

UPDATING YOUR BOILERPLATE - TERMS AND CONDITIONS OF SALE

1. **GENERAL.** These Terms and Conditions of Sale (the "**Terms and Conditions**") shall govern and control the order and sale of the products (the "**Products**") which are described on the purchase order to which these Terms and Conditions are attached (the "**Purchase Order**") by _____ ("**Seller**") to the Purchaser specified in the Purchase Order ("**Purchaser**") and shall supercede all terms and conditions which may have been inserted by the Purchaser on the Purchase Order and other inconsistent terms submitted by Purchaser prior to acceptance by Seller of this order. These Terms and Conditions, the Purchase Order and any special Terms and Conditions which are executed by both the Purchaser and the Seller, together with any designs, diagrams or other specifications of the Products being ordered pursuant hereto shall constitute the "**Agreement**". These Terms and Conditions may not be varied unless agreed to in writing by a duly authorized representative of Seller and Purchaser. Failure of Seller to object to any provisions which have been inserted by Purchaser on the reverse hereof or which may be contained in any other writing of Purchaser shall not be construed as a waiver of these Terms and Conditions or an acceptance by Seller of any terms and conditions of Purchaser. Purchaser shall be deemed to have accepted these Terms and Conditions if Purchaser signs any Purchase Order to which these Terms and Conditions are attached or accepts any shipment of Products subsequent to receipt of these Terms and Conditions. Seller shall not be bound until Seller has executed a counterpart of the Purchase Order.
2. **PRICES.** Seller's sale of Products is made according to the applicable price schedule or other price quotation of Seller as from time to time in effect as confirmed by execution by Seller of the Purchase Order to which these Terms and Conditions are attached. Prices are quoted F.O.B. the delivery point noted in the Purchase Order (the "**Delivery Location**"). All price quotations issued by Seller are for a period of thirty days unless otherwise indicated by Seller. **Except as specified in this Section, prices are subject to change without notice.** Price quotations based on estimated or projected quantities are subject to increase in the event that actual quantities purchased during this specific period are less than the estimated or projected quantities. Seller's prices do not include any applicable sales, use or other taxes, and the amount of any such taxes may be added to each invoice or separately invoiced by Seller to Purchaser.
3. **PAYMENT.** Each shipment shall be considered a separate transaction and payment shall be made accordingly. Unless otherwise authorized in writing by Seller, payment shall be made on the basis of net cash thirty (30) days from date of Seller's delivery of the Products to the Delivery Location; provided, however, if, in the sole and absolute discretion of Seller, the financial condition of the Purchaser at any time does not justify the making of any shipment on the terms specified herein, Seller may make a shipment on a C.O.D. or cash in advance basis, suspend performance, or revoke the acceptance of the Purchaser's Purchase Order. If shipments are ready to be made to Purchaser in accordance with the Purchase Order and Purchaser delays shipment, Seller shall have the right to demand payment thirty (30) days from the date Seller is prepared to make shipment. The shipments not made pending payment or instructions by Purchaser shall be held at the risk and expense of Purchaser. Any payments for Products not received by Seller when due shall incur an additional charge equal to 1% of the unpaid amount per thirty day period of non-payment (prorated for any portion thereof), not to exceed the highest rate permitted by applicable law. Seller shall deliver all invoices to Purchaser at the address noted in the Purchase Order. All payments under this Agreement shall be made in United States dollars in good funds by check or wire payment to the address for Seller provided in the Purchase Order or as provided from time to time by written notice from Seller to Purchaser. Purchaser agrees to provide Seller with reasonable information regarding Purchaser's financial condition as Seller may request from time to time.
4. **DELIVERY.** Products shall be delivered F.O.B. to the Delivery Location, except as otherwise agreed upon in writing by Purchaser and Seller. Title and risk of loss for the Products shall pass to Purchaser as the Products are unloaded at the Delivery Location. Packing and marking of all Products shall be as set forth in the Purchase Order, or if no instructions are included in the Purchase Order, as agreed upon in writing by Purchaser and Seller, or if no such agreement exists, as is reasonably determined by Seller in accordance with industry standards.
5. **LIMITED WARRANTY.** Seller warrants that the Products and Services are in material conformance with the Purchase Order and free from any material defects in material or workmanship. Any Products which do not meet the warranty set forth in this Section 5 shall at Seller's option either be replaced by Seller, or Seller shall issue a credit for any such Products in the amount of the original invoice price upon return of the Products by Purchaser to Seller. Such obligation shall be conditioned upon receipt by Purchaser of written notice of any alleged material non-conformance to specifications within 5 days of delivery to Purchaser. **THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE. PURCHASER ACKNOWLEDGES AND DELCARES THAT IT IS BUYING THE PRODUCTS AT ITS OWN PERIL AND RISK, EXCEPT AS EXPRESSLY OTHERWISE PROVIDED HEREIN. PURCHASER FURTHER DECLARES AND ACKNOWLEDGES THAT THE FOREGOING WAIVERS HAVE BEEN BROUGHT TO ITS ATTENTION AND EXPLAINED IN DETAIL TO IT, AND THAT PURCHASER HAS VOLUNTARILY AND KNOWINGLY CONSENTED TO THE FOREGOING WAIVERS. UNDER NO CIRCUMSTANCES SHALL PURCHASER HAVE ANY CLAIM FOR NONCONFORMANCE OR DEFECTS IF IT DOES NOT NOTIFY SELLER WITHIN 5 DAYS OF DELIVERY OF THE PRODUCTS TO THE DELIVERY LOCATION.**
6. **WAIVER OF CONSEQUENTIAL AND OTHER DAMAGES.** UNDER NO CIRCUMSTANCES SHALL SELLER BE LIABLE TO PURCHASER OR ANY OTHER PERSON OR ENTITY FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, DAMAGES BASED UPON LOST GOOD WILL, LOST SALES OR PROFITS, WORK STOPPAGE, PRODUCT FAILURE, IMPAIRMENT OF OTHER GOODS OR OTHERWISE, AND WHETHER ARISING OUT OF BREACH OF WARRANTY, BREACH OF CONTRACT, NEGLIGENCE OR OTHERWISE.
7. **INSPECTION AND REJECTION.** All Products are subject to final inspection and acceptance by Purchaser promptly upon receipt, and in any event, within 5 days of delivery. Any Products that do not materially comply with the specifications provided to Purchaser in the Purchase Order or contain defective material or workmanship may be rejected by Purchaser and returned to Seller at Seller's expense by promptly notifying Seller of the rejection in writing. In connection with any rejection under this Agreement (a) Purchaser shall promptly notify Seller in writing of its intention to reject the Products in accordance with this Section 7; (b) Purchaser shall permit a representative of Seller (which may include an independent inspector) to inspect the Products at the Delivery Location to ascertain Seller's opinion as to the compliance of the Products with the terms of this Agreement; (c) Purchaser shall have the burden of proving that any alleged damage to the Products did not occur after delivery of the Products; (d) if Seller disagrees that the Products were delivered in non-compliance with the specifications of this Agreement, Purchaser and Seller will appoint an independent inspector to review the Products, and the opinion of the independent inspector shall be accepted by both Purchaser and Seller, with the cost of the inspector to be paid by Seller if the rejection of the Products is found to be permitted under this Agreement and by Purchase if the rejection is found not to be permitted under this Agreement; and (e) if Seller agrees (or the independent inspector decides) that Purchaser is entitled to reject the Products then Seller shall, within a reasonable period of time, either correct the defect or non-conformance or arrange for the transportation of the defective Products from the Delivery Location and the substituting of conforming Products for the non-conforming Products. Any rejection by Purchaser shall apply only to that portion of the Products which is defective or non-conforming in accordance with this Agreement. If Purchaser and Seller cannot agree upon an independent inspector, then each of them shall select one independent inspector and the two inspectors shall choose a third who shall perform the inspection. If the independent inspector determines that rejection of the Products is not permissible under the Agreement, then Purchaser may not reject the Products. Title and risk of loss for any Products that are redelivered

to Seller in accordance with this Section 7 shall pass to Seller as the Products are loaded onto the truck for redelivery to Seller.

