Customer's representative to inspect and make copies of such records and interview Service Provider Personnel in connection with the provision of the Services[; *provided that* any such inspection shall take place during regular business hours no more than once per year and Customer provides Service Provider with at least [ten] business days/reasonable] advance written notice];

#### DRAFTING NOTE: RECORDS; AUDIT

##### CUSTOMER

It is particularly important to include this recordkeeping and audit provision where the service provider is providing services on a time and materials basis (see Section 7.2). Additionally, if the customer is a publicly-held company and the services arrangement is effectively an outsourcing arrangement, the customer may need sufficiently broad audit rights to meet its obligations under the Sarbanes-Oxley Act of 2002.

For more information on Sarbanes-Oxley, see Practice Note, Corporate Governance Standards: Audit Committee ([3-381-8544](#)).

##### SERVICE PROVIDER

If an audit right is acceptable in the context of the transaction, the service provider should insist that any such inspection be subject to reasonable limitations, by including, for example, the bracketed limitations in Section 3.1(g).

For more information and a sample long-form audit clause, see Standard Clauses, General Contract Clauses: Audit Rights ([4-567-1110](#)).

(h) obtain Customer's written approval[, which consent shall not be unreasonably withheld or delayed/which consent may be given or withheld in Customer's sole discretion,] prior to entering into agreements with or otherwise engaging any Person, including all subcontractors and Affiliates of Service Provider, other than Service Provider's employees to provide any Services and Deliverables to Customer (each such approved subcontractor or other third party, a "**Permitted Subcontractor**"). Customer's approval shall not relieve Service Provider of its obligations under the Agreement, and Service Provider shall remain fully responsible for the performance of each such Permitted Subcontractor and its employees and for their compliance with all of the terms and conditions of this Agreement as if they were Service Provider's own employees. Nothing contained in this Agreement shall create any contractual relationship between Customer and any Service Provider subcontractor or supplier; and

(i) require each Permitted Subcontractor to be bound in writing by the confidentiality and intellectual property assignment or license provisions of this Agreement[, and, upon Customer's written request, to enter into a non-disclosure or intellectual property assignment or license agreement in a form that is reasonably satisfactory to Customer].

3.2 Service Provider is responsible for all Service Provider Personnel and for the payment of their compensation, including, if applicable, withholding of income taxes, and the payment

and withholding of social security and other payroll taxes, unemployment insurance, workers' compensation insurance payments and disability benefits.

3.3 Service Provider acknowledges that time is of the essence with respect to Service Provider's obligations hereunder and that prompt and timely performance of all such obligations[, including all timetables, Project Milestones and other requirements in this Agreement and [the/each] Statement of Work,] is strictly required.

#### DRAFTING NOTE: TIME OF THE ESSENCE

##### CUSTOMER

A "time of the essence" clause aims to ensure that the service provider strictly comply with the dates of performance set out in the agreement. In the absence of a time of the essence clause, some courts might only infer that the service provider must perform the services within a reasonable time. For more information about time of the essence clauses in Texas, including the impact of leaving one out, see Standard Clause, General Contract Clauses: Time of the Essence (TX) ([W-000-0720](#)); see also Practice Note, Time of the Essence in Commercial Contracts ([6-519-5141](#)).

##### SERVICE PROVIDER

In a pro-service provider contract, the service provider should delete Section 3.3 and replace with:

"Service Provider shall use reasonable efforts to meet any performance dates specified in [the/a] Statement of Work, and any such dates shall be estimates only."

This clause aims to ensure that the service provider is not strictly held to the

specific performance dates set out in the agreement and instead only needs to use reasonable efforts to meet those dates. In Texas, contract drafters often use the term "commercially reasonable efforts" and follow Delaware case law to interpret the phrase. In *Williams Companies, Inc. v. Energy Transfer Equity, L.P.*, the Delaware Supreme Court implies that contract drafters might want to define "commercially reasonable efforts" to reduce the risk that clients be caught unawares by a far-stronger commitment than they intended (159 A.3d 264, 272 (Del. 2017)).

For more information on efforts provisions generally, see Practice Notes, Efforts Provisions in Commercial Contracts: Best Efforts, Reasonable Efforts, and Commercially Reasonable Efforts ([7-518-0907](#)) and Drafting and Interpreting Contractual Efforts Provisions ([0-579-1826](#)). For more on efforts provisions in Texas, see 3 Tex. Prac. Guide Bus. Trans. § 12:57 and Commercially Reasonable Efforts: A Recent Delaware Supreme Court Holding Might Motivate Contract Drafters to Define the Term for Themselves, 81 Tex. B.J. 338 (2018)).

3.4 [The obligations of Service Provider under this Agreement shall be performed fully within Texas and/or the United States, unless approved in writing in advance by Customer.]

#### DRAFTING NOTE: SERVICES PERFORMED IN THE UNITED STATES

##### CUSTOMER

Include this obligation if the services must be performed fully within Texas and/or the US. If any part of the services is to be performed outside of the Texas and/or US, consider whether any changes must be

made to the agreement to take into account any applicable laws or regulations relating to such other jurisdictions.

For example, Texas courts generally uphold restrictive covenants, but California courts look on them with much less favor. If the customer



expects to have the benefit of a non-compete, for example, it should ensure that the services are rendered in Texas as intended.

In the case of a Worker's Compensation claim, a Texas worker who is injured outside

of Texas is still protected by the Texas Compensation Law if the worker had the status of Texas employee before leaving the state (*Southern Underwriters v. Gallagher*, 136 S.W.2d 590, 592 (Tex. 1940)).

### 3.5 [ANY ADDITIONAL SERVICE PROVIDER OBLIGATIONS.]

#### DRAFTING NOTE: ADDITIONAL OBLIGATIONS

##### CUSTOMER

Consider whether it is appropriate, in the context of the negotiation and the specific type of services being provided, to require any additional obligations from the service provider, including for example, requiring the service provider to:

- Ensure that its personnel are suitably qualified and that the services are sufficiently staffed.
- Transition and train any replacement service provider contract manager or personnel at the service provider's expense.
- Prioritize the services being performed for the customer over the service provider's other business.
- Provide the services at any site the customer may specify.
- Provide periodic status reports.
- Ensure that all of the service provider equipment is in good working order and suitable for the purposes for which it is used, and conforms to all relevant legal standards, or requirements or standards specified by the customer.
- Keep and maintain any customer equipment in the service provider's

possession in good condition and not to dispose of or use it other than in accordance with the customer's written instructions or authorization.

- Take out and maintain any relevant insurance policies, for example, covering the service provider equipment and/or any customer equipment. This can also be covered in a standalone insurance clause (see, for example, Section 14). For more information about insurance, see Practice Note, Insurance Policies and Coverage: Overview ([9-505-0561](#)) and Insurance Policies and Coverage Toolkit ([4-506-1171](#)).
- Meet agreed upon service levels with service credits and/or termination rights granted to the customer where the service provider fails to meet such levels. This can alternatively be the subject of a separate agreement or schedule to be attached to the professional services agreement. For more information on service levels in the outsourcing context, see Practice Note, Service Levels and Service Credit Schemes in Outsourcing ([6-500-9422](#)).

The customer should also consider whether any of the obligations under Section 3 should be extended for the benefit of any Authorized Service Recipients.

#### 4. Customer's Obligations.

#### DRAFTING NOTE: CUSTOMER'S OBLIGATIONS

This section sets out the customer's material obligations under the professional services agreement. In a collaborative arrangement, it is reasonable for the service

provider to request from the customer basic commitments about cooperation, access, and information.

## 4.1 Customer shall:

(a) cooperate with Service Provider in all matters relating to the Services and appoint [and, in its reasonable discretion, replace] a Customer employee to serve as the primary contact with respect to this Agreement and who will have the authority to act on behalf of Customer with respect to matters pertaining to this Agreement (the “**Customer Contract Manager**”);

**DRAFTING NOTE: CUSTOMER CONTRACT MANAGER****SERVICE PROVIDER**

This professional services agreement does not give the service provider a right of veto over the choice of the customer contract manager. For a pro-service provider agreement, include a right of veto or

approval over the identity of the customer contract manager here, but bear in mind that requesting such a right may elicit a request from the customer for a reciprocal right (for example, see the rights granted to the customer in Section 3.1(a)).

(b) provide, subject to Section 3.1(f), such access to Customer’s premises, and such office accommodation and other facilities as may reasonably be requested by Service Provider [and agreed with Customer in writing in advance], for the purposes of performing [the Services/each Project];

**DRAFTING NOTE: ACCESS TO INFORMATION, PREMISES, AND FACILITIES**

This clause requires the customer to provide access to such customer facilities as the service provider reasonably requests, with optional language in brackets requiring the customer’s prior written consent. If there are specific facilities which are unusual but necessary (for example, a dedicated

telephone line or access for large vehicles at any time of the day or night), it may be advisable to refer to them specifically. Consider whether the provision should require the service provider to pay for the provision of any facilities.

(c) respond promptly to any Service Provider request to provide direction, information, approvals, authorizations or decisions that are reasonably necessary for Service Provider to perform Services in accordance with the requirements of this Agreement;

(d) provide such [Customer Materials/information] as Service Provider may [reasonably] request [and Customer considers reasonably necessary], in order to carry out the Services, in a timely manner, and ensure that it is complete and accurate in all material respects;

**DRAFTING NOTE: PROVISION OF CUSTOMER MATERIALS**

The customer is responsible for giving the service provider customer materials and other information that the service provider reasonably requests to allow it to carry out the services. The definition of customer

materials should be sufficiently detailed to ensure that there will be no surprises and that, if there is any doubt as to what additional information the service provider may need, this is covered as well.

(e) [ensure that all Customer Equipment is in good working order and suitable for the purposes for which it is used [in relation to the Services] and conforms to [all relevant legal or industry standards or requirements/[SPECIFY STANDARDS WITH WHICH THE CUSTOMER EQUIPMENT IS REQUIRED TO COMPLY]]];]

#### DRAFTING NOTE: CUSTOMER EQUIPMENT

##### SERVICE PROVIDER

If this obligation is included, the customer may require a reciprocal provision for the service provider equipment. Check what, if any, specific industry standards are applicable to the services and consider adding language requiring the equipment

to comply with such standards. In the event of non-compliance, also consider specifically reserving (without prejudice to any other remedies available) the right to disconnect or remove any non-compliant equipment and replace it at the expense of the customer.

(f) obtain and maintain all necessary licenses and consents and comply with all applicable Law in relation to the Services[, the installation of the Service Provider Equipment, the use of Customer Materials and the use of the Customer Equipment in relation to the Service Provider Equipment] [to the extent that such licenses, consents and Law relate to Customer's business, premises, staff and equipment], in all cases before the date on which the Services are to start;

#### DRAFTING NOTE: LICENSES AND CONSENTS

##### SERVICE PROVIDER

This obligation could refer, for example, to obtaining a consent from a software licensor to allow new software to be used in conjunction with its software or from a landlord to alterations to the premises. Where the service provider is aware of the need for any of these consents, include a specific reference to them in this clause.

Consider adding in the date by which specific consents must be obtained. The service provider should be prepared for a request from the customer for a reciprocal obligation (for example, see Section 3.1(d)). Note that, if the wording in square brackets is included, the service provider will still need to obtain all licenses and consents other than those relating to the customer's business, premises, staff and equipment.

(g) [keep, maintain [and insure] the Service Provider Equipment [in good condition/in accordance with Service Provider's instructions as notified in writing from time to time], and shall not dispose of or use Service Provider Equipment other than in accordance with Service Provider's written instructions or authorization.]

#### DRAFTING NOTE: CARE OF SERVICE PROVIDER EQUIPMENT

##### SERVICE PROVIDER

If there are specific requirements for the care of any service provider equipment in the customer's possession, for example,

control of humidity levels or a 24-hour power supply from an uninterrupted source, specify them here or in a separate SOW or schedule.

## 4.2 [ANY ADDITIONAL CUSTOMER OBLIGATIONS.]

**DRAFTING NOTE: ADDITIONAL CUSTOMER OBLIGATIONS****SERVICE PROVIDER**

The service provider should consider whether it is appropriate, in the context of the negotiation, to require any additional obligations from the customer. For example, consider including obligations requiring the customer to:

- Take out and maintain in effect any relevant insurance policies, for example,

covering the customer equipment. This can also be covered in a standalone insurance clause (see, for example, Section 14).

- Cause any Authorized Service Recipients to comply with the terms of this section.

4.3 If Service Provider's performance of its obligations under this Agreement is prevented or delayed by any act or omission of Customer[, any Authorized Service Recipient] or [its/their] agents, subcontractors, consultants or employees [outside of Service Provider's reasonable control], Service Provider shall not be deemed in breach of its obligations under this Agreement or otherwise liable for any costs, charges or losses sustained or incurred by Customer, in each case, to the extent arising directly or indirectly from such prevention or delay.

**DRAFTING NOTE: ACTS OR OMISSIONS OF CUSTOMER****CUSTOMER**

The customer should not include this clause in a pro-customer agreement.

**SERVICE PROVIDER**

The service provider should include this provision to ensure that if the customer's

action or inaction makes it more difficult for the service provider to perform its obligations or causes the customer to incur additional costs, the service provider will not be in breach of the agreement or liable to the customer as a result of any resulting prevention or delay of its performance.

5. Change Orders.

5.1 If either party wishes to change the scope or performance of the Services, it shall submit details of the requested change to the other in writing. Service Provider shall, within a reasonable time after such request (and, if such request is initiated by Customer, not more than [NUMBER] business days after receipt of Customer's written request), provide a written estimate to Customer of:

- (a) the likely time required to implement the change;
- (b) any necessary variations to the fees and other charges for the Services arising from the change;
- (c) the likely effect of the change on the Services; and
- (d) any other impact the change might have on the performance of this Agreement.

