**Note to Accompany Contract for Services Template**

This template contract is provided as an example of the sort of terms you might consider using when dealing with a *business client* (these terms are not suitable when dealing with consumer clients).

**Background to the Contract**

Please note:

* If you decide to use these terms it’s important that you obtain legal advice as to whether or not these terms adequately protect your interests.

If you have any questions about these terms please contact Azam M. Z. Zia from Chattertons Solicitors on azam.zia@chattertons.com or 01522 814606.

* We particularly draw your attention to Part II of the Housing Grants, Construction and Regeneration Act 1996, in particular relating to adjudication and payment provisions, which may apply to any contract for services you enter into.
* The limitations of liability set out in condition 11 are provided as an example only. You should consult your provider of professional indemnity insurance to ensure that any specific wording required by your insurer is incorporated into your terms and conditions and your level of liability reflects your level of indemnity cover.
* The TSA accepts no responsibility whatsoever for your use of these terms.

The purpose of this note is to explain some of the pertinent clauses of this template contract for services.

This template contract for services has been drafted for the supply of ongoing services drafted from the perspective of the TSA member (as the ‘supplier’ of the services), with the main commercial details set out as contract details on the first page at the front of the agreement.

Please note, in the interests of producing a short form contract for services, we have omitted or shortened various clauses that would be included in the longer version of this agreement.

A short form agreement is generally considered appropriate for low-risk transactions. In assessing whether it is appropriate to use the agreement you may wish to consider the following:

* The type of transaction. Is it a routine transaction or are the risks such that they would justify the time and expense of negotiating a long form agreement?
* The nature and value of the goods? Are the services of a high enough value to justify the time and expense in negotiating a long form agreement?
* Is there a limited budget for legal and professional fees?
* Is there enough time to negotiate a long form agreement?

The clauses that have been omitted from this agreement include:

* Transfer of undertakings (Protection of Employment) Regulations 2006
* Data protection
* Change of control

The intellectual property rights clause (clause 5), the termination clause (clause 8) and the final clause 9 have all been shortened.

**Implications of Brexit**

On 29 March 2017 the UK government gave formal notice of the U.K.'s intention to leave the EU under Article 50 (2) of the Treaty of the European Union. The direct legal implications of the UK leaving the EU for service agreements are unclear at present. The UK's exit may affect existing laws on service agreements. Areas that may be subject to change include the applicability of data protection rules and the rules on discrimination in the supply of services.

From a drafting perspective some standard provisions may need to be adapted in light of the UK.'s impending exit from the EU.

We will aim to update this template contract to reflect any new developments, as and when such developments become clear.

**Contract details**

At the front of the template is a cover sheet entitled Contract Details which, when completed, will contain key variable terms. Putting these terms here should make it easier to prepare the document. The charges for the services should be specified in the contract details or in a schedule accompanying the contract. Alternatively the manner by which the charges will be fixed should be set out, for example by reference to the list price current at the date of the agreement.

The template envisages that the main conditions will remain unchanged. Any amendment can be set out opposite the words “special terms” in the contract details, noting when, for example a clause is either deleted, added or amended.

**Clause 1 - Interpretation**

Please check each definition carefully to make sure it means what you intend it to mean and amend it where necessary.

Please check this whole clause carefully as these definitions will apply to the whole agreement.

**Clause 2 - Commencement and term.**

This contract provides that the contract will continue but both parties have the right to terminate it by giving written notice to the other. The section in brackets can be included if there is a minimum term (for example a number of years from the date on which the services start) during which the parties can only terminate the agreement for breach or insolvency (see clause 8).

A supplier should avoid agreeing to an indefinite term with no right to terminate for convenience, particularly if no price increase mechanism has been agreed.

**Clause 3 - Supply of services.**

This clause sets out members’ principal obligations with regard to the services. While it would be possible to include fewer obligations the common areas of concern for customers have been included in the interests of reaching an agreement.

You will note that clause 3.2(b) says that suppliers will use “reasonable endeavours” to perform the services in accordance with the schedule. This is drafted to protect members from claims; however, a discerning client may insist that you change this to read “best endeavours” which is a higher standard (and thus harder to meet).

**Clause 4** **- client obligations.**

This clause sets out some general obligations on the client.

However, if the client has significant responsibilities, or there are specific obligations which the customer must carry out before the supplier can perform the contract of services, it may be sensible to include them here, or in a separate schedule, to avoid future disputes and to ensure that it is clear that the supplier’s ability to deliver is dependent on the customer first meeting those dependencies. This schedule will then also be useful as a reference document for the supplier’s personnel who are dealing with the customer. Any schedule should use the same language as the service description (schedule 1).

**Clause 5 -** **intellectual property.**

Intellectual property rights are relevant in service contracts wherever:

* The customer is providing the supplier with something in which intellectual property rights subsist to enable the supplier to perform the services. In the template contract these are defined as “customer materials”.
* The supplier is as part of the services, providing the customers with something in which intellectual property rights subsist. These might include materials (such as instructions or software) which the supplier or a 3rd party has already developed or materials developed as part of the services (such as bespoke reports).

