



# IT, DOTTED AND CROSSED: CONTRACTING WITH CONSULTANTS

WHAT LOOKS LIKE A LOT OF LEGAL MUMBO JUMBO  
CAN SAVE YOUR PROJECT OR BAIL YOU OUT OF A  
BAD SITUATION. BY SEAN DOHERTY

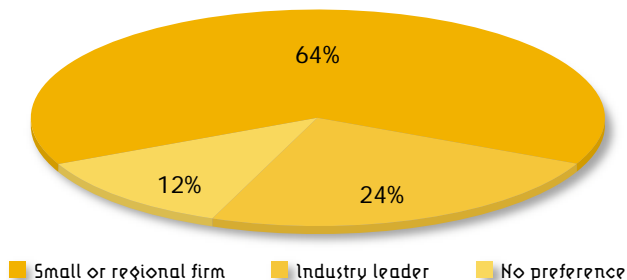
Like it or not, a consultant is not an employee. You can define the scope and duration of work, but you have little say over how, when or where it is accomplished. The contract you negotiate will reinforce this fact.

You've probably looked at such agreements and may have dismissed much of the language as legalese. But before you hire a consultant, make sure you understand the terms, as the contract law that governs these documents will be the last word in settling any disputes that arise.

**IN THE BEGINNING: TITLES AND PREAMBLES** Any independent contractor agreement should begin with a title that identifies it as such. Don't get literary; "Independent Contractor Agreement" works just fine. The opening clause should make clear that the parties are clients and consultants. It should include an effective date so the groups know when their obligations begin. Also, the parties to the agreement should be identified by their legal entities first—for NETWORK COMPUTING, that would be parent company CMP Media LLC, for example.

A preamble generally sets the tone. It should be designed so a court or arbitrator can glean both parties' intent. The preamble should include the scope of the work and refer to any proposal submitted by the consultant.

**In general, do you prefer using a small or regional consulting vendor, or a top national firm?**



Source: NETWORK COMPUTING EMail Poll: 70 respondents

Once your intentions are clear, define the terms and conditions of the relationship. This section will include a full description of the work to be performed and a schedule for the consultant's performance. It should detail the length of the relationship and document when work will commence. It should also include organizational matters, such as staffing and reporting.

The terms and conditions should also estimate the costs of professional services and forecast the consultant's expenses. Do not build in reimbursement for the consultant's travel and meals, which should be covered by the set fees. The consultant should periodically invoice the client for the time spent in performing services. Deduct from the payment a retainer withholding—that is, an amount of money held back until the project is complete.

If set at the right level, a retainer provides a measure of security for the consultant's continuing performance. A low retainer will not give you much leverage in a dispute, while a high retainer can squeeze the consultant's cash flow, which can hurt performance. The amount of the retainer is negotiable, though it's commonly set as a percentage of the billed amount.

Warranties provide another option to guarantee performance levels. Beyond simply promising the work will be done satisfactorily and on time, this section ensures that the consultant's work is original and doesn't infringe on anybody else's copyrights or trademarks. You'll want a warranty both as a guarantee that the consultant will deliver and as an assurance that you won't be held responsible for any such infringements.

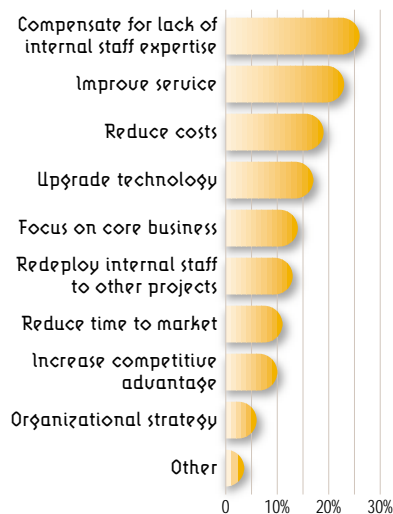
**REMOVING THE DEVIL FROM THE DETAILS** In the terms and conditions clause, you're likely to encounter the term "best efforts"—as in "the consultant will use its best efforts to perform the services required." This phrase means you require the highest quality or the greatest usefulness for the effort's intended

purpose. But don't let legalese be the devil in the details. Instead of leaving "best efforts" undefined, link your deliverables to the work's specifications, which should be measurable. You will need to test the deliverables and evaluate the results to make sure they are acceptable. Acceptance triggers payments and warranties.

To be sure that consultants give you their best efforts, you'll need to develop rigorous acceptance tests and detail them in the agreement's terms and conditions section. You can hire an independent organization to test the consultant's work, rely on your internal IT department or leave it to the consultant. Where possible, use your own data. When application response time is critical, the agreement should detail the acceptable range of performance.

Ownership of the deliverables is paramount in negotiating the agreement. For many tangible objects, payment implies ownership. But this is not true for consulting services. The parties must agree in writing that the client, not the consultant, will own the product. The consultant

**For which of the following reasons have you engaged or are you planning to engage consulting services?**



Source: NETWORK COMPUTING E-Mail Poll; 70 respondents

must irrevocably assign all copyright, patent and other proprietary rights to the client.

### CHANGES AND TERMINATIONS

A good contract will include a procedure to handle change in the relationship. Clients should advise consultants of such changes in writing, specifying as much as possible the scope of the new work. The procedure should include the costs for preparing new estimates and assess the changes' impact on factors such as total cost of services and time for completion.

Planning for the end of the relationship is equally important. Sometimes the project just ends, but other times the results are unacceptable and the consultant fails to provide a solution. Since consultants are independent contractors, not employees, termination needs to be defined in the agreement. The contract should not only limit the relationship to a fixed term but also provide grounds for termination should the relationship deteriorate.

Finally, make sure to include an integration clause that demarks the outer limits of the agreement. This standard section states that all terms and conditions are included in the contract and can't be changed unless both parties agree in writing. If something is important to the relationship, include it. You can add the original proposal from the consultant as well as marketing brochures and cost estimates.

For a sample contract, with instructions for completion, see [www.nwc.com/1315/1315rd1.html](http://www.nwc.com/1315/1315rd1.html).

*Sean Doberty is a technology editor and lawyer based at our Syracuse University Real-World Labs®. A former project manager and IT engineer at Syracuse University, he helped develop centrally supported applications and storage systems. Send your comments on this article to him at [sdoberty@nwc.com](mailto:sdoberty@nwc.com).*