5.2 Promptly after receipt of the written estimate, the parties shall negotiate and agree in writing on the terms of such change (a "Change Order"). Neither party shall be bound by any Change Order unless mutually agreed upon in writing in accordance with Section 18.10.

**DRAFTING NOTE: CHANGE ORDERS**

Section 5 sets out the process by which the parties can request and make changes to the scope or performance of the services.

**SERVICE PROVIDER**

Consider including a clause allowing the service provider to make alterations that will not materially affect the nature or quality of the services, for example, to allow for changes to comply with applicable laws or regulations or other changed circumstances, such as a change in its own suppliers and, if so, whether the service provider should agree to give advance notice of such changes. Sample language to this effect is as follows:

“Notwithstanding Section 5.1 and Section 5.2, Service Provider may, from time to time change the Services: (i) without notice to Customer in order to comply with any applicable safety or statutory requirements, or (ii) [ subject to Customer’s prior written consent, which shall not be unreasonably withheld or delayed], in each case provided that such changes do not materially affect the nature, scope of, or fees or other charges for the Services.”

The service provider should also consider including a clause allowing it to charge for its time spent dealing with change requests and preparing an altered specification (particularly where the agreement is not on a pure time and materials basis). Sample language to this effect is as follows:

“Service Provider may charge for the time it spends assessing and documenting a change request from Customer on a time and materials basis in accordance with Section 7.”

In this case, the service provider’s rates need to be set out in the applicable SOW.

For a sample change order form, see Standard Document, Services Agreement: Change Order Form ([0-522-5179](#)). For more sample change order clauses, see Standard Clauses:

- Services Agreement: Change Order Clause (Change Order Request Procedure) ([8-521-9532](#)).
- Services Agreement: Change Order Clause (Change Directives) ([5-523-5048](#)).
- Services Agreement: Change Order Clause (Excusable Events) ([2-523-5139](#)).

**6. Term.**

This Agreement shall commence as of the Effective Date and shall continue thereafter [until the completion of the Services [under all Statements of Work]/for a period of [TERM]], unless sooner terminated pursuant to Section 13.

**DRAFTING NOTE: TERM**

This section should be adapted to reflect the agreement between the parties as to the term of the contract. The bracketed language should be modified to provide for either:

- Automatic expiration once a particular project or the services have been completed.
- A term that will expire after a set time period.

The appropriate term will vary according to whether the services are project based or of a continuing nature.

If the term is determined by completion of the project or the services, make sure the applicable SOW or schedule is clear on when and how a particular project is completed, including, if appropriate, requiring the service provider to issue a notice of completion and/or customer to issue an acceptance certificate.

**SERVICE PROVIDER**

The service provider should consider instead providing for a fixed initial term, with automatic, consecutive renewal terms, unless either party gives notice of non-renewal in by a specified time prior to the start of each renewal term. Language to this effect can be drafted as follows:

“This Agreement shall commence as of the Effective Date and, unless sooner terminated pursuant to Section 13, shall continue for a period of [NUMBER] years, after which it will

automatically renew for additional [NUMBER] year renewal terms unless either party gives at least [30] days written notice of non-renewal prior to end of the then-current term.”

Unlike some states, Texas has not enacted legislation placing conditions on the enforceability of automatic renewal clauses in business-to-business transactions. For an example of a long form clause specifying the term of an agreement, including provisions regarding renewal and termination rights, see Standard Clauses, General Contract Clauses: Term and Termination (TX) ([W-001-4773](#)).

**7. Fees and Expenses; Payment Terms.**

7.1 In consideration of the provision of the Services by the Service Provider and the rights granted to Customer under this Agreement, Customer shall pay the fees set forth in the [applicable] Statement of Work. Payment to Service Provider of such fees and the reimbursement of expenses pursuant to this Section 7 shall constitute payment in full for the performance of the Services, and, Customer shall not be responsible for paying any other fees, costs or expenses.

**DRAFTING NOTE: FEES**

The fee structure in a professional services engagement can vary widely, but is typically structured on a time and materials basis, a fixed price basis, or a hybrid of the two.

For example, a hybrid arrangement can be structured as:

- A time and materials up to a fixed cap on fees or as staged pricing, with one or more stages of the services being based on time and materials and one or more other stages on a fixed price. Section 7.2 sets out relevant provisions for a time and materials basis, and Section 7.3, a fixed-price basis.
- A “cost-plus” contract where a party is reimbursed for the costs of materials and labor and receives a stated percentage of the costs as profit (*Garza v. Cantu*, 431 S.W.3d 96, 100 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); see also *Burditt v. Sisk*, 710 S.W.2d 114, 118 (Tex. App.—Corpus Christi 1986, no writ)).

The time and materials basis in some cases can be more risky for the customer because the customer may have less ability

to maintain control over the fees. In fixed pricing, on the other hand, the service provider will typically seek to build in a premium to cover the risk. In some cases, using a competitive RFP process with potential service providers can help the customer drive pricing down.

A statement of work should include all information required to assure that both parties agree on all components of the billing formula, such as (where applicable):

- Billing rate of each provider representative or overall rate to be charged.
- Permitted mark-up of billed expenses.
- Any agreed flat fees for any aspect of the services or the overall project.
- Any ceiling on fees for any aspect of the services or the overall project.
- Any minimum charges.

**CUSTOMER**

If the initial project under the contract is for the service provider to write a detailed proposal, such initial phase should be

performed at a fixed price, and the customer should protect itself for the next phase by having a right to terminate and (implicitly) use a different service provider to perform the remaining phases. This means that the IP rights, including rights in confidential

information, need to vest in the customer on creation (and not, for example, on payment) and also must cover future as well as existing rights. The actual transfer of IP rights to the customer is contained in the IP assignment in Section 8.1.

7.2 Where the Services are provided on a time and materials basis:

(a) the fees payable for the Services shall be calculated in accordance with Service Provider's [daily/hourly] fee rates for the Service Provider Personnel set forth in the [applicable] Statement of Work; and

(b) Service Provider shall issue invoices to Customer monthly in arrears for its fees for time for the immediately preceding month, calculated as provided in this Section 7.2, together with a detailed breakdown of any expenses for such month incurred in accordance with Section 7.4.

#### DRAFTING NOTE: TIME AND MATERIALS

Section 7.2 sets out basic terms for payment on a time and materials basis. Section 7.2(a) refers to the service provider's standard daily or hourly fee rates as stated in a SOW or schedule.

#### CUSTOMER

Where the customer is paying on a time and materials basis, it is particularly important to require the service provider to maintain certain records and permit the customer to audit such records (see, for example, Section 3.1(g)) so that the customer can verify the accuracy of the charges.

Customer should also consider including the following additional terms, whether in Section 7.2 or in the applicable SOW or schedule:

- "Service Provider's standard [daily/hourly] fee rates for all Service Provider Personnel

are calculated on the basis of an eight-hour day, worked between [8:00 a.m.] and [5:00 p.m.] on weekdays (excluding public holidays)."

- "Service Provider shall not be entitled to charge on a pro-rata basis for part-days worked by any Service Provider Personnel unless it has Customer's prior written consent to do so."
- "Service Provider shall ensure that all Service Provider Personnel complete time sheets recording time spent on [the Services/[the/each] Project], and[, subject to the written approval of such completed time sheets by Customer's Contract Manager,] Service Provider shall use such time sheets to calculate the charges covered by each monthly invoice referred to in Section 7.2(b)."

7.3 Where Services are provided for a fixed price, the total fees for the Services shall be the amount set out in the [applicable] Statement of Work. The total price shall be paid to Service Provider in installments, as set out in the Statement of Work[, with each installment being conditional on Service Provider achieving the corresponding Project Milestone]. [On achieving a Project Milestone/At the end of a period specified in the [applicable] Statement of Work in respect of which an installment is due], Service Provider shall issue invoices to Customer for the fees that are then payable, together with a detailed breakdown of any expenses incurred in accordance with Section 7.4.



**DRAFTING NOTE: FIXED PRICE**

The fixed fees should be set out in the applicable SOW or schedule. Where fees will be paid on an installment basis, ensure that the SOW or schedule clearly sets out when these become payable (for example, monthly or at other regular intervals) or when certain work has been completed (project milestones) or accepted by the customer. In setting these dates or events, bear in mind that reaching them triggers the service provider's right to issue an invoice, which is payable within a certain period (30 days in this agreement).

**CUSTOMER**

Consider including an acceptance testing provision setting forth the procedure for the customer's testing and acceptance or rejection of any deliverables in order to determine whether a project milestone has been met. For a pro-customer agreement, the customer should withhold all, or at least a portion of, payment until its acceptance of all deliverables (although this usually meets with strong opposition from the service provider).

7.4 Customer agrees to reimburse Service Provider for all [actual, documented and] reasonable travel and out-of-pocket expenses incurred by Service Provider in connection with the performance of the Services [that have been approved in advance in writing by Customer] [; *provided, that* such expenses conform to Customer's standard travel and expense policy, a copy of which is attached as Exhibit [C]].

**DRAFTING NOTE: EXPENSES**

For more information and a sample pro-customer expenses clause, see Standard Clauses, General Contract Clauses: Pricing Terms (Services, Pro-Customer): Section 1.4 ([1-520-6509](#)) and its accompanying Drafting Note. For an example of an expenses clause drafted in favor of the service provider, see Standard Clauses, General Contract Clauses: Pricing Terms (Services, Pro-Service Provider): Section 1.4 ([9-520-3875](#)). For a sample clause providing for the reimbursement of the service provider's costs and expenses relating to third-party goods or services that the service provider purchased to perform the services, see Standard Clauses, General Contract Clauses: Pricing Terms (Services, Pass-Through Expenses) ([0-570-6786](#)).

Certain expenses of the service provider in providing the services are usually reimbursed. These should be clearly set

out in the statement of work (or in an attached rate schedule), especially any items that could lead to disputes (for example, overhead expenses) along with any information about:

- Mark-ups to which the service provider is entitled.
- Whether pre-approval of expenses is required.
- If pre-approval is required, whether a threshold is set below which expenses can be incurred without prior approval.
- Whether different levels of approval are required for different levels of expenses (for example, expenses over \$5,000 may require approval from both the customer contract manager and that manager's supervisor).

Whether, in addition to pre-approval, compliance with the customer's normal expense reimbursement policy is required.

7.5 [The parties agree that [after the initial [12] months of the Term,] for Services provided on a time and materials basis, Service Provider may increase its standard fee rates specified in the [applicable] Statement of Work upon written notice to Customer; *provided, that:*

- (a) Service Provider provides Customer written notice of such increase at least [90] days prior to the effective date of such increase;
- (b) such increases occur no more frequently than once per contract year of the Term; and
- (c) the amount of such increase shall not exceed the lesser of:
  - (i) the percentage rate of increase for the immediately preceding 12-month period in the [Consumer Price Index, All Urban Consumers, United States, All Items (1982 - 1984 = 100), as published by the Bureau of Labor Statistics of the United States Department of Labor] or, if such index is not available, such other index as the parties may agree most closely resembles such index; or
  - (ii) five percent (5%).]

### DRAFTING NOTE: INCREASES IN SERVICE PROVIDER RATES

#### CUSTOMER

For services provided on a time and materials basis (particularly under a master services agreement that has a term lasting a number of years), the service provider will often include a provision allowing it to increase its fees on written notice to customer (in addition to increases in connection with a change in the scope or execution of the services in accordance with Section 5). If this is acceptable in the context of the transaction, ensure that any such increase is subject to a cap and that increases can only be made once in a given period.

In Section 7.5, the cap is calculated as the amount that is the lesser of (a) the percentage increase in a standard inflation index in the preceding 12-month period or (b) 5%. If using one of the Consumer Price Index (CPI) series published by the Bureau of Labor Statistics of the United States Department of Labor, the parties should precisely identify the specific CPI index, including identifying the population coverage (for example, "All Urban Consumers"), area coverage (for example, "United States"), series title (for example, "All Items") and index base period (for example, "1982-1984=100"), as well as the period for measurement (for example, the "immediately preceding 12-month period"). References in an agreement to a generic "Consumer Price Index" for calculating rate increases have been found by some courts to be ambiguous.

Alternatively, consider including a right to terminate the agreement for convenience (for example, see the termination for convenience clause in Section 13.1) or a specific right to terminate if the customer objects to the service provider's notice that it intends to increase its rates. Sample language addressing a specific right to terminate for a rate increase is as follows:

"If such increase is not acceptable to Customer, Customer may, within [PERIOD] of such notice being received or deemed to have been received in accordance with Section 18.4, terminate the agreement [by giving [NUMBER] months written notice to Service Provider/immediately by giving written notice to Service Provider]."

#### SERVICE PROVIDER

For time and materials arrangements, the service provider should include a provision allowing it to raise its rates to account for increased costs. The customer, in negotiating this clause, may require one or more of the following:

- A percentage limitation or other cap to be put on the amount of any increase.
- A limit on the number of increases in a given time period.
- The right to terminate the agreement if the customer objects to a rate increase.

7.6 Service Provider shall issue invoices to Customer only in accordance with the terms of this Section, and Customer shall pay all properly invoiced amounts due to Service Provider within [30] days after Customer's receipt of such invoice[, except for any amounts disputed by Customer in good faith]. All payments hereunder shall be in US dollars and made by check or wire transfer.

#### DRAFTING NOTE: PAYMENT TERMS

##### CUSTOMER

In a pro-customer agreement, the customer should leave Section 7.6 as drafted above, with no mention of late fees or interest payments, but including the bracketed language permitting the customer to withhold disputed amounts.

The customer should also consider including a provision setting out the procedure for disputing an invoice. Language to this effect can be drafted as follows:

"In the event of a payment dispute, Customer shall deliver a written statement to Service Provider [no later than [ten (10)] days] prior to the date payment is due on the disputed invoice listing all disputed items and providing a reasonably detailed description of each disputed item. Amounts not so disputed shall be deemed accepted and shall be paid, notwithstanding disputes on other items, within the period set forth in Section 7.6. The parties shall seek to resolve all such disputes expeditiously and in good faith. Service Provider shall continue performing the Services

in accordance with this Agreement notwithstanding any such dispute."