8. **FORCE MAJEURE.** In the event that either Seller or Purchaser is prevented from performing this Agreement or any part hereof by circumstances beyond its control and without its fault or negligence, including, without limitation, strikes, lock outs, fire, explosion, flood, terrorism, sabotage, acts of God, war or other hostilities, civil commotion, regulation and severe weather, the obligations of Seller to deliver and the obligation of Purchaser to accept delivery of Products hereunder shall be suspended and the delivery dates for such Products shall be decelerated, except to the extent that a deceleration would materially and adversely affect Purchaser's business, in which case the quantity of Products so affected shall be reduced or eliminated from this Agreement without liability.
9. **SECURITY AGREEMENT; FINANCING STATEMENT.** Purchaser hereby pledges and grants to Seller a continuing security interest in the Products to secure the prompt and complete payment and performance of all obligations owed by Purchaser to Seller, including, without limitation, all amounts owed for the purchase price of the Products delivered hereunder. Purchaser acknowledges that Seller has a purchase money security interest (as defined in Article 9 of the Uniform Commercial Code) in the Products and is entitled to all the rights and privileges with respect thereto. Purchaser further acknowledges and agrees that this Agreement shall constitute a security agreement and that Seller may file one or more financing statements in the name of Purchaser in accordance with the applicable provisions of the applicable Uniform Commercial Code. Upon failure of payment hereunder, Seller may exercise any rights and privileges available under applicable law, including, without limitation, all rights and remedies under Article 9 of the applicable Uniform Commercial Code in addition to all other rights and remedies available hereunder. Purchaser agrees that this grant of security interest is in addition to, and not in lieu of, any other liens or privileges that Seller may have under applicable law.
10. **TERMINATION.** In the event that (a) either Purchaser or Seller breaches any material terms or conditions of this Agreement not involving the payment of money, and fails to remedy the same within 60 days after receiving written notice from the other party specifying the breach and requesting remedy, or (b) either Purchaser or Seller fails to pay to the other any amounts due under this Agreement, and fails to remedy same within 5 days after receiving written notice from the other, specifying the breach and requesting remedy, the non-defaulting party, shall have the right to terminate this Agreement after the cure period expires, if the breach goes uncured, by providing written notice to the defaulting party. Either party to this Agreement may terminate this Agreement upon written notice to the other party at any time if the other party voluntarily or involuntarily becomes subject to bankruptcy, insolvency, trusteeship or receivership proceedings or makes a general assignment for the benefit of creditors. Each party to this Agreement shall promptly notify the other of any such event. In the event that the source from which the Seller is sourcing its Product to supply to the Purchaser ceases to produce Products of any type listed in the Purchase Order, Seller may elect to either terminate this Agreement with respect to such Products or to continue the Agreement but use a different supplier. In the event that the replacement supplier charges a price that is higher than the price that Seller has negotiated with its current supplier, Seller shall notify the Purchaser and Purchaser shall have the option to terminate this Agreement with respect to those Products or accept the increased price.
11. **ENTIRE AGREEMENT.** This Agreement sets forth the entire agreement of the Purchaser and Seller with respect to the matters which are the subject hereof, and supercedes all agreements, understandings and communications between Purchaser and Seller related to the subject matter hereof. This Agreement may be modified only by written amendment, duly executed by Purchaser and Seller.
12. **MISCELLANEOUS.** (a) This Agreement may not be assigned by any party hereto without the written consent of the other party, which consent shall not be unreasonably withheld; provided that this provision shall not prevent an assignment by either party pursuant to a merger, a consolidation, or the sale of all or substantially all of such party's assets. (b) Each party to this Agreement agrees to maintain the confidentiality of all material terms of this Agreement. (c) This Agreement shall be construed and interpreted in accordance with the laws of the State of _____ without regard to any conflicts of laws. (d) This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which taken together will constitute but one agreement.
13. **NOTICES.** Except as expressly provided herein to the contrary, any and all notices, requests, demands and other communications which are required or deemed desirable to be given pursuant to the terms of this Agreement shall be made in writing and shall be deemed to have been given if delivered personally or sent by registered or certified mail, postage prepaid, return receipt requested, or if sent by nationally-recognized overnight air courier, or by facsimile, with written confirmation of delivery to the addresses provided in the Purchase Order.
14. **NONWAIVER OF COMPLIANCE.** No failure by Seller to exercise, and no delay in exercise, any right hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by this Agreement or applicable law.

UPDATING YOUR BOILERPLATE

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BY

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This paper provides thoughts on updating of boilerplate provisions in standard contracts. There are several different reasons one should update boilerplate provisions:

- Boilerplate should be tailored to the present needs of the particular client
- Boilerplate should be tailored to the location where services are performed or the type of transaction involved
- Boilerplate should be updated to remove state provisions or to modernize other clauses

I have focused less on the legal framework behind contractual provisions and more on some practical suggestions regarding contract language. I have attached to this paper two form contracts - a short form Service Agreement, drafted from the Owner's perspective (the "*Services Agreement*"), and a form of Terms and Conditions of Sale, drafted from the Seller's perspective (the "*Terms and Conditions*"). I thought it would be useful to provide you with one agreement from the purchaser's standpoint (the Services Agreement is drafted from the viewpoint of the purchaser of the services) and one agreement from the seller's standpoint (the Terms and Conditions are drafted from the viewpoint of the seller of the products). While there are clearly differences between an agreement for services and an agreement for products, many issues and provisions should be considered for both types of agreements. By contrasting the attached forms, you can see how you might update a seller's agreement boilerplate differently from a purchaser's agreement.

This paper reviews certain key provisions of these contracts and suggests some of the purposes behind the included language. I will also discuss some other provisions that you should consider for special circumstances. Here are some terms I will try to use consistently throughout the paper:

- "*Contract*" will be the written agreement under discussion.
- "*Our Party*" will mean your client.
- "*Other Party*" will mean the other party to the Contract.
- "*Services*" will mean all services to be provided by the Other Party in favor of Our Party under the Services Agreement.

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- "**Products**" will mean all goods and materials being provided by Our Party to the Other Party pursuant to the Terms and Conditions.

