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Introduction

When you are buying management consultancy services it is important to recognise that it is a different kind of buying and contracting process to when buying a standard specification, homogenised output where the Client has limited influence over the delivery of the output. Therefore the terms and conditions you use must reflect that. It is also important to understand which contract terms will have a direct impact on the engagement itself and which may be irrelevant, yet can often consume a lot of time and energy in discussion. Critically the contract structure you use must underpin whichever commercial model is the most appropriate.

Contracting Principles

The following sections are intended to highlight the key areas of discussion during the course of agreeing a project for consultancy services. Both parties' interests have been highlighted. To avoid entrenched negotiations taking place which protracts discussions and diverts energies away from a positive relationship and focus on delivery of a project, each party should seek to understand the interests of the other and find a suitable outcome with these in mind.

Key Considerations

1. Contract Structure

Identifying the most suitable vehicle for contracting between a Supplier and Client will save both parties precious time and money, so it is worthwhile taking the time to assess the various options available to you. Ultimately what is going to be the most appropriate and efficient vehicle? A framework agreement? Using the Supplier's terms? A commercial rate-card agreement alone? Using the Client's terms? If you are looking for specialised services to be performed, it may be more appropriate to utilise the Supplier's terms, as they will have been tailored accordingly. However, if as a Client your industry with very strict legal obligations, for example in Energy & Resources where you may have very strict health and safety requirements, it may be preferable to use the Client's terms.

There is no hard and fast rule; the most suitable vehicle for contracting between a Supplier and Client will be informed by the nature of the relationship, the type of project (including any specialist services or regulatory requirements) and a thorough assessment and definition of the Client's needs.

Use of Master Services Agreements ("MSA")

Suppliers have seen an unprecedented demand for master services agreements (MSAs) (also commonly referred to as framework agreements) from Clients in recent years. What generally underpins this demand is a shared desire for a simplified and more efficient contracting process.

An MSA is not in itself an operative contract – as a standalone agreement it creates very few, if any, obligations between the parties. It only 'comes to life' when services are procured by the Client and subsequently provided by the Supplier through a Scope of Services document (also referred to as statement of work, project agreement or engagement request) which will include all the project specific provisions. With two contracts 'in play' at any one time, this inevitably raises the question of which takes precedence in the event of a conflict or ambiguity: the Scope of Services or the MSA?

The Client's Perspective: The Client will typically want the terms of the MSA to prevail over the Scope of Services in the event of a conflict or ambiguity as this avoids renegotiating terms in the MSA that are pre-agreed.

The Supplier's Perspective: Typically the Supplier will want the terms of the Scope of Services to prevail over the MSA to reinforce the standalone nature of the scope and to agree terms specific to the particular project.

Both parties will need to agree which of the terms, the scope or the terms of the MSA will prevail in the event of a conflict or ambiguity to for the particular project and should be clear that neither option undermines the validity of all other terms agreed.

An MSA may not always be the most suitable contracting option available to the parties. A number of factors need to be considered in order to arrive at the right outcome. The conversation around the right contracting option will be informed by the requirements of the respective organisations and the number of opportunities in the pipeline. If there is a single specific opportunity available it may be quicker and easier to contract using a standalone contract rather than attempting to agree a broad set of terms that seek to cover a range of services and an unidentified number of opportunities. If an MSA is being considered both parties must approach the process with a genuine appetite to engage constructively in order to achieve the desired outcome. The negotiations can become difficult and will consume a lot of time, energy, cost and resources.

