

APDF

Terms and Conditions Reference For Product Design Consultants

Core77.com Readers - Limited Preview
Sections: VII. Client Responsibility & VIII. Indemnification

ASSOCIATION
of PROFESSIONAL
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Contract Terms and Conditions Reference For Product Design Consultants

Association of Professional Design Firms
Ad Hoc Committee on Terms

February, 2004

IDSA.

Endorsed by the Industrial Designers Society of America

VII. CLIENT RESPONSIBILITY

Client is solely responsible to test the designs and any prototypes Consultant provides. Client is solely responsible to ensure that any resulting products are tested, manufactured, packaged, labeled (including adequate warnings), sold, and used in a safe and careful manner and in compliance with all applicable laws, regulations, and appropriate industry standards.

Unless otherwise specifically stated in this Agreement, Client is solely responsible for obtaining any applicable or necessary approvals.

Client assumes all responsibility for any information and/or specifications it provides to Consultant and agrees that, unless specifically stated in this Agreement, Consultant may rely on such information and/or specifications without independent verification.

VIII. INDEMNIFICATION

Client shall indemnify, defend and hold Consultant and its directors, officers, employees, and agents harmless from and against all Claims for illness, injury, and property damage (including loss of use and loss of profits), actual or alleged, that may arise out of or in connection with this Agreement or the Services, Work Product, designs, prototypes, and incidental goods furnished or to be furnished to Client by Consultant. This obligation shall apply, without limitation, to Claims of Client and any employee, invitee, or agent of Client, of any lessee or purchaser of Client's goods or services and of any third party.

Consultant Should Consider . . .

This important section delineates specific client responsibilities and recognizes that they are not the Consultant's responsibilities under the terms of this design contract, unless specifically written otherwise.

These provisions typically follow from a client's responsibility as the manufacturing or marketing source.

Indemnification is one of the most complex and risky areas for product design consultants. New consultants, in particular, are urged to educate themselves thoroughly on this matter and to get advice from an attorney experienced in contract law and new product development when dealing with this subject.

The product design industry has lately identified two high-risk client stances, or pitfalls, the consultant must guard against:

- clients who are unwilling to indemnify their consultants
- clients who ask their consultants to indemnify them

APDF, and the IDSA, opposes both of these positions because they set up an inappropriate balance of risk and reward. Consultants have little or no control over many of the aspects of client's business practices which could be the cause of the lawsuits.

To be sure, APDF members must be committed to customer satisfaction and take pride in the quality and integrity of their design solutions (refer to IDSA code of ethics). The process starts with hiring competent, ethical, committed, well-trained engineers and designers and managing them well. These measures result in safe, reliable designs and work that is consistent with standards of care in the design industry.

The issue of indemnification, however, transcends good business practice: Without an indemnification from a client, a consultant is, in essence, agreeing to accept responsibility for defending itself and possibly paying damages, based allegations of injury, harm, product liability, etc. Without an indemnification from a client, a consultant is responsible for his or her own defense even in the case of a frivolous lawsuit.

In any lawsuit, a plaintiff will name any and every party down the line, so legal costs, in the hundreds of thousands or even millions, could easily bankrupt a consultant without this indemnification.

If a consultant agrees to the second pitfall listed above and provides a client with an indemnification, the situation is even more grave because the consultant has agreed to defend the client in the event of a lawsuit involving the consultant's product design or services. The consultant would be stepping into the line of fire and shielding the client from legal risks normally associated with the client's line of business - marketing, manufacturing, and distributing new products. In many industries, these are significant and very real risks.

Consultants are in no position to assess risk of lawsuit against a client or product, and they typically have neither control nor influence over the steps involved in getting a product to market. Therefore, consultants who are tempted to accept contracts without an indemnification provision from the client should be aware that they could be naively accepting millions of dollars in liability for many years to come in exchange for their modest design fee.

Clients should realize that refusing to indemnify their consultant might amount to asking the consultant to provide product liability insurance within the scope of the consultant's design fees. The commercial value of such insurance, if available, would generally far exceed the value of any design fees paid for most design contracts.

In general, most clients are unwilling to give a consultant ownership of any of the ideas developed and are not interested in arranging any type of "royalty" based agreements. Consultants should accept this as long as the client protects the consultant from the risks associated with new product development.

The risk associated with potential lawsuit costs is rightly borne by the entity that will receive the rewards (revenue) from marketing the products and by the entity that has the ability to reflect the cost of its legal exposure in the price of its products. When spread across a client's total product revenue, the costs of product liability and intellectual property liability are generally acceptable. In contrast, a consultant's fixed term contract reaps only a fraction of the cost of a single legal action and would not provide enough compensation for the consultant to accept limitless liability.

APDF Order Details

For more information and purchase details for the full document, please visit:

<http://www.apdf.org>