1. Generally. When updating the boilerplate for a Contract spend a moment to consider the purpose of the Contract and the details regarding implementation of the Contract. For instance, it is important to consider:

- What, exactly does Our Party need to accomplish from the Contract. Does Our Party need Services or Products for a specific project or a general supply of Services or Products for multiple projects. If only a single project of Our Party is implicated, you should tailor the boilerplate of the Contract to that project.
- How does the performance by the Other Party integrate with Our Party's business and with the other contractual relationships of Our Party? For instance, if the performance by the Other Party is needed for Our Party to perform under one or more specific contracts with third parties, the provisions of the Contract should mirror the contractual provisions contained in the third party agreement(s) (including warranties, standards of performance, scope of work and indemnities). (This is called making the contracts 'back to back'). If timing is important in the performance by the Other Party for Our Party to accomplish a business purpose or meet another contractual deadline, you should include time deadlines in the Contract and consider liquidated damage provisions for failure to meet delivery deadlines.
- Think about how a default by Other Party will impact Our Party's business. Are there other sources of supply? How long would it take to replace the Other Party as a Service or Product supplier? What, practically, would Our Party do if Other Party defaults? Let your covenant, defaults and remedy provisions be guided by the answers to these questions. Also consider where likely bottle necks may develop for the Other Party in the performance or supply of Services or Products to Our Party.
- Think through the entire chain of steps in the delivery of Services or Products by or to Our Party. For example, if Other Party is selling Products to Our Party, think about where the Products originate (does the Other Party manufacture them or is the Other Party a broker?) How and by what means will the Products be transported to the Other Party and by the Other Party to Our Party? Where will the Products be stored at each step, and under whose direction and control? How will the Products clear customs, who is the customs broker, who is responsible for import duties and are there likely delays for this kind of Product? Where do you want the Product to be delivered to Our Party? Who will be responsible for delivering the Products to that point, unloading the Products from the shipper, storing the Products, if necessary, re-loading the Products onto a new shipper, if Our Party needs the Products at a different location, and for the risk of loss, and payment of costs with respect to the shipping, insurance, unloading and storage at each point along the journey.

2. Service Agreement. This Section will analyze the key provisions of the Services Agreement boilerplate in sequential order. This Services Agreement is drafted from the "owner's" perspective (i.e. the Service consumer).

2.1 Description of Services (Section 1). Provide a detailed description of the Services being provided. Specificity in the scope of work is one of the two aspects of a Services Agreement for which clarity is most important. More unnecessary disputes erupt over unclear descriptions of scopes of work than any other dispute that I see. Think about this question: "for what services am I expecting that the service-provider will not be paid extra and for what services am I expecting that the service-provider will be paid extra". Try to think of every type of service that Our Party might want included in the Contract and specify them. This requires input from your business contact within your company. I typically have the client provide the first draft of the scope of work, but I always review that draft to tighten up the language and integrate the scope of work with the other terms of the Contract. Use defined terms from the Contract where applicable and analyze the scope of work for consistency with other Contractual provisions. You will note in the form Services Agreement I have included the scope of the Services on an attached Schedule A.

2.2 Standard of Performance (Section 1). When representing the party contracting for Services, always specify the standard by which the performance of the Services will be measured. An easy, though non-specific standard is "the standard of care, skill and diligence normally provided by professionals in the same industry performing the same or similar type of services." Where appropriate, consider what results Our Party needs to obtain from the performance of the Services and tailor the performance standard to require achievement of those results. Where the Services can be quantified by objective criteria, such as improved performance from a manufacturing facility or decreased costs of operations, try to include those objective criteria. Review the pitch materials prepared by the Other Party and discuss with your client what promises the Other Party has made. Include those pitches and promises in the Contract as required standards of performance. Where licenses, licensed personnel or personnel with specific levels of experience or qualification are needed or desired, include provisions to that effect. Where materials are being used in connection with the performance of the Services (as with construction Services), you should also include a standard for the materials, such as "the materials incorporated into the Work shall be of the highest grade, suitable for inclusion in the Work and free from defects and liens". When Our Party is the contractor, you should attempt to limit the warranty for the Services (and any materials included in the Work) in terms of scope, amount and duration.

2.3 Term (Section 2). Carefully consider what the term of the Contract should be. Always note that the Term is for the period stated "unless sooner terminated in accordance with the Contract or extended by mutual agreement of the parties".

2.4 Compensation (Section 3). Obviously, this is one of the most important sections of the Contract. In addition to a sufficient description of how to calculate the amount of compensation due, you should consider including the following:

- Delivery of Invoice. When and where the invoices should get delivered (typically, invoices should be delivered by a means and to an address that is different from

the "legal notices" address, meaning that you should specify this information separately). When updating your boilerplate you will want to "de-link" the invoice delivery and payment location from the "legal notice" address.

- Detail in Invoice. What information should be included in the invoice? For instance, providers of Services and Products should be required to include in their invoices all relevant information which is used to calculate the compensation, together with the work sheets which show the calculation of the compensation due.
- Due Date for Payment. The timing of when the payment is due, the means by which payments should be made and the location to which the payment should be delivered (again, this is typically different from the "legal notices" address).
- Interest. Whether interest will be charged on overdue amounts.
- Cost Pass-Throughs. For reimbursements and for cost-plus contracts, you should request all backup invoices for which reimbursement is requested, and you should be extremely detailed about exactly what items are eligible for reimbursement and what items are the responsibility of the Other Party, as being included in the base compensation paid. This is another area where lack of detailed specificity can create room for disagreement or foul play.
- Audit Rights. You should consider providing for audit rights. An audit provision should permit you or your representative to enter the Other Party's premises, review the Other Party's books and records, take extracts from the books and records and calculate the amounts due. If a discrepancy is found in excess of a minimum threshold, the Other Party should be required to pay for the audit; otherwise the audit is typically at the expense of the auditing party.

2.5 Confidentiality (Section 5). When updating your Confidentiality provisions, consider whether your client is more likely to provide or receive information that will need to be accorded confidential treatment and tailor the provision accordingly.

2.5.1 Disclosing Party. Our Party's need for confidentiality can vary greatly, and you should consider those needs when drafting a confidentiality provision. Where the need is basic, a simple provision like Section 5 of the Service Agreement can be used. Where Our Party relies on intellectual property or other trade secrets for its competitive advantage, you will want to have a more detailed provision. In addition, where confidentiality needs are high, consider obtaining separate confidentiality agreements from each of the Other Party's employees and contracted personnel who will have access to Our Party's confidential information, since those parties are not bound by something signed by the Other Party. In addition to the standard confidentiality and nondisclosure covenant, you may also want to obtain an agreement which prevents a public announcement of your transaction, and you may want to prevent the Other Party's use of Our Party's confidential information for a purpose outside of the Contract scope. Make sure that the provision regarding confidentiality survives the termination of the Contract.

2.5.2 Reviewing Party. If you are the party receiving confidential information, you will want to include exclusions which allow you to disclose information (a) to professionals and service providers who you will need in connection with the negotiation of the Contract and provision of the Services or Products; (b) as required by law or by a stock exchange on which Our Party's securities are registered; and (c) where information is already public or is obtained by Our Party through a non-confidential disclosure by a third party. Where confidential information is required to be disclosed by law, you can require that the Other Party notify Our Party and give Our Party an opportunity to protest the disclosure and request that the information be sealed in the court's records.

2.6 Statutory Employer (Section 7). **[Louisiana-specific provision]**. When updating your boilerplate, you will want to consider where the services will be performed and whether there are any local nuances that you need to know. "Statutory employer" provisions provide an example of such a nuance. This type of provision is only helpful when an "owner" has contracted for certain integral or essential services to be conducted by another party at a Louisiana facility. If the criteria are met, then La. R.S. 23:1061 provides that an injured employee of the contractor may only sue the owner in workmen's comp, as opposed to tort, thus significantly reducing the scope of likely damages. The owner can only avail itself of these benefits if the contract between the owner and the contractor contains language invoking the "statutory employer" statute.