##### SERVICE PROVIDER

The service provider, on the other hand, should include a provision allowing it to charge interest and suspend performance if fees are not paid within a certain period after becoming due. Language to this effect can be drafted as follows:

"In the event payments are not received by Service Provider [within [30] days] after becoming due, Service Provider may (a) charge interest on any such unpaid amounts at a rate of [1%] per month or, if lower, the maximum amount permitted under Law, from the date such payment was due until the date paid, and (b) suspend performance for all Services until payment has been made in full[, except for any amount disputed in good faith in accordance with Section 7.6."

For more information on payment terms in general, see Standard Clauses, General Contract Clauses: Payment Terms (TX) ([W-000-6241](#)).

7.7 Customer shall be responsible for all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state or local governmental entity on any amounts payable by Customer hereunder; *provided, that*, in no event shall Customer pay or be responsible for any taxes imposed on, or with respect to, Service Provider's income, revenues, gross receipts, personnel or real or personal property or other assets.

#### DRAFTING NOTE: TAXES

##### CUSTOMER

Unless the customer is in a strong bargaining position, the customer is typically responsible for the payment of all sales and use taxes imposed with respect to

its purchase and use of the services from the service provider. The customer should ensure that the agreement expressly excludes responsibility for any taxes relating to service provider's income, revenues, gross

receipts, personnel or assets, or amounts paid by the service provider for its own purchase of supplies or services.

For information on state sales and use taxes in Texas, see State Q&A, Sales and Use Taxes: Texas.

7.8 [Without prejudice to any other right or remedy it may have, Customer reserves the right to set off at any time any amount owing to it by Service Provider against any amount payable by Customer to Service Provider [under this Agreement].]

#### DRAFTING NOTE: RIGHTS OF SETOFF

##### CUSTOMER

While many professional services agreements stay silent on the matter of setoff rights, a pro-customer agreement may include a right of setoff for the situation where the customer claims the service provider has been overcompensated or otherwise owes the customer money. Include the bracketed language if the setoff right is limited only to amounts owed under the professional services agreement.

For more information on setoff rights, see:

- Practice Notes, Setoff and Commercial Contracts ([8-534-2848](#)) and Setoff,

Recoupment and Counterclaim Under Commercial Law ([5-535-0905](#)).

- Standard Clauses, General Contract Clauses: Setoff ([5-532-5548](#)) and General Contract Clauses: No Setoff (TX) ([W-000-0902](#)).

##### SERVICE PROVIDER

The service provider should resist granting customer a setoff right, which would give the customer discretion to unilaterally withhold payments from the service provider.

#### 8. Intellectual Property Rights; Ownership.

8.1 [Except as set forth in Section 8.3,] Customer is, and shall be, the sole and exclusive owner of all right, title and interest in and to the Deliverables, including all Intellectual Property Rights therein. Service Provider agrees, and will cause its Service Provider Personnel to agree, that with respect to any Deliverables that may qualify as “work made for hire” as defined in 17 U.S.C. § 101, such Deliverables are hereby deemed a “work made for hire” for Customer. To the extent that any of the Deliverables do not constitute a “work made for hire”, Service Provider hereby irrevocably assigns, and shall cause the Service Provider Personnel to irrevocably assign to Customer, in each case without additional consideration, all right, title and interest throughout the world in and to the Deliverables, including all Intellectual Property Rights therein. The Service Provider shall cause the Service Provider Personnel to irrevocably waive, to the extent permitted by applicable Law, any and all claims such Service Provider Personnel may now or hereafter have in any jurisdiction to so-called “moral rights” or rights of droit moral with respect to the Deliverables.

8.2 Upon the [reasonable] request of Customer, Service Provider shall, and shall cause the Service Provider Personnel to, promptly take such further actions, including execution and delivery of all appropriate instruments of conveyance, as may be necessary to assist Customer to prosecute, register, perfect or record its rights in or to any Deliverables.

8.3 [Service Provider and its licensors are, and shall remain, the sole and exclusive owners of all right, title and interest in and to the Pre-Existing Materials, including all Intellectual Property Rights therein. Service Provider hereby grants Customer [and the Authorized Service Recipients] a [limited, irrevocable, perpetual, fully paid-up, royalty-free, non-transferable (except in accordance with Section 18.7), non-sublicenseable, worldwide] license to [use,

perform, display, execute, reproduce, distribute, transmit, modify (including to create derivative works), import, make, have made, sell, offer to sell and otherwise exploit] any Pre-Existing Materials to the extent incorporated in, combined with or otherwise necessary for the use of the Deliverables [for any and all purposes/solely to the extent reasonably required in connection with Customer's receipt or use of the Services and Deliverables]. All other rights in and to the Pre-Existing Materials are expressly reserved by Service Provider.]

8.4 Customer and its licensors are, and shall remain, the sole and exclusive owner of all right, title and interest in and to the Customer Materials, including all Intellectual Property Rights therein. Service Provider shall have no right or license to use any Customer Materials except solely during the Term of the Agreement to the extent necessary to provide the Services to Customer. All other rights in and to the Customer Materials are expressly reserved by Customer.

### DRAFTING NOTE: INTELLECTUAL PROPERTY RIGHTS; OWNERSHIP

The ownership of IP rights is often extensively negotiated by the parties. The customer, having paid for the creation of the deliverables or work product, wants outright ownership of all IP rights in or to the deliverables (by means of the short-form assignment set out in Section 8.1), while the service provider typically wants to retain ownership of any such IP rights and merely grant the customer a limited license to use them. Even if the service provider agrees to give the customer ownership of any newly created or custom deliverables, it may have incorporated its own proprietary pre-existing materials into such deliverables and so, at the very least, needs to retain ownership of the IP rights in such materials in order to be able to re-use them in providing similar services to other customers.

Where a third-party service provider creates deliverables during the course of providing services, the service provider will generally own the intellectual property rights arising out of the creation of such materials absent a written agreement to the contrary. If the customer is to own any IP rights arising out of the provision of the services or creation of any deliverables, the customer should ensure that the contract includes an express assignment provision to the customer as shown in Section 8.1, as well as copyright "work made for hire" language to ensure that ownership of any materials subject to the "work made for hire" provisions of the US Copyright Act automatically vests in the customer (17 U.S.C. § 101). For more information on copyright law generally, see Practice Note, [Copyright: Overview \(2-505-5835\)](#).

Provisions allocating ownership of IP rights in or to the deliverables vary widely based on the circumstances of the specific transaction, including the nature of the services and deliverables being provided. Before drafting and negotiating IP ownership rights, consider:

- The nature of the deliverables (for example, deliverables can be, among other things, strategies, software, algorithms, formulas, designs, reports, manuals, audiovisual materials, video, photographs, and marketing materials) as well as the type of IP rights that might arise from the creation of, or may be necessary to use and exploit, such items (for example, patent, copyright, trade secret or trademark rights). For a discussion of the types of IP rights arising under US law, see Practice Note, [Intellectual Property Rights: Overview \(8-383-4565\)](#).
- The facts surrounding the particular services. If, for example, the services are unique services specifically developed for the customer, it is more likely that the customer will want outright ownership of all IP rights in or to any deliverables (which may result in higher fees charged by the service provider). If, on the other hand, the services and resulting deliverables tend to be largely the same from customer to customer, it may make more sense for the service provider to retain ownership of any IP rights in any deliverables (other than any confidential information of the customer or customer materials incorporated in such deliverables).

- Each party's anticipated future use of the deliverables. The customer will generally require that it owns all IP rights in deliverables that are core to its business, for example, deliverables that are essential to the customer's critical business functions, may give it a competitive advantage or are incorporated into the customer's own products or services that are then further distributed to its customers or end users.
- This professional services agreement is drafted on the assumption that the customer will own any IP rights specifically arising out of the provision of the services or creation of any deliverables pursuant to the short-form assignment in Section 8.1. The optional language in brackets in Section 8.1 and Section 8.3, however, carves out any pre-existing materials of the service provider from the grant of ownership to customer. Such pre-existing materials are instead licensed to the customer on a non-exclusive basis to the extent necessary to use and exploit the deliverables.

#### **OWNERSHIP OF DELIVERABLES BY CUSTOMER**

Both parties should closely review the following:

- The definition of Deliverables (see Section 1) and the definition of Pre-Existing Materials (see Section 1). These two definitions must be reviewed in conjunction with each other by each party to ensure that they cover or exclude, as applicable, the appropriate items.
- The terms and conditions of any license grant to the customer to use any pre-existing materials of the service provider that may be incorporated into the deliverables. The license grant should expressly identify:
  - All licensees. Consider whether entities or individuals in addition to the customer should be identified as licensees (including if applicable, any Authorized Service Recipients, the customer's affiliates and their consultants and other third parties that may need the right to use such materials). Alternatively, the license could expressly allow the customer the right to sublicense these rights to any such entities.
- The term of the license. The provision should specify whether the license is perpetual or for a specific period of time, as well as whether the license is to survive the expiration or earlier termination of the agreement. If the license is to survive the expiration or termination of the agreement, ensure that the clause containing the license grant is listed in Section 13.4 as a provision that will survive expiration or earlier termination of the agreement.
- Whether the license is non-exclusive (which means that the service provider can freely use and license such rights to other third parties) or exclusive (which means that the service provider cannot itself use or license such rights to other parties).
- Whether any additional license fees or royalties apply or whether the license is considered fully paid-up and royalty-free.
- Whether the licensed rights can be freely sublicensed by the customer to third parties, including, for example, to any Authorized Service Recipients, the customer's affiliates and their consultants (in each case if such entities and individuals are not identified expressly as licensees), as well as other third parties that may need the right to use such materials, in particular, the customer's end users or customers, distributors or the customer's other service providers.
- Whether the license can be transferred by the customer to a third party or whether it is non-transferable. In particular, the customer should ensure that any restriction on transferability expressly excludes any rights the customer may have to transfer or assign the agreement pursuant to Section 18.7.
- The geographic scope of the license. IP rights are territorial in nature and must be licensed on a country-by-country basis. The customer, for example, may want to request a worldwide license so that it does not have to go back to the service provider each time it wants to use or otherwise exploit the

deliverables in a new territory. The service provider, on the other hand, should ensure that, if it does grant a license for non-US jurisdictions, any indemnity for intellectual property infringement agreed to by the service provider in Section 11.2(c) is limited to claims arising out of activity only in those countries for which the service provider is comfortable assuming the risk of infringement.

- Any limitations on the scope of use or other restrictions. The customer will normally request a broad license to use and exploit any pre-existing materials incorporated into the deliverables. The service provider, on the other hand, should ensure that the scope of use is appropriately restricted.

#### **OWNERSHIP OF DELIVERABLES BY SERVICE PROVIDER**

Where the service provider retains all ownership rights in the deliverables and instead grants the customer a limited, non-exclusive license to use the deliverables, delete Section 8.1, Section 8.2 and Section 8.3 and replace with the following alternate clause:

“As between Customer and Service Provider, all Intellectual Property Rights and all other rights in and to the Deliverables (except for

any Confidential Information of Customer or Customer Materials) and the Pre-existing Materials shall be owned by Service Provider. Service Provider hereby grants Customer [and the Authorized Service Recipients] a license to use all such rights [free of additional charge and on a non-exclusive, worldwide, royalty-free and perpetual] basis] to the extent necessary to enable the Customer [and the Authorized Service Recipients] to make reasonable use of the Deliverables and the Services.”

#### **Customer**

Where any or all of the IP rights in the deliverables instead are to be owned by the service provider and only licensed to the customer, closely review the terms of the license grant and revise as necessary to ensure that the customer has the rights it needs in order to use and exploit the deliverables. For a discussion of the specific license terms and conditions to consider, see Drafting Note, Ownership of Deliverables by Customer above.

The customer should also ensure that any grant of ownership rights to the service provider expressly excludes all confidential information of the customer and customer materials that may be incorporated into the deliverables.

## 9. Confidential Information.

### 9.1 The Receiving Party agrees:

(a) not to disclose or otherwise make available Confidential Information of the Disclosing Party to any third party without the prior written consent of the Disclosing Party; *provided, however*, that the Receiving Party may disclose the Confidential Information of the Disclosing Party to its [and its Affiliates, and their] officers, employees, consultants and legal advisors who have a “need to know”, who have been apprised of this restriction and who are themselves bound by nondisclosure obligations at least as restrictive as those set forth in this Section 9;

(b) to safeguard the Confidential Information from unauthorized use, access, or disclosure using at least the degree of care it uses to protect its most sensitive information and no less than a reasonable degree of care;

(c) to use the Confidential Information of the Disclosing Party only for the purposes of performing its obligations under the Agreement or, in the case of Customer, to make use of the Services and Deliverables; and

(d) to [immediately/promptly] notify the Disclosing Party in the event it becomes aware of any loss or disclosure of any of the Confidential Information of Disclosing Party.



9.2 If the Receiving Party becomes legally compelled to disclose any Confidential Information, the Receiving Party shall provide:

- (a) prompt written notice of such requirement so that the Disclosing Party may seek, at its sole cost and expense, a protective order or other remedy; and
- (b) reasonable assistance, at the Disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure.

If, after providing such notice and assistance as required herein, the Receiving Party remains required by Law to disclose any Confidential Information, the Receiving Party shall disclose no more than that portion of the Confidential Information which, on the advice of the Receiving Party's legal counsel, the Receiving Party is legally required to disclose [and, upon the Disclosing Party's request, shall use commercially reasonable efforts to obtain assurances from the applicable court or agency that such Confidential Information will be afforded confidential treatment].