Nevertheless, a number of factors should be considered before the decision is made to commence MSA negotiations. To MSA or not to MSA? That is the question:

To MSA…..	Not to MSA……
• Speedier, easier and more efficient route to contracting once it is agreed	• Cost and effort associated with the negotiation process
• Can be the foundation of a long standing, productive relationship between the parties	• Can have a detrimental impact on the business relationship if negotiations prove difficult
• Can be used to cover a broad range of services and include the provision of services outside of the UK (with adjustments for local law and regulation – see further below on international contracting)	• The agreed terms and conditions may not always be appropriate for the nature or value of services being procured and some terms may be irrelevant to the services being provided. Some services may require specific and additional terms in any event on account of their specialist nature (e.g. IT attack and penetration services)

To MSA.....	Not to MSA.....
Client's perspective: • standardisation across various Suppliers which helps to drive efficiencies in the contract management process • the MSA may include a rate card and other commercial arrangements which help achieve cost efficiencies **Supplier's perspective:** • Increases access to opportunities and the chances of winning work and can create an advantage against competitors • Cross-selling opportunities across a range of services • Reduces length of selling process and its costs	**Client's perspective** • limits competition amongst a select group of preferred Suppliers • stakeholder and procurement interests may not be aligned (e.g. the business's desire for a particular Supplier versus procurement driven objectives) exposing tensions between different parts of the business **Supplier's perspective:** • Rate cards, volume discounts and other commercial arrangements may erode margin • A "one size fits all" framework agreement may not allow for the nuances of the Supplier's organisation to be taken into consideration

The ability to contract globally will largely depend on the structure of the organisation in question. In a typical corporate structure, the contracting entity may be the parent company or an entity which has the authority to bind its subsidiaries to the MSA terms.

International contracting is complex for both Clients and Suppliers regardless of their internal structure. These complexities arise on account of (i) taxation issues (e.g. cross border billing); (ii) local practices and cultures in emerging markets; (iii) local regulations and mandatory requirements that cannot be ousted by a choice of law; (iv) the challenges of working in different jurisdictions and the different choices of law that result. In the world of professional services, many professional service providers will be locally regulated and registered in their jurisdiction as separate entities and therefore have to operate as independent networks. Therefore MSAs will need to be implemented at a local level, usually through a separate implementation agreement. Whilst the Client may be expecting very few amendments to the MSA terms, other than those required by local custom and practice, the local network firm may not be willing to stand behind some or all of the terms agreed by the firm which has negotiated the MSA on account of a different risk appetite, volume of work or relationship with the Client.

When considering contract structure, some thought also needs to be given to purchase orders and their relevance to MSAs. Purchase orders sometimes seek to introduce additional terms to the contract. The Supplier will typically reject these as an attempt to vary the MSA terms since the MSA terms have already been agreed. For the Supplier, Purchase Orders are not intended to be the contract or introduce additional terms but rather a process/mechanism required in order to generate an invoice and, ultimately, payment.

Purchase orders must also be considered in the context of the contracting process and any ordering process should be addressed in the MSA, to provide clarification for both parties. Typically a Supplier will be prevented from signing a Scope of Services/Statement of Work and therefore raising an invoice, until it has received a purchase order from the Client. The requirement for a purchase order and the delays in issuing a purchase order can hold up the contracting process. This can have implications for parties:

For the Client it can result in a delay to the delivery of the services; **For the Supplier**, it can result in a delay to receiving payment.

2. Supplier and Client obligations

Scope of Services

Consultancy services by their nature require collaboration and cooperation and so it is vital for the success of any project for the parties to adopt a teaming approach to the way they work.

One of the first and most important steps for any procurement is the definition of the scope of services. There are essentially 6 key questions to cover in a Scope of Services.

1. **Why**: why are consultancy services being procured? – this is the background.
2. **What**: what are the consultancy services being procured? This is the meat of the scope of this project and will be described in a way that is consistent with the chosen commercial model.
3. **Who**: who needs to do what? This area reflects the symbiotic nature of consultancy projects and recognises the joint dependencies.
4. **How**: what are the necessary standards…this seeks to describe a mutual understanding of the standard and manner in which the services will be delivered.
5. **When and where**: these questions speak for themselves but are generally the areas relating to the timing of the services and the location of the services. These are all matters that need to be thought through and agreed to at the outset.

Further detail on these questions can be found on the CBF Guide to Writing an Effective Scope of Services. This is covered in detail within a separate guide.