2.7 Indemnity (Section 10).

2.7.1 Indemnification Approaches. There are several different approaches to the negotiation of indemnity provisions. Three common alternatives are: (a) the "one-way" indemnity provision, (b) the fault-based indemnity provision; and (c) the "knock for knock" indemnity provision. When updating boilerplate, you will want to have a philosophical discussion within the legal department and with your business contacts on what approach to adopt. The "one-way" indemnity provision contains indemnities only by the Other Party in favor of Our Party. In the extreme, the indemnifying party is asked to pay for any injury or death resulting from all matters covered by the Contract. Obviously, if you can get this provision that is terrific; but that only happens if the Other Party is out to lunch or desperate. The "fault-based" indemnity allocates all responsibilities purely on the basis of fault, with the indemnity provisions being reciprocal with respect to Our Party and the Other Party. The "knock for knock" provision allocates responsibility to each party for its own employees and contractors (i.e. those for whom a lawsuit would be conducted under workmen's comp rules) and allocates third party liabilities on the basis of fault. Different situations may dictate a different approach to the indemnity.

2.7.2 General Provisions of Indemnities. For any indemnity provision, you should be careful to include the following elements:

- Language. The Other Party should "defend, indemnify and hold harmless" Our Party. "Indemnify" means that the Other Party will pay Our Party for indemnified claims. "Hold harmless" means that the Other Party will not sue Our Party for indemnified claims. "Defend" means that the Other Party will pay for and handle the defense of indemnified matters.

- Indemnified Parties. Make sure that the list of indemnified parties includes "Our Party, any affiliates of Our Party and all of their respective agents, representatives, employees, shareholders, directors, officers and assigns". Most indemnities that I see do not include a sufficiently full description of the parties being indemnified.
- Carve-Outs. Include carve outs for the gross negligence or willful misconduct of the parties being indemnified. Many states do not allow for one party to indemnify another for the indemnified party's own gross negligence or willful misconduct.
- Survival. Make sure that the indemnity survives the termination of the agreement. Where Our Party is more likely to have an indemnity asserted against it, you may want to cap the duration of the survival of the indemnification provision, although caps on duration are less common in Service and Product agreements.
- Liability Cap. Consider a cap on the amount of liability. Although, a cap on liability exposure is less common in Service and Product agreements, many Service and Product agreements limit the remedies for defective Services or Products to repair or replacement and cap the indemnity amount at the value paid to the indemnifying party for the Services or Products involved.
- Notice and Defense. You should include a provision for notice of the indemnity claim and a right for the indemnifying party to assume the defense. For more complex/higher dollar value Contracts, the notice and defense provisions can be quite lengthy, including a discussion of when the indemnified party can employ its own counsel, whether the indemnified party has a right to approve the indemnifying party's counsel, when the indemnifying party has the right to settle the matter; etc.
- Tax Gross Up. Some indemnification provisions contain a tax gross up provision under the theory that a payment from the indemnifying party to the indemnified party constitutes income to the indemnified party and that the indemnifying party should thus pay the income tax associated with that payment in order to keep the indemnified party whole. I only believe that tax gross up provisions are appropriate in limited contexts, such as where the indemnifying party is located in another country which would impose a withholding tax on the payment. Otherwise, while it is true that the indemnified party would have to include in its income the payment from the indemnifying party, the indemnified party should also be entitled to a deduction in an equal amount for whatever payment the indemnified party was required to make for which it is being indemnified by the indemnifying party.

- Exclusive Remedy. Where an indemnification provision includes limitations on the indemnity obligations of Our Party either in amount or duration, you should consider including a provision to the effect that the indemnity constitutes the exclusive remedy of the Other Party for the matters covered by the indemnity provision. Otherwise, the Other Party may be able to assert a breach of contract claim which could allow for a larger recovery than would be otherwise allowable under the indemnity provision, thus skirting the benefit of the indemnity limitations.
- Express Negligence. Obviously in Texas you would want to include an “express negligence” provision. This is another example of how certain boilerplate provisions need to be tailored to the jurisdiction of performance.

2.8 Insurance (Section 11). As a matter of course, you should run your insurance provisions in important contracts by your insurance department or broker. Your broker will be best able to help you determine whether the coverages and deductibles are appropriate for the specific Contract. Important aspects of an insurance clause include:

- Coverages. You should make sure that the Other Party's coverages are sufficient for the purposes of the Contract. For instance, where the Other Party is selling Products, they should have products liability coverage; where work is being performed on or around the water, marine and/or longshoreman and harbor workers insurance is required; where the Other Party's personnel will be driving vehicles, automobile insurance is required. Your insurance department or broker can help you with this. Coverages can change over time and can vary with respect to location so this is a good example of a provision to review periodically for update.
- Limits/Deductibles. The dollar limits of the coverages and the deductibles should be specified and should be appropriate. Again, the insurance department/broker should be consulted. Again, the appropriate deductible limits can vary over time and by jurisdiction.
- "Primary". The Other Party's insurance policies should be primary to your insurance policies; otherwise, the Other Party's insurance company may attempt to force your insurance company to pay for a loss if both insurance companies have exposure for the occurrence.
- Contractual Indemnities. You should be sure that the Other Party's insurance coverage also covers their liability under the contractual indemnities the Other Party will owe to Our Party pursuant to the Contract. Sometimes this requires a special endorsement.
- Waiver of Subrogation. The Other Party's insurance policies should contain waivers of subrogation in favor of Our Party, all of Our Party's affiliates, and all of their respective agents, representatives, employees, shareholders, directors,

officers and assigns. Otherwise, the Other Party's insurance company could pay the claim and then attempt to sue Our Party and its affiliates for alleged fault in connection with the loss.

- *Additional Insured/Loss Payee.* Where appropriate, Our Party should be included as an "additional insured" under the Other Party's general liability policy and as "loss payee" under the Other Party's casualty policy. Inclusion as an "additional insured" means that the Other Party's insurance will cover actions by Our Party which cause injury or property damage. The "loss payee" is the person to whom casualty insurance proceeds should be paid when property is damaged by fire or other covered events.
- *Insurance Certificates.* The Other Party should be required to deliver an insurance certificate prior to closing, which certificate should note all coverages, policy limits, deductibles and endorsements (such as the contractual indemnity endorsement). The certificate should note that the insurance company will not accept changes to the policy or allow the policy to terminate without 30 days advance written notice to Our Party. That will allow Our Party the time to cancel the Contract or to put in place its own insurance if the Other Party attempts to change its insurance coverage or fails to pay a premium. Read the Certificate. Most people just get the Certificate and check the box, but it is important to read the Certificate to compare it to the coverage requirements.
- *"Occurrence" vs. "Claims Made".* All of the Other Party's insurance policies should be "occurrence" policies as opposed to "claims made" policies. "Occurrence" policies will cover a loss if the event occurs during the policy period, even if the claim is made after the policy coverage period has expired. A "claims made" policy will cover a loss only if the loss both occurs and a claim is made during the policy coverage period.
- *Survival.* If the liability which you want covered by the Other Party's insurance policy will survive the termination of the Contract, you should require that the Other Party's insurance also survive the termination.