9.3 [Nothing in this Agreement shall prevent either party from using any general methodologies or know-how contained in the unaided memory of such party's personnel [or those of its Affiliates] developed or disclosed under this Agreement, provided that in doing so it is not in breach of its obligations of confidentiality under this Section or using any Intellectual Property Rights of the other party [or any of its Affiliates].]

#### DRAFTING NOTE: CONFIDENTIAL INFORMATION

The term "Confidential Information" is defined in Section 1. This section sets out the minimum confidentiality obligations of the parties. It places a general obligation on each party to respect the confidentiality of information supplied to it by the other party. It also requires each party to create and enforce equivalent confidentiality provisions against such party's affiliates, and their employees, contractors and other representatives. This section also requires each party to protect the confidential information from unauthorized disclosure using the same degree of care it uses to protect its own most sensitive information (and using no less than a reasonable degree of care).

The confidentiality obligations in this Section 9 are included in the general list of obligations that survive expiration or termination of the agreement in Section 13.4. If, however, the parties intend for the confidential obligations to only survive for a specified period after expiration or termination of the agreement, add the following language as a separate clause in this section:

Each party's obligations under this Section 9 will survive termination or expiration of this Agreement for a period of [ten] years, except

for Confidential Information that constitutes a trade secret under any applicable Law, in which case, such obligations shall survive for as long as such Confidential Information remains a trade secret under such Law.

As noted in the drafting note to Section 1, some confidential information may rise to the level of a trade secret and receive protection under state or federal law, although still included in the general list of obligations under this agreement. For information on trade secrets, see Practice Note, Confidentiality and Nondisclosure Agreements (TX): Trade Secrets ([W-007-0568](#)) and State Q&A: Trade Secret Laws: Texas ([4-506-3556](#)).

If the confidential information contains trade secrets, the company may want to position itself to take advantage of additional rights and protection available under the Defend Trade Secrets Act of 2016 (DTSA) by adding notification language consistent with the act if the service provider falls within the DTSA's definition of employee. For further discussion and examples of the prescribed language, see Standard Clause, General Contract Clauses: Confidentiality Agreement Clauses After the Defend Trade Secrets Act ([W-002-9194](#)) and Article, Expert Q&A

on the Defend Trade Secrets Act and its Impact on Employers: Review and Revise Agreements Regarding Trade Secrets and Confidential Information ([W-002-2128](#)).

For more information on confidentiality, see Confidentiality and Nondisclosure Agreements Toolkit ([3-502-1883](#)). For more information on drafting and negotiating confidentiality provisions in Texas, see:

- Practice Note, Confidentiality and Nondisclosure Agreements (TX) ([W-007-0568](#)).

- Standard Documents, Confidentiality Agreement: General (Short Form, Mutual) (TX) ([W-001-7617](#)) and Confidentiality Agreement: General (Short Form, Unilateral, Pro-Discloser) (TX) ([W-012-7735](#)).
- Standard Clauses, General Contract Clauses: Confidentiality (Long Form) (TX) ([W-000-0595](#)) and (Short Form) (TX) ([W-000-0596](#)).

## 10. Representations and Warranties.

### DRAFTING NOTE: REPRESENTATIONS AND WARRANTIES

Representations are statements of fact and warranties are statements of future assurances made by the parties that often are extensively negotiated. These are statements that allocate risk between the parties where the representation turns out to be false or the warranty is breached, including by:

- Permitting a party to sue for damages for breach of contract.
- Potentially serving as the foundation for an indemnification claim (for example, see Section 11.1(b)).
- Affecting a party's right to terminate the agreement (for example, see Section 13.2).

The representations and warranties included in a particular professional services agreement depend on the nature of the particular services as well as the respective bargaining power and risk tolerance of each party. Additionally, because changes to the scope of representations and warranties may affect the scope of indemnification and limitations on liability provisions (see Section 12), these provisions should always be reviewed in conjunction with one another to ensure that a change to one section does not create an unintentional, potentially adverse consequence in another.

For more information on representations and warranties generally, see Practice Note, Representations, Warranties, Covenants, Rights, and Conditions ([9-519-8869](#)) and Standard Clauses, General Contract Clause: Representations and Warranties ([6-611-7326](#)).

### SERVICE PROVIDER

The service provider's representations and warranties are typically more extensive than the those given by the customer because the service provider has more specific obligations under the agreement, while the customer's principal obligation typically is to pay fees. It is in the service provider's best interest to minimize the number and scope of any representations and warranties it agrees to give as well as to limit the available remedies in the case of breach.

In the event the service provider cannot exclude certain representations and warranties altogether, consider trying to negotiate a more reasonable allocation of risk by modifying the representations and warranties, where appropriate by including:

- Materiality qualifiers.
- Knowledge qualifiers.
- Limitations as to scope.
- Limitations as to time.

10.1 Each party represents and warrants to the other party that:

- (a) it is duly organized, validly existing and in good standing as a corporation or other entity as represented herein under the laws and regulations of its jurisdiction of incorporation, organization or chartering;
- (b) it has the full right, power and authority to enter into this Agreement, to grant the rights and licenses granted hereunder and to perform its obligations hereunder;
- (c) the execution of this Agreement by its representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate action of the party; and
- (d) when executed and delivered by such party, this Agreement will constitute the legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms.

#### DRAFTING NOTE: MUTUAL REPRESENTATIONS AND WARRANTIES

The mutual representations and warranties in Section 10.1 relate to each party's corporate and legal authority as well as other corporate formalities and are not

typically controversial. For more information, see Standard Clauses, General Contract Clauses: Representations and Warranties ([6-611-7326](#)).

10.2 Service Provider represents and warrants to Customer that:

- (a) it shall perform the Services using personnel of required skill, experience and qualifications and in a professional and workmanlike manner in accordance with [best/ generally recognized/commercially reasonable] industry standards for similar services and shall devote adequate resources to meet its obligations under this Agreement;

#### DRAFTING NOTE: PROFESSIONAL AND WORKMANLIKE MANNER

The Texas Supreme Court has defined "workmanlike" as that quality of work both performed:

- By one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation.
- In a manner generally considered proficient by those capable of judging such work.

(*Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987); see also, 2017 WL 2507841, at \*4 (Tex. App.—Waco June 7, 2017, no pet.)

#### CUSTOMER

This is a customary warranty that customer should insist on including in the agreement. While not the case in Texas, courts in some states have found this warranty implied

in services agreements where it was not expressly included. However, because this may not be the case in all jurisdictions, the customer should always require that this warranty be expressly included in the agreement.

#### SERVICE PROVIDER

Section 10.2(a) is a reasonable and customary warranty for the service provider to give. The service provider should, however, resist agreeing to perform the services in accordance with "best" industry standards and instead agree to perform in accordance with "generally recognized" or "commercially reasonable" industry standards. For more information, see Practice Note, Efforts Provisions in Commercial Contracts: Best Efforts, Reasonable Efforts, and Commercially Reasonable Efforts ([7-518-0907](#)).

(b) it is in compliance with, and shall perform the Services in compliance with, all applicable Laws;

#### DRAFTING NOTE: COMPLIANCE WITH LAWS

##### CUSTOMER

The customer should insist on including a representation and warranty that the service provider is in compliance with, and will perform all services in accordance with, applicable law.

##### SERVICE PROVIDER

It is not unreasonable for the customer to ask for a warranty that the service provider

comply with applicable laws. The service provider should, however, require a reciprocal representation and warranty from the customer, particularly if the customer has any significant obligations under the agreement or if the service provider will be performing any services on the customer's premises.

For more on compliance with laws, see Standard Clause, General Contract Clauses: Compliance with Laws ([2-524-6307](#)).

(c) [Customer will receive good and valid title to all Deliverables, free and clear of all encumbrances and liens of any kind;]

#### DRAFTING NOTE: GOOD AND VALID TITLE

##### CUSTOMER

The customer should include this warranty if it is receiving an assignment of title in any deliverables.

##### SERVICE PROVIDER

The service provider should, if possible, avoid giving this warranty. If the service

provider is not giving an express warranty of title, ensure that any implied warranty of title is also specifically disclaimed in Section 10.3.

(d) (i) [to Service Provider's knowledge] none of the Services, Deliverables and Customer's use thereof infringe or will infringe any [Intellectual Property Right/registered or issued patent, copyright or trademark] of any third party [arising under the Law of the United States/IDENTIFY SPECIFIC JURISDICTIONS], and, (ii) as of the date hereof, there are no pending or, to Service Provider's knowledge, threatened claims, litigation or other proceedings pending against Service Provider by any third party based on an alleged violation of such Intellectual Property Rights, in each case, excluding any infringement or claim, litigation or other proceedings to the extent arising out of (x) any Customer Materials or any instruction, information, designs, specifications or other materials provided by Customer to Service Provider, (y) use of the Deliverables in combination with any materials or equipment not supplied or specified by Service Provider, if the infringement would have been avoided by the use of the Deliverables not so combined, and (z) any modifications or changes made to the Deliverables by or on behalf of any Person other than Service Provider. [Service Provider's sole liability and Customer's sole and exclusive remedy for Service Provider's breach of this Section 10.2(d) are Service Provider's obligations under Section 11.2];

**DRAFTING NOTE: NO INFRINGEMENT****CUSTOMER**

The customer should insist on a warranty from the service provider that neither the receipt nor use of the services or deliverables will infringe the intellectual property rights of a third party. A service provider in a strong position, however, will often refuse to give a non-infringement warranty altogether or otherwise require that the customer's sole and exclusive remedy for a breach of any non-infringement warranty is limited to the service provider's indemnification obligations for infringement claims.

The customer should be aware that, if it does agree to omit a non-infringement warranty or limits its remedies for breach of a non-infringement warranty to the service provider's indemnification obligations, if the customer or service provider is subject to a claim of infringement, or if customer becomes aware of an infringement (even if no claim by a third party has been made), the customer:

- Will not be able declare breach of contract based on the breach of a non-infringement warranty and sue the service provider for direct damages caused by such breach.
- Will not be able to terminate the agreement for breach of the non-infringement warranty pursuant to Section 13.2(a) if the service provider fails to cure such infringement.

**SERVICE PROVIDER**

In a pro-service provider agreement, delete this warranty if possible. Otherwise,

consider limiting its scope by including one or more of the bracketed phrases shown in Section 10.2(d) for example, by:

- Adding a knowledge qualifier, at least with respect to patent infringement, which, unlike copyright infringement claims or trade secret misappropriation claims, does not require knowledge or willful misconduct as an element of a claim. Patent infringement claims also can be extremely expensive to defend and may result in significant damages. With a knowledge qualifier, the warranty would only be breached if the service provider had actual or constructive knowledge of an actual or alleged infringement and did not inform the customer.
- Limiting the territory of the warranty to the United States or such other specific jurisdictions as the parties may agree so that the service provider can better manage its risk.
- Providing a warranty only with respect to registered intellectual property.
- Providing only a limited warranty for which the sole and exclusive remedy for breach is the service provider's indemnification obligation for infringement claims (for example, see Section 11.2).

The service provider should consider requesting a reciprocal non-infringement representation and warranty from the customer if the service provider will be using materials provided by the customer in connection with the performance of the services.

(e) [the Services and Deliverables will be in conformity in all [material] respects with all requirements or specifications stated in this Agreement and the [applicable] Statement of Work [for a period of [30] days after [delivery to/acceptance by] Customer]. [In the event of Service Provider's breach of the foregoing warranty, Service Provider's sole and exclusive obligation and liability and Customer's sole and exclusive remedy shall be as follows:

(i) The Service Provider shall use reasonable efforts to cure such breach; provided, that if Service Provider cannot cure such breach within a reasonable time (but no more than [30] days) after Customer's written notice of such breach; Customer may, at its option, terminate the Agreement by serving written notice of termination in accordance with Section 18.4.

(ii) In the event the Agreement is terminated in accordance with this Section 10.2(e), Service Provider shall within [30] days after the effective date of termination, refund to Customer any fees paid by the Customer as of the date of termination for such Service

or Deliverable [less a deduction equal to the fees for receipt or use of such Deliverables or Service up to and including the date of termination on a pro-rated basis].

(iii) The foregoing remedy shall not be available unless Customer provides written notice of such breach within [30] days after [delivery/acceptance] of such Service or Deliverable [to/by] Customer or with respect to changes made by any Person other than Service Provider or at Service Provider's direction.]

### DRAFTING NOTE: CONFORMANCE WITH SPECIFICATIONS

#### CUSTOMER

The customer should include this warranty in the event the services or deliverables must meet technical specifications or other requirements. In a pro-customer agreement, the customer leaves Section 10.2(e) as drafted above without including the language in brackets.

#### SERVICE PROVIDER

The service provider, on the other hand, should include the language shown in brackets in Section 10.2(e) so that:

- The warranty is limited in duration and to material non-conformities only. The bracketed language contemplates a

30-day warranty that can be modified to start either on the date of delivery of the relevant services or deliverables to the customer or the customer's acceptance of the relevant services or deliverables. The service provider should ensure that the applicable SOW clearly defines what "delivery" or "acceptance" means for purposes of the warranty and other relevant provisions of the service agreement (see also Section 2.2).

- The customer's sole and exclusive remedy for breach of the warranty is repair or re-performance of the faulty service or deliverable, with the right for the customer to terminate the agreement and receive a refund for any fees paid for the service or deliverable at issue.

(f) [[ADDITIONAL REPRESENTATIONS AND WARRANTIES]]

### DRAFTING NOTE: ADDITIONAL REPRESENTATIONS AND WARRANTIES

#### CUSTOMER

The customer should consider whether any additional representations and warranties are required by any applicable laws or regulations or are otherwise necessary or desirable based on the type of services being provided or the customer's industry. Additionally, if any software is being provided, whether assigned or licensed to customer, consider including warranties specifying that such software will not include any viruses or other harmful code or disabling mechanisms or any open-source software. For example:

"The Deliverables [and the Pre-Existing Materials] shall not contain:  
(i) any virus, Trojan horse, worm, backdoor or other software or hardware devices the effect of which

is to permit unauthorized access or to disable, erase, or otherwise harm any computer, systems or software, or (ii) any time bomb, drop dead device or other software or hardware device designed to disable a computer program automatically with the passage of time or under the positive control of a Person other than an authorized licensee or owner of a copy of the program or the right and title in and to the program."