3. Supplier personnel

There are a number of provisions in the course of a contractual discussion that relate to personnel.

The cornerstone of the Supplier's reputation hinges on the quality, capabilities and expertise of its personnel. It is recognised by Clients that the people deployed by the Supplier will have a significant impact on whether this project is delivered successfully or not.

The Client's perspective: Mindful that the Client is paying to bring such expertise into its organisation, the Client may be keen to impose various restrictions on the Supplier's personnel. The Client may feel it is gaining a competitive advantage by virtue of the project and may therefore wish to restrict personnel who have worked on its project from working for its competitors.

The Supplier's perspective: The wealth of information and knowledge that its personnel gain on Client projects is integral to the Supplier's core ability to provide services. Indeed the various reasons Client's will want a particular team is because of their experience of successful projects for comparable organisations.

There are a range of options available to the Client which seeks to impose restrictions on the Supplier's personnel. The Client and Supplier's interests may be at opposite ends of the spectrum as they each seek to protect their respective and competing interests.

Non-solicitation

People are the asset of professional services organisations. People drive the value of a project for a Client. Although both parties may be aligned in their desire to restrict the other party from soliciting their respective personnel, it may also be the case that the Client wishes to tap into these assets of the Supplier on a continued and on-going basis. Supplier personnel find themselves working very closely with Client teams and become integral to those teams. Clients are reluctant to lose them and therefore may seek to entice them away from the Supplier. If a Supplier is regularly losing its personnel to Client organisations it is losing its key assets and the knowhow, expertise and eminence that many of those assets – its people – have. There is a cost associated –both in terms of time, training and recruitment costs – to the Supplier when it loses its personnel.

For this reason non-solicitation clauses are included in contracts. These are usually reciprocal provisions although, it is probably fair to say, particularly important to Suppliers. There are examples where, on account of a continual stream of departures to Clients, more onerous terms are negotiated.

A mutual non-solicitation clause over a reasonable period of time may be fairly non-contentious and relatively easy to agree in the context of the entire negotiation process.

Key personnel

Key personnel are generally considered to be those essential to the successful delivery of a project and hence the Client will be keen to exercise an element of control over certain personnel. Similarly, the Supplier may be keen to identify key stakeholders or programme leads within the Client organisation that are critical for the Supplier to have access to. The effect of identifying personnel as key in a contract usually means that there are restrictions on removing those personnel.

The Client's perspective: The Client may have awarded a particular piece of work to the Supplier because of the capabilities and experience of a specific individual. Or perhaps the Client has an existing relationship with a certain individual whom the Client is keen to secure for a particular project? Either way, the Client may wish to secure their deployment by designating them as "key personnel" and placing various restrictions on their removal from the project without the Client's prior consent.

The Supplier's perspective: Individuals often choose to work for consultancy firms because of the variety of work and breadth of Clients at the Supplier's disposal. The Supplier will be keen to ensure that its personnel gain a broad range of experience across various Client engagements. Some projects can be long, stretching into months, even years. The Supplier will want to ensure that it has enough flexibility to redeploy personnel across its portfolio of Clients and will therefore seek to limit the number of personnel designated as "key personnel" in any given project.

In order to achieve an appropriate outcome the parties should focus on the breadth and scope of such clauses. For example, it may be unreasonable for junior members of the team to be designated as key personnel. Likewise, the Supplier will probably reject attempts to make the entire project team "key personnel". On the other hand, where an individual's involvement can be demonstrated to be integral to the successful delivery of a project, the Supplier may be willing to consider including restrictions on that person's removal from the project without the Client's consent.

In any case, the Supplier will always expect there to be exceptions to the key personnel restrictions. Allowance should be made for the removal of such personnel without the Client's consent in circumstances that are generally considered to be outside of the Supplier's control, for example, where the individual has resigned, is ill or is on maternity/paternity leave.

TUPE

TUPE Regulations have been designed to protect the jobs of employees if the business in which they work changes hands. If a TUPE transfer applies, all terms and conditions of work and continuity of employment should be preserved.