2.9 Default (Section 13). Many agreements for Services and Products only contain one-way default and termination provisions in favor of the consumer of the Services or Products. If you represent the provider of the Services or Products, you should include a default/termination provision if the consumer of the Services or Products breaches the Contract, in particular, by failing to make payment. Where you represent the party that is most likely to receive money under a Contract, make sure that the cure period for payment defaults is a short period of time (such as five days) even though the cure period for other defaults can be longer. One good provision to incorporate into a Contract if you can is a right to suspend performance in the event of the Other Party's breach, although this is not a provision that is usually accepted by the Other Party. Often, when Our Party believes that the Other Party is in breach of the Contract, there is a difficult decision of whether or not to terminate the entire Contract. With suspension of performance as an explicit alternative remedy, Our Party can delay the decision on whether to terminate the Contract without feeling compelled to continue performance under the Contract.

2.10 Notices (Section 19). A good notice provision should include a sentence on "deemed receipt" such as the last sentence of Section 19 of the Services Agreement. Otherwise, the Other Party can dodge actual receipt of legal notices thus calling into question the effectiveness of the notice. When updating boilerplate, make sure to remove the "telex" notification provisions and require that e-mail notification also be followed up with written confirmation.

2.11 Additional Provisions to Consider. For more complex projects, you may want to include provisions to cover the following matters:

- Contractor and Owner Representatives. You may want to require that the Other Party appoint a single person as its authorized representative for your project so that you will know that you can rely on decisions and commitments from that person.
- Interference With Other Operations. If the Services are being conducted at a busy site, you may want to provide that the performance of the Services may not unreasonably interfere with other operations at the site.
- Subcontractors. If it is contemplated that the Other Party will hire subcontractors to discharge certain of the Services, the Contract should explicitly provide that the Other Party is responsible for the performance of the subcontractors, should require that the work of the subcontractors is subject to the provisions of the Contract (such as with regard to licensure of personnel, compliance with laws and standards of performance) and should expressly require that the subcontractors maintain the required insurance coverages and provide the necessary insurance certificates.
- Safety, Health and Environment. For certain types of more dangerous Services or for Services performed at a site that contains dangerous conditions, you should include special provisions relating to safety. For example, if applicable, you should include a provision that the Other Party should read and agree to be bound by any site or plant safety rules and the Other Party should be held liable for any damage to the environment or violation of environmental protection laws.
- Inspection and Testing. For more intricate Services, you may want to include a provision for inspection and testing, such as where the Services involve construction or repair of mechanical equipment.
- International. Where the Contract covers Services being performed outside of the United States, you will want to consider a number of additional issues, such as (i) tax minimization strategies (by dividing the Contract into separate "onshore" and "offshore" Services Agreements and avoiding creation of a permanent establishment in the country); (ii) Foreign Corrupt Practices Act ("FCPA") issues (by performing due diligence and obtaining representations that the Other Party is not an entity to which payments should not be made under that FCPA); (iii) payment and choice of currency issues; (iv) export controls, such as ITAR and (v)

Contract enforcement issues (I usually include an arbitration provision, but you should determine that the host country is a party to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards -- a/k/a the "New York Convention"). When updating boilerplate it is particularly important to determine if the boilerplate needs to contemplate international operations because that can significantly change the boilerplate needs.

3. Terms and Conditions. Many of the provisions discussed in Section 2 are also relevant to a sale of Products when Our Party is the Purchaser of the Products. (Remember that the Services Agreement is written from the standpoint of the consumer/purchaser of the Services). You will note, however that many of those provisions are not included in the Terms and Conditions in part because the Terms and Conditions are written from the seller's viewpoint, as opposed to that of the Purchaser.

3.1 Description of Products (Section 1). As with the description of the Services in the Services Agreement, it is critical to explicitly describe the types and amounts of Products being purchased.

3.2 Exclusion of Other Writings (Section 1). Our Party and the Other Party may both have forms of purchase orders and terms and conditions which are delivered to one another. In this classic "battle of the forms" it is often difficult to determine which terms prime the other. Language similar to the last four sentences of Section 1 can help support the supremacy of Our Party's form, although it is unlikely to resolve the issue.

3.3 Prices and Payment (Sections 2 and 3). The payment section in a Products Contract is similar to one in a Services Contract. One difference is a seller of Products should be careful about its extension of credit by the Seller to the Buyer. If Our Party is the seller of the Products, you should consider provisions which require the disclosure by the Other Party of financial information and permit Our Party to limit or eliminate the amount of credit it extends to the Other Party.

3.4 Delivery (Section 4). One obvious distinction between a Services Agreement and Products Agreement is the need for a "delivery" provision. Although Section 4 of the Terms and Conditions uses the term "F.O.B.", more and more of the contracts that I see use the INCOTERMS acronyms. Anyone heavily involved in the purchase and sale of Products should be familiar with the INCOTERMS terms. In a contract relating to Products, it is important to clarify who is responsible for shipping, insurance, unloading and storage of the Products, in addition to clarifying when title and risk of loss is transferred. The various INCOTERMS terms set forth these rights and obligations. The incorporation of INCOTERMS is an important consideration when updating boilerplate for the sale of goods. You should involve your clients actively in a determination of the appropriate delivery terms.

3.5 Warranties (Sections 5 and 6). For a seller of Products, you should set forth a simple, clear and express warranty (typically that the Products are "in material conformance with the specifications and free from any material defects in material or workmanship"). You should specify the timeframe within which a warranty claim can be made, and you should be careful to disclaim all implied warranties, such as warranties of redhibition

(under Louisiana law) and of merchantability or fitness for a particular purpose (under UCC Article 2). When I represent sellers of Products and providers of Services, I like to include a waiver of consequential, special and incidental damages, such as Section 6 of the Terms and Conditions. When Our Party is the purchaser, the Contract should provide that the Products are delivered free from liens.

3.6 Inspection and Rejection (Section 7). For Contracts involving the sale of Products and for certain types of Services contracts, such as construction services, it is useful to include a detailed section involving the inspection and rejection of the Products or Services (if you represent the provider of Services or Products, that is). While an inspection provision is typical in construction contracts, such a provision is not so typical in Products contracts. I am only successful about half of the time in obtaining agreement to the inspection section included in Section 7 of the Terms and Conditions.

3.7 Force Majeure (Section 8). A force majeure provision is important if you represent the provider of Products or Services. Section 8 of the Terms and Conditions is a simple provision. For more complex or higher dollar value Contracts, you may want to include a more detailed provision which can include some of the following provisions:

- Notice. A requirement that the asserting party assert a force majeure within a specified period of time after the occurrence of the force majeure (although such provisions can be tricky, since for some force majeure events, it is difficult to determine at what time a force majeure event has risen to the level to trigger a force majeure).
- Time Limit. A limit to the time period for which a force majeure may stay in effect.
- Termination Option. A provision which allows either party to terminate the Contract if a force majeure remains in effect beyond a specified period of time.
- Third Party Purchases. A provision which allows Our Party, as a consumer of Services or Products not affected by force majeure, to obtain those Services or Products from third parties during the time period during which the force majeure affects the Other Party (and possibly for some period of time following the termination of the force majeure, such as in the case where the only commercially reasonable contracts available for Products or Services require a minimum time or volume commitment). These purchases should reduce the commitment obligations under the Contract.
- Cessation of Force Majeure Event. Provisions which describe when the force majeure event has ended (for example, if a factory is shut down for a force majeure event, it may take several days or weeks after the actual force majeure event ends before the factory is producing sufficient levels

of Products so that the Products can be produced and shipped to the delivery point to satisfy the customer's requirements).

- Rationing. A provision for the rationing of available Services or Products in the event of a partial force majeure, which rationing can include a preference in favor of certain consumers if specified in the Contract.