"The Deliverables [and the Pre-Existing Materials] shall not contain any shareware or open source code[, or other software which could require disclosure or licensing to any third party of any source code with which such software is used or compiled.]"

10.3 EXCEPT FOR THE EXPRESS WARRANTIES IN THIS [AGREEMENT/Section 10], (A) EACH PARTY HEREBY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE UNDER THIS AGREEMENT, AND (B) SERVICE PROVIDER SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, [AND] FITNESS FOR A PARTICULAR PURPOSE, [TITLE AND NON-INFRINGEMENT].

### DRAFTING NOTE: DISCLAIMER OF WARRANTIES

An express disclaimer of implied warranties is included in almost all contracts for the provision of services, which serves to:

- Generally disclaim any warranties not expressly made in the agreement.
- Specifically disclaim the four warranties (that is, merchantability, fitness for a particular purpose, title and non-infringement) that could be implied under Article 2 of the UCC (Tex. Bus. & Com. Code Ann. §§ 2.312 to 2.315). Although Article 2 of the UCC generally applies only to the sale of goods, some courts may under certain circumstances look to Article 2 principles to apply to services contracts. Where a contract involves both a sale of goods and services, courts apply UCC Article 2 if the sale of goods is either a dominant factor or the essence of the transaction (*Texas Development Co. v. Exxon Mobil Corp.*, 119 S.W.3d 875, 881 (Tex. App.—Eastland 2003, no pet.)). For a discussion of implied warranties under Article 2 of the UCC in Texas, see Practice Note, UCC Article 2 Implied Warranties (TX) ([W-000-8871](#)).

#### CUSTOMER

An express disclaimer of implied warranties (and particularly the implied warranties of merchantability and fitness for a particular purpose) is often included by the service provider in contracts for the provision of services unless the customer is in a particularly strong negotiating position compared to the service provider. For more information, see Practice Note, UCC Article 2 Implied Warranties (TX): Implied Warranty of Merchantability ([W-000-8871](#)) and Implied Warranty of Fitness for a Particular Purpose ([W-000-8871](#)).

If such disclaimer is acceptable in the context of the transaction, customer should carefully review it to ensure that:

- The disclaimer does not limit the service provider's express warranties to those specified in Section 10.1 and Section 10.2 because other sections of the agreement may include warranties made by the service provider.
- The disclaimer is mutual where appropriate.

#### SERVICE PROVIDER

Because any statement of assurance made by the service provider (whether in the agreement, in its response to the customer's request for proposal or in discussions with the customer) might be construed by a court to be a warranty, the service provider should draft the disclaimer broadly enough to disclaim any express warranties other than those stated in Section 10.1 and Section 10.2. For a discussion on disclaiming express warranties under Article 2 of the UCC in Texas, see Practice Note, UCC Article 2 Express Warranties (TX) ([W-001-4747](#)).

The service provider should also ensure that the disclaimer complies with Article 2 of the UCC and common law contract principal requirements, including:

- Specifically disclaiming the implied warranties of merchantability, fitness for a particular purpose, title, and non-infringement.
- Making the disclaimer conspicuous by drafting in all capital letters or in bold to set it off from surrounding text (*Cate v. Dover Corp.*, 790 S.W.2d 559, 560 (Tex. 1990, no pet.) and *Womco, Inc. v. Navistar Intern. Corp.*, 84 S.W.3d 272, 279 (Tex. App.—Tyler 2002, no pet.)).



## 11. Indemnification.

**DRAFTING NOTE: INDEMNIFICATION**

The indemnification provisions are typically heavily negotiated. Particular words, for example, “indemnify” and “hold harmless,” may have different meanings depending on the jurisdiction (see Practice Note, Indemnification Clauses in Commercial Contracts (TX): Indemnification Versus Hold Harmless Provisions) ([W-004-5777](#)). Indemnification provisions allocate the risk of losses between the parties, whether they are losses arising out of a breach of a representation, warranty, or covenant or a specific liability. The indemnification provisions should be read in conjunction with the representations, warranties and covenants as well as the limitations on liability to determine the full scope of what is covered.

For more information on indemnification generally in Texas, see:

- Practice Note, Indemnification Clauses in Commercial Contracts (TX) ([W-004-5777](#)).
- Drafting and Negotiating an Indemnification Clause Checklist ([2-618-5303](#)).
- Standard Clauses, General Contract Clauses: Indemnification (TX) ([W-000-0637](#)).

For more information on the interplay between indemnification and other contractual remedies, see Interaction Between Indemnification and Other

Contractual Remedy Provisions Checklist ([9-619-5346](#)).

In Texas, an indemnity agreement that releases a party in advance for its own negligence must meet the fair notice requirements of both:

- **Conspicuousness.** The release must be written in such a manner that a reasonable person against whom it is to operate should have seen it. In other words, an agreement’s release provisions must attract the attention of a reasonable person by its distinctiveness with respect to the other language in the agreement. For example, language will be considered conspicuous if it is in:
  - capital letters;
  - bold type;
  - contrasting font color; and
  - larger size font.
- (See *Dresser Indus. Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509-11 (Tex. 1993); see also *Reyes v. Storage & Processors, Inc.*, 86 S.W.3d 344 (Tex. App.—Texarkana 2002) aff’d 134 S.W.3d 190 (Tex. 2004)).
- **The Express Negligence Test.** The party’s intent to be released from the consequences of its own negligence must be expressed clearly and unambiguously within the four corners of the release document (*Dresser Indus.*, 853 S.W.2d at 507-09).

11.1 Service Provider shall defend, indemnify and hold harmless Customer [and Customer’s Affiliates/Authorized Service Recipients] and [its/their] managers, officers, directors, [shareholders,] [partners,] [members,] employees, agents, successors, and permitted assigns (each, a “**Customer Indemnitee**”) from and against all Losses [awarded against a Customer Indemnitee in a final judgment] [arising out of or resulting from any third-party claim, suit, action or proceeding (each, an “**Action**”) ] arising out of or resulting from:

- (a) bodily injury, death of any person or damage to real or tangible, personal property resulting from the willful, fraudulent or [grossly] negligent acts or omissions of Service Provider or Service Provider Personnel; and
- (b) Service Provider’s [material] breach of any representation, warranty or obligation of Service Provider set forth in [this Agreement/in Section 10.1 or Section 10.2 of this Agreement].



**DRAFTING NOTE: GENERAL INDEMNIFICATION BY SERVICE PROVIDER****CUSTOMER**

The customer should, in addition to the indemnification of intellectual property infringement claims in Section 11.2, require the service provider to indemnify and defend the customer against any third-party claims arising out of:

- Bodily injury, death, or personal property damages caused by the service provider's negligent or willful acts or omissions. This indemnification is particularly important if the service provider will be performing the services on the customer's premises. Some jurisdictions allow parties to be indemnified from its own gross negligence. Often, these jurisdictions allow indemnification from gross negligence when the indemnification is between sophisticated parties. In Texas, for example, courts have held that the indemnification from gross negligence did not "offend public policy" when both the contractor and owner were "sophisticated parties" (*Valero Energy Corp. v. M.W. Kellogg Constr. Co.*, 866 S.W.2d 252, 257-58 (Tex. App.—Corpus Christi 1993, writ denied)).
- The service provider's breach of its representations, warranties and obligations under the agreement.
- A service provider will typically agree to indemnify the customer for bodily injury and damage to tangible property but will likely resist agreeing to broadly indemnify the customer for claims arising out of any breach of representations, warranties, and obligations under the agreement or even just the specific representations and

warranties in Section 10, particularly if the indemnification obligations are not subject to contractual limitations on the service provider's liability (for example, see Section 12).

The customer should ensure that the service provider's obligation to indemnify is not limited to paying only those losses relating to a final, non-appealable judgment, which would exclude any losses at the trial court level.

Also consider whether the indemnity should be extended for the benefit of any Authorized Service Recipients. Similarly, based on the customer's needs and the balance of bargaining power, the customer may want to include partners, members, or shareholders, or all three (including all three may be preferable for the customer to take into account a future reorganization). If any third parties other than the customer are included in the indemnity, be sure to expressly identify them as third-party beneficiaries under Section 18.8 for the purpose of the indemnification in Section 11.

**SERVICE PROVIDER**

The service provider should resist agreeing to indemnify the customer for third party claims arising out of any breach by the service provider of the agreement, particularly if the parties' indemnification obligations are listed as an exception to the contractual exclusions and caps on liability in Section 12.

11.2 Service Provider shall defend, indemnify and hold harmless the Customer Indemnitees from and against all Losses [awarded against a Customer Indemnitee in a final judgment] based on a claim that any of the Services or Deliverables or Customer's receipt or use thereof infringes any Intellectual Property Right of a third party [arising under the Laws of the United States] [; provided, however, that Service Provider shall have no obligations under this Section 11.2 with respect to claims to the extent arising out of:

- (a) any Customer Materials or any instruction, information, designs, specifications or other materials provided by Customer in writing to Service Provider;
- (b) use of the Deliverables in combination with any materials or equipment not supplied to Customer or specified by Service Provider in writing, if the infringement would have been avoided by the use of the Deliverables not so combined; or
- (c) any modifications or changes made to the Deliverables by or on behalf of any Person other than Service Provider or Service Provider Personnel].

**DRAFTING NOTE: INFRINGEMENT INDEMNIFICATION BY SERVICE PROVIDER**

Section 11.2 requires the service provider to indemnify the customer for intellectual property infringement claims brought by third parties arising out of the receipt or use of the services or deliverables.

**CUSTOMER**

For a pro-customer agreement, Customer should not include the bracketed language in Section 11.2.

The customer should ensure that the service provider's indemnification obligation for infringement claims:

- Is not limited to costs and damages relating to only the final judgment (which would exclude damages awarded against the customer at the trial level).
- Covers all territories in which the customer plans to receive the services or use any deliverables.
- Covers claims for infringement of all IP rights (for example, patents, copyrights, trade secrets and trademark rights)

relevant to the type of deliverables created under the agreement.

**SERVICE PROVIDER**

Section 11.2(a) through Section 11.2(c) includes bracketed language with exceptions to the indemnity for potential liabilities that are not reasonably within the service provider's control (for example, if the infringement arises out of materials provided by the customer).

The service provider should try to limit the scope of its indemnification obligations to:

- claims arising under US law, or other specific jurisdictions for which the service provider is willing to indemnify the customer.
- awards of damages resulting from final (non-appealable) judgments only.

If the customer is providing materials or equipment for use by the service provider in performing the services, the service provider should consider asking customer for a reciprocal infringement indemnity.

11.3 Customer shall defend, indemnify and hold harmless Service Provider [and Service Provider's Affiliates] and [its/their] officers, directors, employees, agents, successors and permitted assigns from and against all Losses [awarded against Service Provider in a final judgment] [arising out of or resulting from any third-party Action] arising out of or resulting from:

- (a) bodily injury, death of any person or damage to real or tangible, personal property resulting from the [grossly] negligent or willful acts or omissions of Customer; and
- (b) Customer's [material] breach of any [representation, warranty or obligation of Customer in this Agreement/representation or warranty set forth in Section 10.1 of this Agreement].

**DRAFTING NOTE: CUSTOMER INDEMNIFICATION OF SERVICE PROVIDER****CUSTOMER**

In a pro-customer agreement, the customer should not include Section 11.3. If the customer, however, is requesting extensive indemnification obligations from the

service provider, it is not unreasonable for the service provider to ask the customer to agree to certain reciprocal indemnification obligations.

11.4 The party seeking indemnification hereunder shall promptly notify the indemnifying party in writing of any Action and cooperate with the indemnifying party at the indemnifying party's sole cost and expense. The indemnifying party shall immediately take control of the defense and investigation of such Action and shall employ counsel of its choice to handle and defend the same, at the indemnifying party's sole cost and expense. [The indemnifying party shall not settle any Action in a manner that adversely affects the rights of the indemnified party without the indemnified party's prior written consent[, which shall not be unreasonably withheld or delayed].] The indemnified party's failure to perform any obligations under this Section 11.4 shall not relieve the indemnifying party of its obligations under this Section 11.4 except to the extent that the indemnifying party can demonstrate that it has been materially prejudiced as a result of such failure. The indemnified party may participate in and observe the proceedings at its own cost and expense.

#### DRAFTING NOTE: INDEMNIFICATION PROCEDURES

The indemnifying party should include a provision which gives it control over the defense of third party claims for which it is to indemnify the other party and that

ensures that the indemnified party gives the indemnifying party prompt written notice of any claim and provides reasonable cooperation at the indemnifying party's cost.

## 12. LIMITATION OF LIABILITY.

#### DRAFTING NOTE: LIMITATION OF LIABILITY

The limitation of liability provision is another important risk allocation provision that is often extensively negotiated by the parties. Service providers will almost always include a limitation of liability provision in some form in the contract, seeking to limit their liability for damages (including direct damages as well as consequential, incidental and other special or indirect damages) in connection with any claims the customer might have arising out of or relating to the contract or services, including breach of contract or tort claims. For more information, see Practice Note, Risk Allocation in Commercial Contracts (4-519-5496) and Standard Clauses, General Contract Clauses: Limitation of Liability (TX) (W-000-0751).

#### CUSTOMER

The customer will normally prefer not to include a limitation of liability provision in the contract so that the full range of damages permitted under law are available for claims it may have against the service provider in connection with the agreement. Except for certain transactions where the customer is in a particularly strong bargaining position, however, most sophisticated

service providers are able to insist on some contractual limitation of liability. If putting forward the initial draft of the agreement, the customer may want to consider whether to leave out a limitation of liability provision entirely or to include a reasonable clause rather than wait until the service provider insists on including its own version.