Although it is unlikely to apply, this may become an issue for both parties so it is important this is considered as part of contract negotiations. For example, where Supplier personnel may be providing services at a Client's premises and are treated like the Client's employees, including allocation of an internal email address, there may be a risk of a claim that the Supplier personnel have been transferred to the Client when services are bought back-in house. You may face claims for unfair dismissal (if you do not keep the transferring employees) as well as claims related to the pre-transfer acts or omissions so addressing this in the contract where TUPE may apply is good practice for both the Client and the Supplier.

Staff rotation

In circumstances where one consultant is replaced with another, the parties may have different views on who bears the costs of that transition.

The Client' perspective: The Client will not want to pay for time spent transitioning the services from one consultant to another. Continuity of services is a Supplier's responsibility and it should not fall on the Client to bear the costs associated with such transition.

The Supplier's perspective: The Supplier may be prepared to absorb the cost of transitioning personnel in circumstances where it has exercised the right to replace one consultant with another. However, if the Client requests a stream of changes this may not be viable. It may also impede the successful delivery of the project.

Restrictions on personnel

An attempt by the Client to restrict the deployment of Supplier personnel to other Clients is often a contentious issue and part of a broader discussion about exclusivity. Often exclusivity clauses, as proposed by Clients, are very far reaching and go beyond restrictions on named personnel (see further below in relation to exclusivity more generally).

The Client's perspective: The free flowing, unrestricted movement of Supplier personnel from client to client allows the Supplier to take know-how gained from the Client's organisation to a competitor, potentially eliminating any competitive advantage that the project was intended to bring. By restricting named Supplier personnel from working for competitors for a period of time after they cease working for the Client, the Client is able to better protect confidential insights and know-how acquired by the Supplier over the lifespan of the project.

The Supplier's perspective: The Client's confidentiality is protected by other contractual means and there is no need to seek further protection by placing restrictions on the redeployment of the Supplier's personnel. The Client appoints the Supplier because of its expertise and ability to deliver the services. If every Client sought to impose restrictions on the redeployment of personnel the Supplier would be prevented from delivering similar services to other Clients, significantly hampering its ability to do business. There is a clear commercial implication for the Supplier. One that would be difficult to realistically cost as it would depend on the stream and scale of future opportunities (and in any event would make the price of the services uncompetitive).

Factors to consider for the purpose of the contract negotiation include the length of such restriction, the geographic scope, the number of named persons affected, whether it is limited to a type of service and whether it is limited to named competitors of the Client. The Client should be aware that the Supplier may seek to charge a premium for an individual who is prevented from providing services elsewhere after she/he ceases to provide services to the Client.

4. Exclusivity

Both Client's and Supplier's should be free to contract with whomever they want (subject of course to any legal and regulatory obligations) and exclusivity provisions represent a significant restraint on that freedom. By the same token, an exclusivity provision gives the party receiving the benefit of exclusivity something of value.

The Client's perspective: By restricting the Supplier from providing the same or similar services to your competitors for a period of time after the services are completed then the Client can retain a competitive advantage. The Client is able to better protect the benefits, insights and know-how acquired from the delivery of the Services beyond the lifespan of the project.

The Supplier's perspective: As Supplier's trade on their knowledge, experience and Intellectual Property it is critical to its business that their potential Client market is not limited. The Client often appoints the Supplier because they have demonstrable capability of delivering the same or similar services to a Client's competitors or in the Client's industry and will therefore be considered to have the expertise and experience needed to deliver its requirements. If every Client sought to impose restrictions on providing the same or similar services (subject to any duty of confidentiality to the Client) to existing or prospective Clients, this would materially affect the Supplier's ability to do business.

This is not the say that the Supplier may not consider offering limited exclusivity to a Client after they cease providing the services having due consideration for the length of such restriction, the geographic scope, whether it is limited to a specific service and whether it is limited to named personnel of the Supplier (see above) or named competitors of the Client.