**Clause 6** **- charges and payment.**

There are a number of different mechanisms for pricing arrangements. These can be on a time and materials basis, a fixed fee basis or a combination of the two.

From a supplier's perspective, the time and materials basis is usually preferable as it provides more leeway.

However this agreement is drafted on the basis that a fixed fee will be payable for the services, at monthly intervals. This fee together with the due date for payment should be set out in schedule 2.

The customer has to pay the supplier's invoice within 30 days or you can add interest at 4% above base rate to the bill. You can amend this clause to fit your particular circumstances (for example 14 days to pay etc.).

**Clause 7- limitation of liability.**

Limitation of liabilities is a key issue in a service contract. This clause should always be tailored for your particular transaction. It is likely to be the subject of the most negotiation between parties.

The clause as drafted in the template agreement is that which is commonly found in negotiated agreements under which:

* The supplier does not exclude or limit liability for types of loss that cannot be excluded or limited.
* The supplier excludes its liability for indirect or consequential losses.
* The supplier caps any losses for which it is liable.

The customer may well require that all the exclusions in this clause be made mutual.

It is important to consider these exclusions carefully; there is a risk that if the customer is given no effective remedy, the restrictions will be found to be unenforceable.

The clause has been drafted in a series of sub clauses with the intention that if one sub clause is held to be unreasonable it can be severed from the other provisions, which will remain enforceable.

In respect of clause 7.3, members should refer to their insurers to ascertain a reasonable minimum amount for their liability. If this minimum amount is too low they may be at risk of the clause being unenforceable (as an unfair contract term) and members will then risk their liability being unlimited.

**Clause 8 – termination.**

The contract can be terminated with immediate effect by giving notice if there is a material breach of the contract which is not remedied within 14 days or there is an insolvency event.

On termination for whatever reason, all of the members’ unpaid invoices become immediately payable.

**Clause 9 - general.**

This clause sets out essential boilerplate provisions as follows:

Clause 9.1. force majeure

Because it will be the supplier that is responsible for the main obligations under the contract you may wish to list specific events that amount to force majeure in your case and also include wording to grant an extension of time for performance of obligations should there be a force majeure event.

Please note in the business to business contract on standard terms a force majeure clause will be subject to the Unfair Contract Terms Act 1977 reasonableness test as it allows the parties to avoid liability for non-performance of their obligations.

Where it is limited to events which are genuinely outside the control of the party relying on it, it is more likely to be reasonable.

Clause 9.2 - assignment and other dealings.

The supplier may assign and otherwise deal with the contract and the customer may not.

Clause 9.3 – confidentiality.

Under this clause both parties have to keep the other party’s confidential information confidential forever. They can disclose it to their staff etc. as necessary (providing that the staff etc. abide by the terms of confidentiality) or unless required by law.

Clause 9.4 - entire agreement.

The entire agreement clause is one of the most regularly litigated clauses in commercial agreements.

The purpose of these clauses are to prevent the parties from raising claims that any ‘pre-contractual’ statements (for example statements made during the contract negotiations but that were not included in the final versions of the agreement) constitute additional terms of the agreement or some side agreement.

Clause 9.5 – variation.

A variation clause sets out the procedure for the party to follow in order to vary the agreement. It is intended to exclude the possibility of informal, and perhaps inadvertent, oral variations being made to an agreement.

Please note there are limitations as to the effectiveness of such a clause in precluding any variation of an agreement whether orally or by conduct.

Despite the limitations of a no variation clause and a written agreement, such a clause will still have practical value in that it:

* Indicates a minimum procedure
* Encourages parties to ensure the variations as documented and signed by all the parties (thereby seeking to avoid future dispute about what was and was not agreed to be varied.
* Requires a party seeking to rely on the variation to prove that there was a valid agreement between the parties to vary the terms of an existing contract.

Clause 9.6 – waiver.

This clause seeks to protect a party's rights if that party fails to take action in respect of a breach of contract.

Clause 9.7 – severance.

This clause seeks to ensure that an agreement will continue to be enforceable even if one of its terms is found to be illegal, invalid or unenforceable.

Clause 9.8 – notices.

This clause provides a mechanism for how notices will be given.

Clause 9.9 - third-party right.

This clause deals with the rights of third parties to enforce contract terms under the contracts (Rights of Third Parties) Act 1999.

Clauses 9.10 and clause 9.11

These clauses provide that the contract will be interpreted in accordance with English law and any disputes will be addressed by an English court.

**Schedule 1 - service specification**

This schedule should set out the full service specification. If members are clear on what they are providing it prevents a situation where the supplier ends up providing extra services because a client ‘thought’ something was included.

**Schedule 2 - charges**

This should clearly set out the charges and invoicing involved etc.

As mentioned above if you have any questions about these terms or wish to adapt them to your particular business, please contact Azam M Z Zia at Chattertons Solicitors on Azam.Zia@Chattertons.com or 01522 814606.