The customer should ensure that:

- Any limitation of liability provisions are made mutual so that the customer's liability is limited as well (if the service provider is offering up the first draft of the contract, the limitations are often one-sided in favor of the service provider).
- Any limitation of liability provisions are subject to appropriate exceptions that are expressly stated (for example, see the exceptions listed in Section 12.3).
- Any monetary caps on damages are set high enough to provide the service provider with a sufficient incentive to avoid liability.

#### SERVICE PROVIDER

The service provider should always insist on a contractual limitation of liability. Without

contractual limitations it could subject itself to unlimited liability, a “bet the business” proposition that may be greatly out of proportion to the fees it is receiving from the customer for the services. However, in drafting the provision, the service provider should keep in mind that limitations of liability are typically construed against the person seeking to rely on them (in this case, the service provider), and a court may impose a test of reasonableness on such

limitations (see *Mansfield Heliflight, Inc. v. Bell/Agusta Aerospace Co., LLC*, 507 F. Supp. 2d 638, 645-46 (N.D. Tex. 2007)).

If the exclusions are overly broad (for example, excluding all liability) or the liability cap is too low (for example, significantly below the contract price), a court may find the provision unconscionable (and therefore unenforceable), leaving the service provider potentially fully liable for all damages.

12.1 EXCEPT AS OTHERWISE PROVIDED IN SECTION 12.3, IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER OR TO ANY THIRD PARTY FOR ANY LOSS OF USE, REVENUE OR PROFIT [OR LOSS OF DATA] OR FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL OR PUNITIVE DAMAGES WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGE WAS FORESEEABLE AND WHETHER OR NOT SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

#### DRAFTING NOTE: EXCLUSION OF CONSEQUENTIAL AND OTHER INDIRECT DAMAGES

Section 12.1 expressly excludes all consequential, incidental or special damages as well as any other types of indirect damages, subject to certain exceptions specified in Section 12.3. If an exclusion of consequential and other indirect damages is included, the parties must closely review and agree on the list

of damages or losses being excluded and modify as appropriate.

For more on consequential and other indirect damages, see Practice Note, Damages for Breach of Commercial Contracts (TX): Consequential or Special Damages ([W-015-3517](#)).

12.2 EXCEPT AS OTHERWISE PROVIDED IN SECTION 12.3, IN NO EVENT WILL EITHER PARTY’S LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED [TWO (2) TIMES] THE AGGREGATE AMOUNTS PAID OR PAYABLE TO SERVICE PROVIDER [PURSUANT TO THIS AGREEMENT/PURSUANT TO THE APPLICABLE STATEMENT OF WORK/IN THE [NUMBER OF YEARS/MONTHS] PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM].

#### DRAFTING NOTE: CAP ON MONETARY LIABILITY

Section 12.2 limits each party’s total monetary liability for claims arising out of or relating to the contract to a fixed amount,

often the contract price or a multiple thereof, subject to any exceptions set out in Section 12.3.

12.3 [The exclusions and limitations in Section 12.1 and Section 12.2 shall not apply to:

- (a) damages or other liabilities arising out of or relating to a party's failure to comply with its obligations under Section 8 (Intellectual Property Rights; Ownership);
- (b) damages or other liabilities arising out of or relating to a party's failure to comply with its obligations under Section 9 (Confidentiality);
- (c) a party's indemnification obligations under Section 11 (Indemnification);
- (d) damages or other liabilities arising out of or relating to a party's gross negligence, willful misconduct or intentional acts;
- (e) death or bodily injury or damage to real or tangible personal property resulting from a party's negligent acts or omissions;
- (f) damages or liabilities to the extent covered by a party's insurance; and
- (g) a party's obligation to pay attorneys' fees and court costs in accordance with Section 18.5.]

#### DRAFTING NOTE: EXCEPTIONS TO LIMITATIONS OF LIABILITY

Exceptions to the contractual limitations of liability are often heavily negotiated and will depend on the type of transaction and bargaining power of the respective parties. Section 12.3 sets out certain types of claims that are sometimes carved out from either or both of the exclusion of consequential and other indirect damages in Section 12.1 and the overall cap on monetary damages in Section 12.2, which include:

- Infringement by one party of the other party's IP rights.
- Breaches of a party's confidentiality obligations.
- A party's indemnification obligations.
- Damages arising out of a party's willful misconduct or gross negligence. In some (but not all) jurisdictions, including limitations on liabilities that arise out of a party's willful misconduct or gross negligence are not enforceable as against public policy. The Texas Supreme Court has not decided on the issue and decisions on this topic are generally mixed (no bright line) (see, for example, *Atlantic Richfield Company v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989)). Given

the potential unenforceability, this carve-out is not typically controversial.

- Death or personal injury or damage to real or tangible personal property arising from a party's negligence.
- Damages or liabilities to the extent covered by a party's insurance policies.
- A party's obligations to pay attorneys' fees if such provision is included in the agreement (for example, see Section 18.16)

Each party should consider the effects of carving out these categories of claims. Some alternatives to consider when drafting and negotiating limitations of liability provisions are:

- Carving out certain exceptions from the exclusion of consequential damages in Section 12.1, so that some recovery of damages is permissible, but not carving such claims out of the overall cap on monetary liability in Section 12.2.
- Agreeing to a higher overall monetary cap for certain types of claims (for example, a higher cap for claims involving an indemnification for intellectual property infringement).

### 13. Termination; Effect of Termination.

13.1 [Either party, in its sole discretion, may terminate this Agreement [or any Statement of Work], in whole or in part, at any time without cause, by providing at least [sixty (60)] days' prior written notice to the other party.]

**DRAFTING NOTE: TERMINATION WITHOUT CAUSE**

Optional Section 13.1 gives each party the right to terminate the agreement without cause, on notice (the length of which should be consistent with any provision allowing the customer to terminate the agreement as a result of fee increases (see Drafting Note, Increases in Service Provider Rates)). A mutual right to termination without cause may not be appropriate for all transactions, and in many cases, neither party will have the right to terminate for convenience

(in which case, this clause should not be included in the agreement), or only the customer will have the right to terminate without cause (in which case, revise Section 13.1 accordingly).

For more information on termination generally, see Standard Clauses, General Contract Clauses: Term and Termination (TX) ([W-001-4773](#)).

13.2 Either party may terminate this Agreement, effective upon written notice to the other party (the “**Defaulting Party**”), if the Defaulting Party:

- (a) [materially] breaches this Agreement, and such breach is incapable of cure, or with respect to a [material] breach capable of cure, the Defaulting Party does not cure such breach within [thirty (30)] days after receipt of written notice of such breach.
- (b) (i) becomes insolvent or admits its inability to pay its debts generally as they become due; (ii) becomes subject, voluntarily or involuntarily, to any proceeding under any domestic or foreign bankruptcy or insolvency law, which is not fully stayed within [seven] business days or is not dismissed or vacated within [45] days after filing; (iii) is dissolved or liquidated or takes any corporate action for such purpose; (iv) makes a general assignment for the benefit of creditors; or (v) has a receiver, trustee, custodian or similar agent appointed by order of any court of competent jurisdiction to take charge of or sell any material portion of its property or business.

**DRAFTING NOTE: TERMINATION FOR CAUSE**

Section 13.2(a) gives a party the right to terminate in the event of the other’s (material) breach of the agreement which is either incurable or is not cured within a reasonable time (30 days in this professional services agreement) after receipt of written notice.

In Texas, whether a breach is material depends on the likelihood or extent to which:

- The injured party will be deprived of the benefit it reasonably expected.
- The injured party can be adequately compensated for the deprived benefit.
- The non-performing party will suffer a forfeiture.
- The non-performing party will cure the failure.
- The non-performing party’s behavior comports with standards of good faith and fair dealing.

(*Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 199 (Tex. 2004) (citing Restatement (Second) of Contracts § 241 (1981)).)

Other factors relevant to assessing the materiality of the breach involve the extent to which:

- It reasonably appears to the injured party that delay may prevent or hinder that party in making reasonable substitute arrangements.
- The agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party’s remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important.

(Mustang Pipeline, 134 S.W.3d at 199 (citing Restatement (Second) of Contracts § 242 (1981).)

Section 13.2(b) includes a right for a party to terminate due to the other party's bankruptcy, insolvency or financial distress. Although a clause allowing a party to terminate an agreement due to the other party's bankruptcy or insolvency (also referred to as an ipso facto clause) is generally unenforceable against a debtor during bankruptcy, this clause should still be included in contracts because it can be triggered by events outside of bankruptcy (such as the inability to pay debts as they become due, or any of the other events listed in clauses (i), (iii), (iv) or (v)). Without this clause, none of these events would be grounds to terminate the agreement. Also, the clause is enforceable again once the bankruptcy case is closed, if the debtor commits a new act described in the clause.

This agreement provides that the non-breaching party can terminate the entire agreement for a breach. In some agreements, the non-breaching party may

only terminate the particular service or SOW relating to a breach. In other agreements, the non-breaching party has the option of terminating the entire agreement or only a particular service or SOW. Each party should consider its likelihood of breaching the agreement and whether it would expect to benefit from granting each party a right to terminate the entire agreement for a breach relating to only one or more individual services.

Always ensure that the provisions of this clause are consistent with those specifying the term of the agreement in Section 6.

#### **OTHER TERMINATION EVENTS**

Consider whether any other event should trigger a termination, including:

- A breach and subsequent termination of any other contract between the parties.
- A change of control of a party (for restrictions on a party's ability to assign the agreement or delegate its obligations in the event of a change of control, see Section 18.7).

13.3 Upon expiration or termination of this Agreement for any reason:

(a) Service Provider shall (i) promptly deliver to Customer all Deliverables (whether complete or incomplete) for which Customer has paid[, all Customer Equipment] and all Customer Materials, (ii) promptly remove any Service Provider Equipment located at Customer's premises, (iii) provide reasonable cooperation and assistance to Customer [upon Customer's written request and at Customer's expense ] in transitioning the Services to an alternate Service Provider, and (iv) on a pro rata basis, repay all fees and expenses paid in advance for any Services or Deliverables which have not been provided.

(b) Each party shall (i) return to the other party all documents and tangible materials (and any copies) containing, reflecting, incorporating or based on the other party's Confidential Information, (ii) permanently erase all of the other party's Confidential Information from its computer systems and (iii) certify in writing to the other party that it has complied with the requirements of this clause[; *provided, however,* that Customer may retain copies of any Confidential Information of Service Provider incorporated in the Deliverables or to the extent necessary to allow it to make full use of the Services and any Deliverables].

(c) In no event shall Customer be liable for any Service Provider Personnel termination costs arising from the expiration or termination of this Agreement.



**DRAFTING NOTE: EFFECT OF EXPIRATION OR TERMINATION**

Section 13.3 sets out the parties' obligations on expiration or earlier termination of the professional services agreement.

Consider adding further post-termination obligations, covering, for example:

- The extension of the agreement until specific obligations are completed. If appropriate for the type of services being provided, consider including an exit plan or transition services to be implemented after the expiration or termination of the agreement.
- Payment of the service provider's outstanding invoices immediately and

allowing the service provider to submit invoices for services supplied up to the date of termination.

**CUSTOMER**

If the customer is receiving a license to any Pre-Existing Materials or Deliverables owned by the Service Provider under Section 8.3 that survives expiration or termination of the agreement, include the bracketed language in Section 13.3(b) allowing the customer to retain any confidential information of service provider necessary to exercise such rights.

13.4 The rights and obligations of the parties set forth in this Section 13.4 and Section 1, Section 8, Section 9, Section 10, Section 12, Section 13.3, [Section 14,] Section 15, and Section 18, and any right or obligation of the parties in this Agreement which, by its nature, should survive termination or expiration of this Agreement, will survive any such termination or expiration of this Agreement.

14. INSURANCE.

14.1 At all times during the Term of this Agreement[ and for a period of [three] years thereafter], Service Provider shall procure and maintain, at its sole cost and expense, at least the following types and amounts of insurance coverage:

- (a) Commercial General Liability with limits no less than \$[AMOUNT] per occurrence and \$[AMOUNT] in the aggregate[ including bodily injury and property damage and products and completed operations and advertising liability], which policy will include contractual liability coverage insuring the activities of Service Provider under this Agreement;
- (b) Worker's Compensation with limits no less than the greater of (i) \$[AMOUNT], or (ii) the minimum amount required by applicable law;
- (c) Commercial Automobile Liability with limits no less than \$[AMOUNT], combined single limit; and
- (d) Errors and Omissions/Professional Liability with limits no less than \$[AMOUNT] per occurrence and \$[AMOUNT] in the aggregate.

14.2 All insurance policies required pursuant to this Section 14 shall:

- (a) be issued by insurance companies [[reasonably acceptable to Customer] [with a Best's Rating of no less than [A-VII]]];
- (b) provide that such insurance carriers give Customer at least 30 days' prior written notice of cancellation or non-renewal of policy coverage; *provided that*, prior to such cancellation, the Service Provider shall have new insurance policies in place that meet the requirements of this Section 14;
- (c) waive any right of subrogation of the insurers against the Customer [or any of its Affiliates].
- (d) provide that such insurance be primary insurance and any similar insurance in the name of and/or for the benefit of Customer shall be excess and non-contributory; and



(e) name Customer and Customer's Affiliates, including, in each case, all successors and permitted assigns, as additional insureds.

14.3 Upon the written request of Customer, Service Provider shall provide Customer with copies of the certificates of insurance and policy endorsements for all insurance coverage required by this Section 14, and shall not do anything to invalidate such insurance. This Section 14 shall not be construed in any manner as waiving, restricting or limiting the liability of either party for any obligations imposed under this Agreement (including but not limited to, any provisions requiring a party hereto to indemnify, defend and hold the other harmless under this Agreement).]

