

Contract Drafting

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Contract Drafting

- It is not possible to exhaustively list the concerns that agreement provisions may raise and that we look for and analyze when we review contracts
- However, here are 11 common issues we often see presented under the mnemonic

OUR SALT MINE

Contract Drafting – O U R

➤ Overbroad language

➤ Unduly narrow language

➤ Risk exceeds benefits

Contract Drafting – S A L T

- **S**ilence (e.g., as to timing, who pays the costs, who performs the task, or other material information)
- **A**mbiguous language
- **L**oophole words
- **T**oothless RYNOs™ (i.e., rights yet no obligations)

Contract Drafting – M I N E

➤ Misdirection

➤ Internal inconsistencies

➤ Non-standard language

➤ Endless Trouble

Problematic Provisions

Limitation of Liability

1. WITH RESPECT TO THE INFRASTRUCTURE PROVIDED UNDER THIS AGREEMENT, NEITHER PARTY MAY BE LIABLE TO THE OTHER PARTY FOR ANY CONSEQUENTIAL DAMAGES, INCLUDING ANY LIABILITY FOR DAMAGE TO GENERATION FACILITIES, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR IF SUCH POSSIBILITY WAS REASONABLY FORESEEABLE.
2. THE MAXIMUM LIABILITY FOR DIRECT DAMAGES THAT EITHER PARTY SHALL HAVE TO THE OTHER PARTY AT ANY AND ALL TIMES SHALL EQUAL THE AMOUNT THAT VENDOR HAS RECEIVED UNDER THIS AGREEMENT DURING THE 12 MONTH PERIOD IMMEDIATELY PRECEDING THE CLAIM. NOTWITHSTANDING THE FOREGOING, VENDOR'S LIABILITY FOR ANY CLAIM IN CONNECTION WITH ITS PROVISION OF SERVICES SHALL NOT EXCEED THE AMOUNT PAID FOR THE PROFESSIONAL SERVICES.
3. CUSTOMER MAY PERMIT ITS AFFILIATES TO USE THE EQUIPMENT AND RECEIVE THE PROFESSIONAL SERVICES AND ANY OTHER SERVICES PROVIDED HEREUNDER, AND SUPPLIER SHALL BE LIABLE TO ANY CUSTOMER AFFILIATES IF SUPPLIER'S BREACH OF THIS AGREEMENT HARMS SUCH AFFILIATES.
4. NEITHER PARTY SHALL BE LIABLE FOR THE ACTS OR OMISSIONS OF ANY PERSON THAT IS NOT A PARTY TO THIS AGREEMENT.

Indemnity

1. Vendor will defend and indemnify Utility and its affiliates against any damages finally awarded in connection with any lawsuit alleging that the Services, or Utility's use of the Services, infringe a U.S. patent that was in effect prior to the commencement of this Agreement. Vendor's obligation to indemnify is contingent upon the indemnitees timely notifying Vendor of any claim that could give rise to Vendor's indemnification obligations under this Agreement. Vendor's indemnity obligations are also subject to the limitation of liability cap set forth earlier in this Agreement.
2. Vendor will have no liability for any claim under Section 1 if such claim arises out of or relates to (a) Utility's impermissible use or combination of the Services, (b) any user's use of the Services that is not in accordance with Vendor's instructions or policies then in effect, or (c) Utility's actions, and in all such instances Utility shall indemnify Vendor.
3. An indemnifying party shall pay all costs and expenses incurred by the indemnified party in connection with any claim. Neither party, however, may settle any claims subject to indemnification without the other party's written permission.

Warranty

1. Vendor warrants that (a) under normal use and circumstances, the equipment should perform substantially in accordance with the specifications that Vendor may provide to Customer, and (b) Vendor will provide support in a manner consistent with industry standards reasonably applicable to the provision thereof. If Customer timely notifies Vendor of an alleged breach, Vendor will repair, replace or re-perform the nonconforming portion of the equipment. The foregoing constitutes Customer's sole remedy for any breach of warranty or other provisions relating thereto.
2. The warranty above does not apply to equipment that has been (i) installed, operated, repaired or maintained by any person other than Vendor; or (ii) combined with any third party equipment or technology. Vendor shall also not be deemed to be in breach of this warranty where the circumstances causing the breach are beyond Vendor's reasonable control. Except as warranted herein, there are no other warranties, representations, conditions, or agreements of Vendor in connection with the equipment.

Data

1. The then current terms of Vendor's privacy policy, which can be found at www.norealvendor.com, and which may be modified by Vendor from time to time, may be incorporated by reference into this Agreement. Vendor shall not in any manner use Customer Data other than to the extent permitted by law. All use of Customer Data that violates applicable laws is hereby expressly prohibited.
2. The parties recognize the importance of preventing unauthorized entities from gaining access to Customer Data during the term of this Agreement. Accordingly, Vendor shall take all steps necessary to ensure that Customer Data that it receives under this Agreement is not subject to such unlawful access, and Vendor shall not share Customer Data with any third-party except in connection with Vendor performing its obligations or exercising its rights under this Agreement. In addition, Vendor shall (i) process Customer Data only in accordance with Customer's lawful instructions, and (ii) provide Customer with all information necessary to demonstrate compliance with applicable data privacy and security laws, and fully cooperate and assist in audits and inspections conducted by Customer.