When Our Party is in the position of the purchaser of Services or Products, it is less important to include a force majeure provision, since a failure to pay money is typically not a force majeure event. When updating boilerplate, make sure you include as force majeure events new threats such as terrorism and sabotage.

3.8 Security Interest (Section 9). When representing the seller of Products on credit, you should attempt to include a security interest provision granting to Our Party a security interest over the Products sold to secure the purchase price. Although a provision such as Section 9 of the Terms and Conditions is sufficient to create a security interest, in order to perfect the security interest against third parties, you must file a financing statement in the Uniform Commercial Code records of the jurisdiction in which the Other Party is "located", which is typically the jurisdiction in which the Other Party is organized. Our Party may complete and file a financing statement against the Other Party as long as the Other Party consents in writing, such as pursuant to the third sentence of Section 9 of the Terms and Conditions.

3.9 Additional Provisions to Consider.

- Manufacturer Warranties. Where the Other Party is not the manufacturer, you should make sure that the manufacturer warranties are assigned with the Products. For certain Products (such as with specialty aircraft parts, pharmaceuticals or specialty chemicals, for example), you may want to update your boilerplate to provide the right to specify the manufacturer, have the right to inspect the manufacturer's facilities and require that the manufacturer deliver a certificate of purity or a test report showing the composition of the Products being purchased.
- Quantities. The Terms and Conditions do not provide for quantities, since it is contemplated that the quantities will be listed on the Purchase Order to which the Terms and Conditions are attached. Obviously, the provisions relating to Product quantity are important. For long term agreements, make sure that the Contracts are not exclusive, are not "requirements" Contracts and do not provide for the right to purchase or sell unlimited quantities, unless you expressly desire that result. You may want to provide for a series of rolling forecasts, which can be binding or non-binding, where long lead times exist for ordering and delivery of Products from the manufacturer.
- Prices. The Terms and Conditions contemplate that purchases will be made from time to time at the Seller's then available quoted price. For other Contracts Our Party may want to use a fixed price, a fixed price with escalators or a price determined by an index.

- Where a **fixed price** is to be used, make sure the Contract is clear as to the time frame during which the fixed price is available and as to the maximum and/or minimum quantity allowed or required to be purchased. Whenever a fixed price is chosen for a long term contract, you should require exclusivity if Our Party is the seller; otherwise, the Other Party will shop Our Party's price and choose the lower price every time, while Our Party will be stuck with a fixed price during rising markets.
- Where an **escalator** is chosen, make sure that the chosen escalator bears a realistic similarity to the actual escalation of the component costs for the Product, including manufacture, shipping, insurance, etc. Where the costs to produce a high-dollar value Product include several major component costs, use several different indices. This is especially important for long-term Product or Services Contracts. For example, (i) the 10% natural gas component may be escalated at its actual cost increase; (ii) the 10% transportation component may be escalated in accordance with a transportation cost index; (iii) the 30% materials component may be escalated in accordance with an appropriate raw materials index or a futures market price; and (iv) the 50% labor component may be escalated in accordance with a labor index.
- When using an **index pricing** mechanism, make sure you specify in detail exactly the index being used and any transportation differential that is appropriate. Always provide for a back-up index should the chosen index no longer be available, or provide that a reasonable replacement index will be selected by the parties in good faith.
- *Infringement.* When purchasing certain types of Products, you may want to ask for a non-infringement warranty and indemnity, if the Product is, or has components that are, of a type that could be subject to patent, copyright or trade secret protections. This is another example of how it is important to understand the transactions involved when updating boilerplate, because projects with a heavy intellectual property component deserve special treatment.
- *International Transactions.* When the Products are being purchased from or sold to a non-U.S. entity, there are special considerations. Here are a few special issues to consider: First, the Convention on the International Sale of Goods ("CISG") may apply if the non-U.S. entity is from a country that is a party to the Convention and if you do not specifically opt out from the CISG in the Contract. Second, there are choice of currency and payment issues. You should choose the currency to avoid devaluation and exchange control risks and to match the currency in which your costs are incurred. Our Party should be less willing to extend credit to a non-U.S. entity. Try to obtain payment from a source outside of the local country, for less stable, third world countries, since payment sources within the country (including banks, if a local bank issues a letter of credit which is not confirmed by a bank from a more stable country) are subject to laws restricting the movement of hard currencies. Third, where Our Party is the seller,

foreign receivables are typically excluded from the borrowing base calculations in A/R backed revolving credit facilities. Fourth, you should consider who is responsible for export and import taxes and tariffs. Fifth, you should be careful about the various U.S. laws which restrict exports, including the Trading With the Enemy Act; the antiboycott laws and ITAR. Sixth, be careful about any sales agency or distributorship arrangements with foreign-nationals located abroad. In addition to FCPA concerns, local laws can make it difficult or impossible to terminate local agents if the relationship is not set up properly, regardless of what the written agreement says. Seventh, you should make clear who is responsible for handling and paying for customs and freight-forwarding.

4. Conclusion. This paper touches upon only a few of the many contractual provisions which could arise in connection with a transaction for the consumption of Services or Products. There are also many other provisions which are typical of other contracts, such as construction contracts, distribution agreements, warehousing agreements, transportation agreements, terminal agreements, etc. Please consider this paper as a helpful general start and not as legal advice which can be applied to any specific contractual scenario.

SERVICE AGREEMENT

This **SERVICE AGREEMENT** (the "**Agreement**") by and between _____ (the "**Company**") and _____ ("**Contractor**") made and entered into as of the ____ day of _____, 2007.

A. Company wishes to engage Contractor and Contractor wishes to be engaged by the Company to provide certain of the Services (as defined below).

In consideration of the agreements contained herein, the parties hereby agree as follows:

1. **Services.** Contractor agrees to perform for Company the services (hereinafter referred to as the "**Services**") described in Schedule A hereto (hereinafter referred to as the "**Schedule**") in accordance with the terms and conditions hereof and that standard of care, skill and diligence normally provided by professionals in the same industry performing the same or similar type of services. The Services shall be performed in a safe manner, using qualified, competent and where necessary, licensed personnel. (The Personnel of Contractor used to perform the Services shall be hereinafter referred to as the "**Personnel**"). Any special terms and conditions relating to the Services, if any, shall be described in Schedule.

2. **Term.** This Agreement shall be effective and shall remain in effect for the term as specified in Schedule, unless sooner terminated by Company or by Contractor or extended by the mutual written agreement of the parties.

3. **Compensation.** As full consideration for the satisfactory performance of the Services by Contractor hereunder, Company shall make payments to Contractor based on the pricing schedule provided in the Schedule (hereinafter referred to as the "**Compensation**"). The Compensation shall be paid within 30 days of receipt of an invoice with all required documentation attached thereto. Contractor's invoices shall be prepared in a format acceptable to Company, and shall include: (a) a description of the Services performed by Contractor and covered by such invoice, which description shall include the number of days or hours, if applicable, the Services were performed; and (b) an itemized list of all expenditures incurred by Contractor which are reimbursable under this Agreement (including, to the extent reimbursable, expenditures for transportation, accommodations and meals), all of which expenses must be reasonable and supported by original receipts or other appropriate documentation in order for Contractor to be entitled to reimbursement.

4. **Taxes.** Contractor is liable for, and shall pay on a timely basis, all taxes of any kind or nature imposed against Contractor or its Personnel relating to the performance of the Services under this Agreement. In the event Company is required, under any law, ruling or regulation of any tax authority with jurisdiction, to withhold taxes from payments to Contractor, Company shall deduct the relevant withholding taxes from Compensation due to Contractor without compensation to Contractor for such withholding.