#### DRAFTING NOTE: INSURANCE

The determination of the appropriate types of insurance coverage and policy limits for a particular transaction should be made by each party in consultation with their respective risk management departments and insurance specialists. For more information on insurance generally, see Practice Note, Insurance Policies and Coverage: Overview ([9-505-056](#)).

#### CUSTOMER

The customer should ensure that the service provider maintains adequate insurance to cover its potential liabilities to the customer (as well as its other customers), including, as appropriate:

- Commercial general liability.
- Workers' compensation. For more on workers' compensation in Texas, see State Q&A: Workers' Compensation Laws: Texas.

- Commercial automobile liability.
- Professional Liability/Errors and Omissions.

#### SERVICE PROVIDER

This professional services agreement does not include a provision requiring the customer to maintain any particular insurance coverage. However, depending on the nature of the transaction the service provider should consider including a corresponding provision requiring the customer to maintain appropriate insurance coverage (for example, if the customer will be maintaining service provider equipment on the customer's premises, if the service provider personnel will be performing services on the customer's premises or if the service provider otherwise has concerns about the financial solvency of the customer).

#### 15. [NON-SOLICITATION.]

15.1 During the Term of [this Agreement/any Statement of Work] and for a period of [twelve (12) months] thereafter, neither party shall, directly or indirectly, in any manner solicit or induce for employment any person who performed any work under [this Agreement/such Statement of Work] who is then in the employment of the other party. A general advertisement or notice of a job listing or opening or other similar general publication of a job search or availability to fill employment positions, including on the internet, shall not be construed as a solicitation or inducement for the purposes of this Section 15.1, and the hiring of any such employees or independent contractor who freely responds thereto shall not be a breach of this Section 15.1.

15.2 If either Service Provider or Customer breaches Section 15.1, the breaching party shall, on demand, pay to the non-breaching party a sum equal to one year's basic salary or the annual fee that was payable by the claiming party to that employee, worker or independent contractor plus the recruitment costs incurred by the non-breaching party in replacing such person.]

**DRAFTING NOTE: NON-SOLICITATION**

The optional non-solicitation covenant in Section 15.1 is typically initially requested by the service provider because it is possible that a customer may want to hire a key service provider employee who has been responsible for providing the services to customer. However, the customer may also benefit from this non-solicitation clause. If this provision is included in the professional services agreement, it should be made mutual, and the period and scope of

restraint should be reasonable, otherwise it may not be enforceable.

Section 15.2 provides for liquidated damages in the event of a party's breach of the non-solicitation obligation.

For more information and a sample non-solicitation clause in the context of a confidentiality agreement, see Standard Clauses, Confidentiality Agreement: Non-Solicitation Clause (TX) ([W-001-6418](#)).

16. NON-EXCLUSIVITY; NON-COMPETE.

The Service Provider retains the right to perform the same or similar type of services for third parties during the Term of this Agreement[, except that, during the Term, Service Provider shall not provide services to the following direct competitors of Customer: [LIST DIRECT COMPETITORS].]

**DRAFTING NOTE: NON-EXCLUSIVITY; NON-COMPETE****CUSTOMER**

Even where a services arrangement is non-exclusive, the customer may want to include a non-compete provision that prevents the service provider from supplying the same or similar services to the customer's direct competitors and therefore risk disclosure of confidential information to a competitor or loss of a competitive advantage. However, non-competes that are unreasonable in

scope, duration, or geography may not be enforceable (see State Q&A: Non-Compete Laws: Texas) ([6-504-2412](#)).

**SERVICE PROVIDER**

Unless the parties have agreed to an exclusive arrangement, the service provider should include this optional provision to ensure that it has flexibility to perform the same or similar services for third parties.

17. Force Majeure.

17.1 No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement [(except for any obligations to make payments to the other party hereunder)], when and to the extent such failure or delay is caused by or results from acts beyond the affected party's reasonable control, including, without limitation:

- (a) acts of God;
- (b) flood, fire or explosion;
- (c) war, invasion, riot or other civil unrest;
- (d) actions, embargoes or blockades in effect on or after the date of this Agreement;
- (e) national or regional emergency;
- (f) [strikes, labor stoppages or slowdowns or other industrial disturbances;]

(g) [compliance with any law or governmental order, rule, regulation or direction, or any action taken by a governmental or public authority, including but not limited to imposing an embargo, export or import restriction, quota or other restriction or prohibition, or failing to grant a necessary license or consent;]

(h) [shortage of adequate power or telecommunications or transportation facilities; or]

(i) [any other event which is beyond the reasonable control of such party]

(each of the foregoing, a “**Force Majeure Event**”). A party whose performance is affected by a Force Majeure Event shall give notice to the other party, stating the period of time the occurrence is expected to continue and shall use diligent efforts to end the failure or delay and minimize the effects of such Force Majeure Event.

17.2 [During the Force Majeure Event, the non-affected party may similarly suspend its performance obligations until such time as the affected party resumes performance.]

17.3 [The non-affected party may terminate [this Agreement/any affected Statement of Work] if such failure or delay continues for a period of [30] days or more and, if the non-affected party is Customer, receive a refund of any amounts paid to the Service Provider in advance for the affected Services. Unless this Agreement is terminated in accordance with this Section 17.3, the Term of this Agreement shall be automatically extended by a period equal to the period of suspension.]

#### DRAFTING NOTE: FORCE MAJEURE

While force majeure clauses are generally drafted from the point of view of the service provider, Section 17 is specifically drafted so that it may also be invoked by the customer on the occurrence of an event of force majeure which affects the customer's ability to carry on its business. A force majeure clause aims to exclude liability for breach of contract where delay or failure to perform is as a result of an event outside the reasonable control of the party who would otherwise be in default.

Those events which are to be considered as being “beyond reasonable control” must be chosen and drafted so that they are beyond dispute. This may often involve drafting a list of various examples (such as acts of God, strikes, defaults of suppliers) preceded by a catchall clause that is not limited by the specific examples. It also states that the benefit of a force majeure clause is only available where the affected party had taken all reasonable steps to avoid the event and the impact of its consequences.

In drafting and negotiating the force majeure provision, consider, for example, whether:

- The force majeure provision should apply to each party to the agreement or only

certain parties (for example, an initial draft provided by the service provider often limits to the force majeure provision to the service provider's performance).

- The definition of a force majeure event should expressly include any other types of specific events.
- It is appropriate under the circumstances to limit the scope of the force majeure provision by including an obligation on the party affected by the force majeure event to:
  - take reasonable steps to avoid or prevent the force majeure event before it occurs, if it is anticipated; and
  - mitigate the effects of the force majeure event once it has occurred.
- It is appropriate for the party affected by the force majeure event to determine that such an event has occurred. For example, consider requiring an independent determination of whether a force majeure event occurred.
- Determination of a force majeure event is linked to a dispute resolution requirement if the parties disagree on the nature of the event.
- The parties have contingency plans to allow business continuity despite unexpected problems.

Section 17.2 is optional and suspends the obligations of the other party to the same extent as those of the party affected by the force majeure event.

Optional Section 17.3 creates a termination right for the parties if the force majeure event continues for a specified period of time. The termination right can be given to the non-affected party only or made mutual.

### CUSTOMER

It is usually in the service provider's interest to draft the force majeure provision as broadly as possible. Review each force majeure event proposed by the service provider to ensure that it does not include items that may reasonably be within the service provider's control.

Additionally, if the services being provided by the service provider include disaster recovery services, it may be appropriate

to carve that risk out of the force majeure protection, for example:

“Notwithstanding any other provision of this Section 17, a Force Majeure Event shall not relieve Service Provider of its obligation to provide disaster recovery services in accordance with the [applicable] Statement of Work.”

### SERVICE PROVIDER

The service provider should consider adding a provision to clarify that even if the force majeure event affects the customer, the customer is still required to pay for services rendered, as long as the force majeure event has not affected its ability to do so.

For more information on force majeure, see Practice Note, Force Majeure Clauses: Key Issues ([5-524-2181](#)) and Standard Clauses, General Contract Clauses: Force Majeure (TX) ([W-000-0683](#)).

## 18. Miscellaneous.

18.1 Each party shall, upon the [reasonable] request[, and at the sole cost and expense,] of the other party, [promptly] execute such documents and perform such acts as may be necessary to give full effect to the terms of this Agreement.

18.2 The relationship between the parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.

### DRAFTING NOTE: RELATIONSHIP OF THE PARTIES

This clause, also known as an “independent contractor” or “no agency or partnership” clause, minimizes the risk of creating an unwanted joint venture, partnership, employer-employee, or agency relationship between the parties under Texas law (see State Q&A: Independent Contractors: Texas ([1-506-2756](#))). The creation of such a relationship may have adverse tax consequences and may result in one party being bound by another in relation to

third parties in ways not contemplated by the agreement, or in becoming liable for the other's acts and omissions. A further reason for wanting to exclude a partnership relationship is that partners in a partnership owe fiduciary duties to each other, and the contracting parties will usually wish to exclude implied duties of this kind. For more information, see Standard Clause, General Contract Clauses: Relationship of the Parties ([6-561-3685](#)).

18.3 Neither party shall issue or release any announcement, statement, press release or other publicity or marketing materials relating to this Agreement, or otherwise use the other party's trademarks, service marks, trade names, logos, symbols or brand names, in each case, without the prior written consent of the other party[, which shall not be unreasonably withheld or delayed].

18.4 All notices, requests, consents, claims, demands, waivers and other communications hereunder shall be in writing and shall be deemed to have been given (a) when delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile (with confirmation of transmission) if sent during normal business hours of the recipient, and on the next business day if sent after normal business hours of the recipient or (d) on the [third] day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective parties at the addresses indicated below (or at such other address for a party as shall be specified in a notice given in accordance with this Section 18.4.

If to Service Provider:	[SERVICE PROVIDER ADDRESS] Facsimile:[FAX NUMBER] Attention:[TITLE OF OFFICER TO RECEIVE NOTICES]
If to Customer:	[CUSTOMER ADDRESS] Facsimile:[FAX NUMBER] Attention:[TITLE OF OFFICER TO RECEIVE NOTICES]

#### DRAFTING NOTE: NOTICES

This provision governs the manner in which any notice under the professional services agreement must be given, and the time at which the notice is deemed to be received. Notices sent under this provision relate to key legal communications in connection with the management of the contract, not day-to-day communications.

This agreement does not include e-mail as a permitted means of notice because it is not

always possible to track with certainty when an e-mail has been received, and there may be a greater risk of an e-mail being intercepted by a third party, arriving late or not at all, or being inadvertently deleted or overlooked by the intended recipient. For more information, see Standard Clause, General Contract Clauses: Notice ([6-533-1025](#)).

18.5 For purposes of this Agreement, (a) the words "include," "includes" and "including" shall be deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; and (c) the words "herein," "hereof," "hereby," "hereto" and "hereunder" refer to this Agreement as a whole. Unless the context otherwise requires, references herein: (x) to Sections, Schedules, Exhibits and Statements of Work refer to the Sections of, and Schedules, Exhibits and Statements of Work attached to this Agreement; (y) to an agreement, instrument or other document means such agreement, instrument or other document as amended, supplemented and modified from time to time to the extent permitted by the provisions thereof and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Agreement shall be construed without regard to any presumption or rule requiring

construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The Schedules, Exhibits and Statements of Work referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

#### DRAFTING NOTE: INTERPRETATION

Section 18.5 deals with the general interpretation of the professional services agreement and certain terms and expressions used in it. Its main purpose is to reduce repetition within the body

of the document, making it shorter and easier to read. For more information, see Standard Clause, General Contract Clauses: Interpretation ([5-602-4525](#)).

18.6 This Agreement, together with all Schedules, Exhibits and Statements of Work and any other documents incorporated herein by reference, constitutes the sole and entire agreement of the parties to this Agreement with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings and agreements, both written and oral, with respect to such subject matter. In the event of any conflict between the terms and provisions of this Agreement and those of any Schedule, Exhibit or Statement of Work, the following order of precedence shall govern: [(a) first, this Agreement, exclusive of its Exhibits and Schedules; (b) second, the [applicable] Statement of Work; [and] (c) third, any Exhibits and Schedules to this Agreement[; and (d) fourth, the Service Provider Proposal]].

#### DRAFTING NOTE: ENTIRE AGREEMENT; ORDER OF PRECEDENCE

##### ENTIRE AGREEMENT

This standard entire agreement provision, also known as a merger or integration clause, prevents the parties from being liable for any understandings or agreements other than those expressly set out in the professional services agreement with respect to the services. If there are other existing agreements that should remain in force, such agreements should be referenced here as an exception to this provision. The customer should consider if it is desirable to include an entire agreement clause in the context of the transaction; it may not be, if it the service provider has made statements that the customer is relying on but which are not, for some reason, repeated in the agreement.

##### ORDER OF PRECEDENCE

This clause identifies the order of precedence to be used to determine which document controls in the event of a conflict between the terms of the agreement itself and any schedules, exhibits, statements of work or other attachments. While this agreement provides that the terms of the agreement will take precedence over the SOW and other documents, in the event of a conflict, some parties may prefer to have the applicable SOW govern. Ideally, there should not be any conflict between any of the transaction documents and counsel should examine them closely for any inconsistencies.

For more information, see Standard Clause, General Contract Clauses: Entire Agreement (TX) ([W-008-0773](#)).

18.7 Neither party may assign, transfer, or delegate any or all of its rights or obligations under this Agreement, without the prior written consent of the other party[, which consent shall not be unreasonably withheld or delayed] [; provided, that, upon prior written notice to the other party, either party may assign the Agreement to an Affiliate of such party or to a successor of all or substantially all of the assets of such party through merger, reorganization, consolidation or

acquisition]. No assignment shall relieve the assigning party of any of its obligations hereunder. Any attempted assignment, transfer or other conveyance in violation of the foregoing shall be null and void. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

#### DRAFTING NOTE: ASSIGNMENT

This professional services agreement provides that neither party is entitled to assign any of its rights or delegate any of its obligations under the contract without the other party's consent; however, the language in the first set of brackets would allow such party to withhold consent only if it is reasonable to do so. The additional bracketed language would allow each party to assign its rights and delegate its obligations under the agreement to an affiliate or, in the context of a sale or reorganization, to a successor of all or substantially all of its business.