The Supplier should be aware that this can however be more difficult than it seems at first, especially with services that may overlap with other similar services that are not intended to be covered by the grant of exclusivity. It is vital to make sure that the services covered by the exclusivity provision are crystal clear.

The Client should be aware that a Supplier may seek to charge a premium for the services if there is an expectation that they are prevented from providing services elsewhere. Consider what your interests are and if there is a genuine competitive edge through the Supplier's provision of services. Are there other mechanisms which could be used? See comments below in relation to intellectual property and confidentiality. Is it appropriate in the context of the services, for example, do you need to restrict a Supplier from providing PMO services to your competitor?

Both parties need to make sure they understand how exclusivity provisions will limit what they can do while they are in effect, and that this information is shared internally, so that your personnel know how these limitations affect their responsibilities.

5. Limitation on liability, indemnities, warranties

Tom Cruise once uttered the following line in his smash hit movie Jerry Maguire:

"*We live in a cynical world……..and we work in a business of tough competitors*".

Rarely is that competition more acutely felt than in the debate surrounding liability.

Warranties, indemnities and limitations on liability are a means of allocating risk between the respective parties. The Client may seek protection by means of various warranties, and indemnities while the Supplier may attempt to protect itself by refusing to give certain warranties and indemnities and restricting the scope of situations where claims can be brought against it.

Before we focus on some of the key considerations, it is worth reminding ourselves of the basics. Put simply, a warranty is a contractual statement of fact or promise. An award of damages for breach of warranty aims to put the innocent party in the position that it would have been in had the warranty been true (subject to the well-established rules around mitigation and remoteness).

In contrast, an indemnity is a promise to reimburse the innocent party for a loss suffered by the occurrence of a particular event. Typically this will constitute a breach of a particular provision of the contract but the indemnity can also cover situations where there is no fault (e.g. TUPE related losses). In very simple terms, an indemnity provides pound for pound compensation in respect of a specific loss and, unlike a warranty; the innocent party is not under any obligation to mitigate its loss.

The debate goes to the very core of the risk profile of each party and is a key factor in the overall price of the services. Since the interests of both organisations are likely to be at opposite ends of the spectrum, achieving a position acceptable to both parties can feel like *Mission Impossible*! The general trend from the Client will be to seek the broadest and most extensive range of warranties and indemnities available to it. The Supplier will typically seek to limit the number of warranties and indemnities it gives. Below we investigate the respective positions of each party.

Warranties and indemnities, *Risky Business:*

	Supplier's Perspective	Client's Perspective
Warranties	• Will expect certain warranties to be reciprocal (e.g. warrant of authority to enter into the agreement) • Will pay close attention to the applicability of the warranties in the context of the services being provided • May object to the inclusion of a particular warranty where an indemnity has been given in respect of the same loss (e.g. infringement of third party intellectual property rights) • Will expect an express provision in the MSA excluding implied warranties, terms and conditions so that the contract is the complete statement	• May be reluctant to give any warranties since it is paying for the services • May seek to include a broad range of warranties without having particular regard to the services or their associated risks • May seek by virtue of engaging the Supplier to transfer all risk regardless of its ultimate responsibility for its business
Indemnities	• General appetite for indemnities will be driven by the associated commercial rewards – the Supplier will not give indemnities without having proper regard to the nature of the services and the price being paid for them • Will seek to limit these to those relevant to the services only • May seek reciprocity where a loss can be suffered by either party (e.g. a TUPE related indemnity) • May require an indemnity from the Client in respect of claims brought by third parties where a third party has access to the advice/deliverable	• Will look to use indemnities to reinforce the liability provisions without having particular regard to the services or the associated risks • May be reluctant to consider giving them any indemnities since they cut across the concept of "Client" paying for the services

Conversations around liability caps may be as equally emotive:

The Supplier's perspective: First and foremost, the Suppler will always expect to cap its liability on claims that can be made against it under the contract. A high liability cap may:

- drive up the cost of the services
- limit the number of Suppliers prepared to accept the cap
- deter the Supplier from bidding for work under the MSA where it determines the reward does not justify the financial exposure

In addition, the Supplier will also expect certain losses, such as indirect, consequential and special losses, to be expressly excluded as items of loss on the basis that such losses are generally considered too speculative and remote and outside of the control of the Supplier.