5. **Confidentiality.** Contractor and Company shall keep confidential and not disclose to third parties, without the written consent of Company, any data, reports, plans, ideas, processes, concepts and/or other information obtained from or through Company or discovered, identified, developed or generated by Contractor as a result of its activities or otherwise in connection with its performance of the Services. This confidentiality obligation shall survive the expiration/termination of this Agreement.

6. **Independent Company.** Contractor shall at all times be subject to the general direction and control of Company in the performance of the Services hereunder, however, the details, manner and method of performing the Services shall be under the control of Contractor. Neither Contractor nor any

employee of Contractor shall have the authority to negotiate or conclude any agreement or contract on behalf of Company, either written or oral, without the express written consent of Company. In performing the Services, Contractor and Contractor's Personnel shall not be or be deemed employee(s) of Company, but rather shall operate as and have the status of independent contractor(s). In no event shall any employee of Contractor be deemed to be an employee or agent of Company, except to the extent provided in Section 7 hereof. Contractor will pay all wages and benefits to the Personnel and shall withhold all payroll taxes as appropriate. Contractor shall be responsible for and retain control of setting the wage rates and benefits of its Personnel. Contractor shall retain the right to hire, discipline, discharge or reassign any of its Personnel. Contractor is responsible for recruitment of its Personnel, as well as providing orientation and training for Personnel who provide services for the Company. Contractor will develop and provide work rules and regulations for its employees providing services to Company. Contractor retains control of enforcing its rules and regulations and handling all disciplinary matters concerning its employees.

7. Statutory Employer. In all cases where any of Contractor's Personnel, including, without limitation, Contractor's direct, borrowed, special or statutory employees are covered by the Louisiana Worker's Compensation Act, La. R.S. 23:1021, et seq., Company and Contractor agree that all work and operations performed by Contractor and its Personnel pursuant to this Agreement are an integral part of and are essential to the ability of Company to generate Company's goods, products and services for purposes of La. R.S. 23:1061(A)(1). Furthermore, Company and Contractor agree that Company is the principal or statutory employer of Contractor's Personnel solely for purposes of La. R.S. 23:1061(A)(3). Without regard to Company's status as the statutory employer or special employer (as defined in La. R.S. 23:1031) of Contractor's Personnel, Contractor shall maintain sole responsibility for the payment of Louisiana Worker's Compensation benefits to its Personnel and shall not be entitled to seek contribution for any such payment from Company and shall fully indemnify Company for any payments made to Contractor's personnel.] [Louisiana provision.]

8. Records. Contractor shall keep complete and accurate records of all Services in keeping with all federal, state or local laws in such form as will be readily accessible by Company upon demand and susceptible of clear interpretation by Company. Company shall have the right with reasonable notice, to audit and copy Contractor's books and records relating to the Services.

9. Representations and Guarantees. Contractor realizes that Company is relying on Contractor's skill and judgment in performing the Services for Company's particular use and Contractor represents, warrants and guarantees to Company in that regard: (a) that it has the legal, financial and technical capability to perform its obligations under this Agreement; and (b) that all Services supplied by Contractor in the performance of this Agreement shall be supplied by personnel who are careful, skilled, experienced and competent in their respective trades or professions.

10. Indemnity.

A. The personnel and property of Contractor and its Personnel shall be the sole responsibility of Contractor, and Contractor shall defend, indemnify and hold harmless the Company, its affiliates, any person or entity with whom Company has an arrangement pursuant to which Company is required to pay or indemnify such party, and the respective agents, representatives, employees, shareholders, directors, officers and assigns of each of the foregoing, from and against all losses, liabilities, claims, demands, debts, damages, fines, penalties, causes of action, suits, expenses and costs of any nature whatsoever (collectively, "Losses") (including any third party claim) suffered by any such person or entity as a result of: (a) injury to or death of, or loss or damage to the property of third parties and their employees (excluding the Company and its employees) arising directly or indirectly out of any negligent, reckless or tortious act or omission (including strict or absolute liability) of Contractor or its Personnel; (b) injury to or death of any Personnel of Contractor; (c) any loss or damage to the property of Contractor or its Personnel; or (d) failure of the Contractor to comply with the provisions of this

Agreement, including, without limitation, Sections 4 and 10 hereof, except in the case of either (a), (b), (c) or (d) to the extent that the liabilities, claims, damages, losses, and expenses (including any third party claims) result from the willful, wanton or reckless actions of Company; and (e) Any loss or damage to property of Company arising directly or indirectly out of negligent, reckless or tortious act or omission of contractor or its personnel.

B. Company shall defend, indemnify and hold harmless the Contractor, its affiliates, and the respective agents, representatives, employees, shareholders, directors, officers and assigns of each of the foregoing from and against all Losses (including any third party claim) suffered by any such person as a result of: (a) injury to or death of, or loss or damage to the property of third parties and their employees (excluding the Contractor and its Personnel) arising directly or indirectly from any negligent, reckless or tortious act or omission (including strict or absolute liability) of Company; (b) injury to or death of any employee of Company arising directly or indirectly from any negligent, reckless or tortious act or omission (including strict or absolute liability) of Company; and (c) any loss or damage to the property of Company, except in the case of either (a), (b) or (c) to the extent that the liabilities, claims, damages, losses, and expenses (including any third party claims and all attorneys' fees and court costs) result from the willful, wanton, or reckless actions of Contractor or any of its Personnel or any default by Contractor or any of its Personnel in performance of its obligations under this Agreement.

C. The obligations under this Section shall survive termination of this Agreement.

D. THE INDEMNITY OBLIGATIONS UNDER THIS AGREEMENT SHALL BE ENFORCEABLE NOTWITHSTANDING THE ACTUAL OR ALLEGED NEGLIGENCE (WHETHER ACTIVE OR PASSIVE, SOLE OR CONCURRENT, SIMPLE OR GROSS), STRICT OR STATUTORY LIABILITY OF THE INDEMNIFIED PARTY.

11. Insurance. Contractor and Company shall at all times during the term of this Agreement carry and maintain with sound and reputable insurance companies approved by Company the insurance coverages described below:

A. Workers compensation insurance covering all activities hereunder in accordance with the laws in effect in the jurisdiction or jurisdictions where the Services are performed by such employees. The parties agree that workers compensation insurance of Contractor is primary with respect to Contractor personnel and workers compensation insurance of Company is primary for Company;

B. Commercial general liability insurance, including coverage for contractual liability and products/completed operations, with a combined single limit of liability for bodily injury and property damage claims of not less than US\$1,000,000 per occurrence.

The Contractor's policies referenced above shall contain a waiver of subrogation in favor of Company and shall provide that the policies may not be materially changed or terminated without thirty (30) days prior written notice to Company. The commercial general liability policy shall name the Company as an additional insured. Upon request, the Contractor shall promptly provide the Company with a certificate of insurance evidencing the insurance required by this Section.

The Company will also provide to Contractor a certificate of insurance evidencing the insurance required by this section.

If any Personnel is authorized to drive a vehicle owned or leased by Contractor, Contractor shall furnish, at its expense, automobile liability insurance. The policy shall insure against liability for bodily injury or property damage, with a minimum combined single limit of \$500,000 and uninsured motorist or PIP equivalent coverage of at least the minimum limits required by the state wherein the automobile is registered.