Parties should keep in mind that an assignment only transfers the rights or benefits under a contract. Obligations under a contract cannot be assigned but may, under certain circumstances, be delegated to a third party. Additionally, an anti-assignment provision will not be effective to prevent the change of a control of a party or an assignment or transfer by merger or operation of law unless the contract specifically prohibits such actions. Language to this effect can be drafted as follows:

"Neither party may assign, transfer, or delegate any or all of its rights or obligations under this Agreement, including by operation of law, change of control or merger, without the prior written consent of the other party..."

The extent to which an assignment of the contract by a party is restricted or excluded depends on the respective bargaining leverage of the parties and the nature of the rights or obligations. Parties should consider:

- Whether the rights or restrictions on assignment should be mutual or one way only.
- Whether assignment of rights or delegation of obligations to a third party should be permitted with consent, and whether the other party can only refuse if it is reasonable to do so, or has complete discretion to refuse consent.
- Whether assignments to a party's affiliates should be permitted, and, if so, whether the assignee should be required to reassign the benefit of the contract to the assignor if the assignee's affiliate status changes so that it no longer meets the definition of an affiliate.
- Whether assignments to a successor in the context of a sale of all or substantially all the business should be permitted.

For more information, see Practice Note, [Assignability of Commercial Contracts \(1-525-3176\)](#) and Standard Clause, General Contract Clauses: Assignment and Delegation (TX) ([W-000-0869](#)).

18.8 This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person any legal or equitable right, benefit or remedy of any nature whatsoever, under or by reason of this Agreement.

#### DRAFTING NOTE: NO THIRD-PARTY BENEFICIARIES

If a third party should be entitled to receive any benefits under the professional services agreement, revise this provision to expressly identify such party. For

example, if the customer's affiliates are entitled to receive services under the contract but are not parties, it may be appropriate to identify such affiliates as

third-party beneficiaries here so that they may enforce the warranties, indemnities, and other obligations undertaken by the service provider. For more information,

see Standard Clauses, General Contract Clauses: Third-Party Beneficiaries ([8-614-3485](#)).

18.9 The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

#### DRAFTING NOTE: HEADINGS

For more information, see Standard Clauses, General Contract Clauses: Headings (TX) ([W-000-2383](#)).

18.10 This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each party hereto. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

#### DRAFTING NOTE: AMENDMENT AND MODIFICATION; WAIVER

##### AMENDMENT AND MODIFICATION

This clause provides that the contract cannot be amended or modified except in writing. For more information, see Standard Clause, General Contract Clauses: Amendments (TX) ([W-000-0510](#)).

##### WAIVER

Either party may fail to enforce its rights under a contract, whether as a result of

oversight or because of the commercial realities of the situation. This clause provides that a waiver of a breach of the terms on one occasion will not affect the rights of that party if there is a further such breach, or if the other party subsequently requires compliance with the relevant terms. For more information, see Standard Clause, General Contract Clauses: Waiver (TX) ([W-000-0509](#)).

18.11 If any term or provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.



**DRAFTING NOTE: SEVERABILITY**

The purpose of the severability clause is to make it clear that, if one or more terms or provisions are held to be invalid, illegal or unenforceable, the parties intend the professional services agreement to survive by severing the invalid, illegal or unenforceable terms or provisions from the agreement. The parties may want to consider adding a provision that allows the courts to amend the invalid, illegal or unenforceable provision as an alternative to the parties negotiating in good faith to modify the professional services agreement.

While enforceable in Texas, this type of provision is not enforceable in some jurisdictions and the parties should consider the possibility that the court's decision may not be more favorable than what the parties can negotiate between themselves (see *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 209 S.W.3d 146, 166 (Tex. App.- El Paso 2006) rev'd, 263 S.W.3d 910 (Tex. 2008)).

For more information on severability, see Standard Clause, General Contract Clauses: Severability (TX) ([W-000-0650](#)).

18.12 This Agreement and all related documents [including all exhibits attached hereto][, and all matters arising out of or relating to this Agreement, whether sounding in contract, tort, or statute] are governed by, and construed in accordance with, the laws of the State of Texas, United States of America [(including [its statutes of limitations] [and] [Tex. Bus. & Com. Code Ann. § 271.001 et seq.]][], without giving effect to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Texas.

**DRAFTING NOTE: CHOICE OF LAW**

Section 18.12 designates the substantive law of Texas to apply to the contract.

Parties may choose the substantive law of Texas to apply to the contract for both:

- Transactions that bear a reasonable relation to the state (Tex. Bus. & Com. Code Ann. § 1.301(a)).
- Qualified transactions under Chapter 271 of the Business and Commerce Code (Tex. Bus. & Com. Code Ann. §§ 271.001 to 271.011).

For a discussion of choice of law rules in Texas, including qualified transactions, see Standard Clauses, General Contract

Clauses: Choice of Law (TX): Drafting Note: Texas Choice of Law Statutes ([W-000-0223](#)).

For more information on the optional language in brackets, see Standard Clause, General Contract Clauses: Choice of Law (TX) ([W-000-0223](#)): Drafting Notes:

- Extra-Contractual Matters.
- Statutes of Limitations.
- Choice of Law Rules.

For more information on drafting and negotiating choice of law clauses, see Practice Note, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)).

18.13 Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement, and all contemplated transactions[, including, but not limited to, contract, equity, tort, fraud, and statutory claims], in any forum other than the US District Court for the [Northern/Southern/Eastern/Western] District of Texas or[, if such court does not have subject matter jurisdiction,] the courts of the State of Texas sitting in [POLITICAL SUBDIVISION],

and any appellate court from any thereof. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such courts and agrees to bring any such action, litigation, or proceeding only in the US District Court for the [Northern/Southern/Eastern/Western] District of Texas or[, if such court does not have subject matter jurisdiction,] the courts of the State of Texas sitting in [POLITICAL SUBDIVISION]. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

### DRAFTING NOTE: CHOICE OF FORUM

In this section, the parties confer personal jurisdiction on the courts of Texas and agree that the selected forum is the exclusive forum for bringing any claims under (and sometimes, more broadly relating to) the agreement.

Parties should be aware that in contrast to forum selection, venue selection, which refers to the geographic location within the form (often, the county, but sometimes, a particular court) with the authority to hear the case, is not enforceable in a private contract in Texas unless otherwise provided by statute (*Liu v. CiCi Enters., LP*, 2007 WL 43816, at \*2 (Tex. App.—Houston Jan. 9, 2007, no pet.) (mem. op.)). For example, parties may contractually agree to have the case heard in a specific Texas county if the suit arises from a “major transaction” (Tex. Civ. Prac. & Rem. Code Ann. § 15.020(b), (c)). With certain exceptions, a major transaction is a written agreement under which a person pays or receives consideration with an aggregate stated value of at least \$1 million (Tex. Civ. Prac. & Rem. Code Ann. § 15.020(a)). Best practice, however, is to include the geographic location.

For more information on drafting and negotiating choice of forum clauses, including venue concerns unique to Texas, see Standard Clauses, General Contract Clauses: Choice of Forum (TX) ([W-000-0220](#)) and Practice Notes, Choice of Law and Choice of Forum: Key Issues ([7-509-6876](#)) and Commencing a Lawsuit: Initial Considerations (TX): Forum and Venue Selection Clauses ([W-005-5157](#)).

To settle or avoid protracted forum selection negotiations, the parties sometimes elect to include a floating forum selection

clause that forces a party initiating litigation to do so in the home jurisdiction of the counterparty being sued. For a sample floating forum selection clause, see Standard Clauses, General Contract Clauses: Choice of Forum (Floating: Reciprocal) (TX) ([W-000-0222](#)).

If the parties prefer to resolve disputes by arbitrating rather than litigating them, then they must replace this provision with an arbitration clause. For more information on arbitration and other alternative dispute resolution agreements, including sample clauses, see:

- Practice Note, Drafting Arbitration Agreements calling for Arbitration in the US ([2-500-4624](#)).
- Practice Note, Standard recommended arbitration clauses ([1-381-8470](#)).
- Standard Clauses, American Arbitration Association (AAA)/International Centre for Dispute Resolution (ICDR): Standard Arbitration Clauses ([3-520-8381](#)).
- Drafting Contractual Dispute Provisions Toolkit (TX) ([W-007-8921](#)).

This Standard Document does not contain a dispute resolution escalation provision, which is more commonly used in long-term master service agreements. Escalation provisions first require the parties to resolve their disputes by alternative dispute resolution (ADR), including a period of negotiation and then mediation before submitting the dispute to litigation or ad hoc arbitration. For more information on drafting and negotiating escalation clauses, see Standard Clauses, General Contract Clauses, Alternative Dispute Resolution (Multi-Tiered) (TX) ([W-004-9900](#)).

18.14 [Each party irrevocably and unconditionally waives any right it may have to a trial by jury in respect of any legal action arising out of or relating to this Agreement or the transactions contemplated hereby.]

#### DRAFTING NOTE: WAIVER OF JURY TRIAL

This provision is optional. It is included here because many sophisticated parties prefer that a judge hear and decide any dispute arising out of the agreement, rather than a jury of people who may not appreciate

and understand the potentially complex issues involved in the litigation. For more information, see Standard Clause, General Contract Clauses: Waiver of Jury Trial (TX) ([W-000-0601](#)).

18.15 Each party acknowledges that a breach by a party of Section 8 (Intellectual Property Rights; Ownership) or Section 9 (Confidentiality) may cause the non-breaching party irreparable damages, for which an award of damages would not be adequate compensation and agrees that, in the event of such breach or threatened breach, the non-breaching party will be entitled to seek equitable relief, including a restraining order, injunctive relief, specific performance and any other relief that may be available from any court, in addition to any other remedy to which the non-breaching party may be entitled at law or in equity. Such remedies shall not be deemed to be exclusive but shall be in addition to all other remedies available at law or in equity, subject to any express exclusions or limitations in this Agreement to the contrary.

#### DRAFTING NOTE: EQUITABLE RELIEF

In certain agreements, it may be important to one party that another party actually performs its obligations or is enjoined from taking certain actions, rather than simply being liable for damages on default. For example, one party to the agreement may prefer to prevent or mitigate a disclosure of confidential information by the other party in breach of such party's confidentiality obligations by means of an injunction, rather than relying on damages for breach of the agreement.

Absent a specific statutory right to the contrary, the granting of equitable relief is solely in the court's discretion. Because of this judicial discretion, an equitable

remedies clause cannot compel a court's decision, but should carry evidentiary weight as an expression of the parties' intentions. Counsel should ensure that this provision does not conflict with any other section of the professional services agreement (for example, certain provisions may set out an exclusive remedy for a specific type of breach).

For more information, see Practice Note, Contracts: Equitable Remedies ([0-519-3197](#)) and Standard Clauses:

- General Contract Clauses: Equitable Remedies (TX) ([W-001-4904](#)).
- General Contract Clauses: No Equitable Relief ([5-519-3454](#)).

18.16 [In the event that any action, suit, or other legal or administrative proceeding is instituted or commenced by either party hereto against the other party arising out of [or related to] this Agreement, the prevailing party shall be entitled to recover its [reasonable/actual] attorneys' fees and court costs from the non-prevailing party.]

**DRAFTING NOTE: ATTORNEYS' FEES**

Section 18.16 is an optional provision providing for the recovery of reasonable attorneys' fees and court costs from the losing party in the event of a contract dispute. In Texas, a person may recover attorneys' fees from an individual or entity for breach of oral or written contracts (Tex. Civ. Prac. & Rem. Code §§ 38.001 and 38.002). However, Chapter 38 of the Texas Civil Practice and Remedies Code only applies to individuals and corporations. Chapter 38 does not apply for the recovery of attorneys' fees against a limited liability company or other entity. Therefore, it is important to expressly contract for the recovery of legal fees, as this contractually obligates the parties to cover attorneys' fees apart from Chapter 38.

- What constitutes costs varies by state and generally does not include attorneys' fees, except under limited circumstances.
- Attorneys' fees are not recoverable unless:
  - an applicable statute provides for this type of award; or

- the parties contractually agree otherwise.

Therefore, the parties should state the prevailing party's entitlement to an award of attorneys' fees and specify all reimbursable costs in the contract.

Each party should consider the potential advantages and disadvantages to it of including this provision in the contract. If the provision is included in the contract, consider whether the recovery of attorneys' fees and court costs by the prevailing party should be carved out from the limitations on a party's liability in Section 12. Also consider whether the prevailing party should be entitled to the "actual" fees and costs or only those fees and costs that the court determines are "reasonable".

For more information on attorneys' fees in Texas, see Standard Clause, General Contract Clauses: Litigation Costs and Expenses (TX) ([W-000-0636](#)).

18.17 This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile[, e-mail or other means of electronic transmission] shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

**DRAFTING NOTE: COUNTERPARTS**

For more information on counterparts, see Standard Clauses, General Contract Clauses: Counterparts ([5-564-9425](#)).

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the date first above written.

[SERVICE PROVIDER NAME]

By \_\_\_\_\_

Name:

Title:

[CUSTOMER NAME]

By \_\_\_\_\_

Name:

Title:

## EXHIBITS

### DRAFTING NOTE: EXHIBITS

Placeholders are included for the exhibits referred to in this professional services agreement.

#### EXHIBIT A

[SERVICE PROVIDER PROPOSAL]

#### EXHIBIT B

[FORM OF STATEMENT OF WORK]

#### EXHIBIT C

[CUSTOMER'S TRAVEL AND EXPENSE POLICY]

#### ABOUT PRACTICAL LAW

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