A Supplier will ideally not want the Client's liability to be capped, especially where the Supplier has intellectual property to protect.

The Client's perspective: The Client is paying for the Supplier's services and may be relying on the Supplier's expertise to deliver a particular outcome. A low liability cap may altogether deter the Client from awarding the services to the Supplier. According to the risk profile that you think your project is likely to present, you may want to ask the Supplier for a specific level of liability, which may trigger additional costs if your requested level is different from the Supplier's standard commercial position.

Liability caps come in all shapes and sizes presenting a *cocktail* of possible outcomes:

Type of liability cap	
Contract value caps	The financial cap is often set by reference to the total amount paid/payable to the Supplier by reference to the entire contract (e.g. x% of such fees, with the Client obviously arguing for a higher percentage, and the Supplier for a lower one)
Specific loss, different caps	Many Clients will also demand a higher cap, perhaps even unlimited liability, for specific losses due to their perception of the seriousness of the breach and/or the consequences or the indemnity claims
Different services, different caps	Remembering that an MSA can provide for a range of different services, the Client may demand a different cap for services. For example, mergers and acquisitions and financial due diligence services may justify a higher cap than general consulting services – there may be an established market practice in this area
Client caps	Most of the obligations under the contract will fall on the Supplier (for example, to meet the deadlines, provide the services and produce the deliverables). The primary obligation on the Client is to pay. The Client may therefore consider that it should benefit from a low liability cap. On the other hand, the Supplier may query why the Client needs a liability cap at all?

In order to determine an appropriate outcome on the allocation of risk in the context of the discussion around liability, the parties must be willing to negotiate, with neither party vying to emerge as *Top Gun*. They should have regard to a number of factors, including: the nature of the services; the risk profile attached to those services; the value or potential value of the services; emerging opportunities and, last but not least, current market practice which can be key to achieving a balanced and satisfactory outcome.

6. Intellectual Property

The subject of intellectual property is typically a hotly debated and emotive issue for both parties during the course of contract negotiations.

It is not just a subject related to the terms and conditions and should be considered in the context of the commercial negotiations as well as in relation to the terms dealing with exclusivity.

Starting with the basics, what is intellectual property (IP)? IP is a subset of the broader category known as "intellectual capital" generally recognised as a broad category of tangible and intangible resources, such as human capital, intellectual assets and IP which Suppliers of consultancy services use in their business. Buyers of consultancy services also own intellectual capital in their own businesses. IP is the subset of intellectual capital that is legally protectable and forms assets that can be bought, sold, licensed or even stolen. The main types of IP that apply to consultancy services include patents, copyright, trade secrets and trademarks.

The conversation in relation to ownership of IP is not black and white. Indeed it is Fifty Shades of Grey…

The Supplier's perspective: First and foremost, core consulting practices depend on IP. IP is one of the chief reusable assets that support not only a Supplier's ability to provide services but also its expansion into new initiatives. It is the foundation of the delivery of services to Clients - the basis on which the Suppliers experience is rooted.

Giving away IP may:

- preclude Suppliers from delivering similar services to other Clients
- enable Clients to potentially compete (either in their own right or with a third party) with the Supplier

If the price is right, the consultancy may be willing to consider handing its IP over lock, stock and barrel, but it is important to note that this may make the price uncompetitive and create; (i) challenges for the Client in terms of managing a complex IP portfolio of professional services; and (ii) reduce the Client's choice of Supplier. The essence of such a scenario is that the Client is looking to buy the business.