12. Compliance With Laws. Contractor and Company shall strictly observe and comply with all applicable laws, regulations, judgments, orders, decrees, directives and guidelines relating to the performance of its Services. Contractor and Company shall obtain, hold and maintain all authorizations, consents, certifications, licenses and permits required to perform the Services.

13. Default. If Contractor: (a) becomes insolvent or bankrupt or commences bankruptcy, insolvency, reorganization, stay, moratorium, or similar debtor relief proceedings or has any such proceedings involuntarily commenced against it, (b) fails to proceed with the Services with due diligence and in a competent manner, or (c) otherwise fails to perform or observe any obligation, term, condition or stipulation contained in this Agreement, then in any such case, Contractor shall be in default under this Agreement and Company may exercise any and all remedies available under applicable law, including without limitation the right to: (x) suspend payment under this Agreement until the default has been remedied; (y) take over the Services remaining to be completed either by appointment of a substitute contractor or taking control of the project, including the site and all subcontractors, or (z) cancel this Agreement by notice to Contractor and thereby terminate the engagement of Contractor under this Agreement.

14. Binding Agreement. This Agreement shall be binding upon the parties hereto and their legal successors and permitted assigns. Contractor shall not assign this Agreement without the written approval of Company. Consent by Company to any assignment or subcontracting shall not relieve Contractor from the full and entire responsibility for the performance of its obligations under this Agreement.

15. Choice of Law. Company and Contractor agree that this Agreement shall be governed by and construed in accordance with the procedural and substantive laws of the State of _____, USA.

16. Severability. All provisions of this Agreement are independent and severable from one another. If for any reason any one or more of the provisions herein shall be void, invalid, illegal or unenforceable, in whole or in part, in any respect under any applicable law or decision, such provisions, or a part thereof, shall to that extent be deemed not to form part of this Agreement, and the validity, legality and enforceability of the remaining provisions contained herein shall not be affected or impaired in any way and shall be enforced as written.

17. Amendments. No amendment to this Agreement shall be effective unless made in writing and signed by an officer of the respective companies included in this contract.

18. Non-Waiver. No failure or delay by Company in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided herein shall be cumulative and not exclusive of any rights or remedies provided by law. Any partial or total waiver of any of the terms or provisions of this Agreement shall be valid only if in writing and signed by Company. Any such waiver (i) shall be specific only to a particular occasion, (ii) shall not be continuing unless expressly set forth in the writing granting such waiver, and (iii) shall not constitute a waiver of any other term or provision of this Agreement.

19. Communications. Unless otherwise specified in writing, all notices, notifications, invoices, certificates, approvals, consents, authorizations, ratifications and other matters relating to this Agreement (each a "*Notice*") shall be in writing sent to the respective address of the appropriate party to this Agreement set forth on the signature page hereof, or any other address for such party specified in any duly given Notice sent to the other party. Any such Notice shall be personally delivered or sent by telecopier (with written confirmation of transmission) or nationally recognized overnight courier and

shall be deemed received, if delivered in person or telecopier, on the day sent, or if sent by nationally recognized overnight delivery service, on the day immediately following the day on which the Notice is sent.

20. Counterparts. The parties hereto may execute this Agreement in one or more counterparts, and each counterpart shall be deemed an original, with all counterparts constituting one and the same Agreement. The parties may execute this Agreement by telecopier, with an execution by telecopier being deemed the same as an original. Any party presenting a copy of a telecopied signature page executed by the other party may demand that the other party execute an original of this Agreement and deliver it to the requesting party within five (5) days of the request therefor.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year noted above.

COMPANY

Address:

[NAME]

By: _____

Name:

Title:

CONTRACTOR

Address:

[NAME]

By: _____

Name:

Title

SCHEDULE A

Section 1: Description of Services and Special Terms and Conditions

[TO COME FROM CLIENT]

Section 2: Term of Agreement

[TO COME FROM CLIENT]

Section 3: Compensation for Services

A. Compensation for Services

[TO COME FROM CLIENT]

B. Reimbursement of Certain Expenditures. Company agrees to reimburse the following expenses of Contractor or its Personnel assuming that (a) the expenses are reasonable, direct and out-of-pocket expenditures, (b) the expenses are evidenced by sufficient documentation, in Company's discretion and (c) the expenses are directly related to the performance of the Services:

[LIST OF REIMBURSABLE EXPENSES TO COME FROM CLIENT]

UPDATING YOUR BOILERPLATE

JUNE 12, 2007

BY

J. MARSHALL PAGE, III
JONES WALKER



J. Marshall Page, III - 504.582.8248

Reasons to Update Boilerplate

- Tailor boilerplate to present client needs/operations
- Tailor boilerplate to transaction/ service location and transaction type
- Update boilerplate to remove stale provisions and “modernize” other clauses

Think About the Big Picture

- Client Goals
- How this Contract Integrates with other Relationships
- Impact of a Default by Other Party
- Entire Supply/Distribution/Delivery chain

Sample Agreements

- Service Agreements – Owner's/
Purchaser's Viewpoint
- Terms and Conditions for Goods –
Seller's Viewpoint

Service Agreement Provisions

- Make description of services detailed
- Include a standard of performance (Ask your client and include pitch materials)
- Term

Services/Purchaser

- Compensation
 - *Describe calculation in detail*
 - *Invoice delivery mechanics (not the “legal notice” address)*
 - *Specify required invoice detail*
 - *Due date and interest*
 - *Cost pass-throughs and reimbursements*
 - *Audit rights*

Services/Purchaser (Cont.)

- Confidentiality
- Statutory Employer [Louisiana provision]

Services/Purchaser (Cont.)

- Indemnity
 - *Different approaches*
 - *“Indemnify, hold harmless and defend”*
 - *Indemnified Parties*
 - *Carve-outs*
 - *Survival*
 - *Liability cap*
 - *Notice and defense*
 - *Tax gross up*
 - *Exclusive remedy*
 - *Express Negligence*

Services/Purchaser (Cont.)

- Insurance
 - *Show your insurance department/broker*
 - *Coverages (Need to update periodically)*
 - *Limits/deductibles (Need to update periodically)*
 - *“Primary”*
 - *Coverage of contractual indemnity*
 - *Waiver of subrogation*
 - *Additional insured/loss payee*
 - *Insurance certificate*
 - *“Occurrence” vs. “Claims Made”*
 - *Survival*

Services/Purchaser (Cont.)

- Default
- Notices (remove “telex”)
- Additional Provisions
 - *Contractor Representative*
 - *Interference with operations*
 - *Subcontractors*
 - *Safety, health and environment*
 - *Inspection and testing*
 - *International*

Terms and Conditions

- Make description of products detailed
- Battle of the forms
- Prices and payment (extension of credit)
- Delivery (INCOTERMS, measuring, delivery method)

Goods/Seller

- Warranty and warranty waivers
- Inspection and rejection

Goods/Seller (Cont.)

- Force Majeure
 - *Notice*
 - *Time limit on force majeure*
 - *Third party purchases*
 - *When force majeure ends*
 - *Rationing of available goods*
 - *Update the force majeure threats (terrorism/sabotage)*

Goods/Seller (Cont.)

- Security Interest
- Additional Provisions
 - *Manufacturer warranties/quality assurance*
 - *Quantities (requirements, fixed quantity, open contract)*
 - *Prices (fixed, escalator, index)*
 - *Infringement*
 - *International*

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