The Client's perspective: First and foremost, the Client is paying for the services and therefore has a right to own the output of the services. It may not wish to lose the actual or perceived competitive advantage that the project is intended to bring. The Client may also be keen to ensure that its confidential information is protected and not shared beyond what is necessary. However, note that there are typically separate confidentiality provisions in a contract which could achieve this. The debate on intellectual property ownership and confidentiality whilst related should be separated. (See further below)

Below we seek to highlight some of the key considerations to bear in mind, and questions to ask, when determining what is truly important for each party in the course of discussions on IP. The conversation will be informed very much by the specifics of any particular project, such as, the nature of the Supplier's involvement, the market practice for the particular services and the competitive landscape.

In order to determine an appropriate outcome, the parties focus should be on "interests" rather than the emotions or positions of the parties. The process of open communication which is vital to reaching satisfactory agreement should start here: presenting both parties' interests and desired outcomes in an objective manner and seeking to understand the other parties' interests rather than presenting what appears to be an entrenched position.

The shades of grey……

Client perspective	Supplier perspective
• to own what I have paid for • to obtain a rapidly developed solution which works for my business • possibly to gain a competitive advantage which the services may give me	• Client is paying for our peoples' skills, time and experience • Client is not paying for a product or the right to cut us out of parts of the market place • to provide a rapidly developed solution which works for the Client's business • the rate assumes we retain ownership of all IP, for a Client to pay fully for ownership rights of all IP, we would need to be compensated for the value of future opportunities which are lost in giving up these IP rights • the outputs and ideas which we bring to the Client are based very much on our pre-existing knowledge (see further below on pre-existing knowledge and knowhow) • if there is a genuine competitive advantage through our involvement in this project, the Client may consider restrictions on named individuals working for named competitors for an agreed period of time or a period of exclusivity

The conversation in relation to IP often treats all IP as the same. To do so would be overly simplistic. It is preferable to separate IP into the different categories:

- newly created on the project
- pre-existing/old or tweaks to pre-existing old that is brought to the project or developed independently of the project
- residual skills and knowledge gained on the project

The conversation in relation to IP tends to focus on newly created IP. However the other categories are equally important and are described further below.

Newly created on the project

A range of options exist as to whom ownership of newly created IP vests in:

SCENARIOS	Supplier owns all newly created IP and licences it to the Client for its internal use	Client owns all newly created IP and grants Supplier broad use and sub-licence rights, possibly subject to reasonable restrictions to protect Client's competitive advantage	Joint ownership (without duty of accounting)	Menu approach Option 1: types of ownership rights are divided into categories and the category which applies to be set out in the specific engagement Option 2: potential outputs are divided into categories by type (e.g. report, software etc.), with different ownership rights attaching to each category	Client owns all newly created IP, Supplier obtains no rights
PROS AND CONS	*+VE: Supplier has complete certainty as to what it needs* *+VE: IP is vesting in the organisation which is best placed to manage IP that is core to its business* *-VE: may alienate Client or leave Client with a poor perception of dealing with the Supplier* *-VE: onus on the Client to make sure it has all necessary rights for use of the IP including with any third parties*	*+VE: Both parties get broad rights* *-VE: terms of the licence back and restrictions are critical to factor*	*+VE: Each party has the right to use and exploit independently* *+VE: it feels fair albeit practically may not be* *-VE: difficult to draft suitable provisions* *-VE: potentially results in joint decision making in relation to all IP particularly in the context of enforcing those IP rights* *-VE: mismatch of expectations in relation to future royalties and inability to manage at both parties*	*+VE: Suitable for MSA/Framework Agreements as provides flexibility* *+VE: keeps dialogue open for both parties reflecting interests on a case by case basis* *+VE: does not create a bar in the relationship/future work* *-VE: Default position as to who owns the IP rights if the parties cannot agree is the key issue* *-VE: Defers the debate* *-VE: Requires a high degree of discipline in managing each contract*	*+VE: Client has complete certainty that it has what it needs* *-VE: unlikely to be suitable to Supplier unless inconsequential or very Client specific* *-VE: may preclude Supplier from doing further work for this Client e.g. discourages innovation* *-VE: may damage relationship and limit choice of Suppliers who are prepared to live with these terms* *-VE: leaves Client to manage a portfolio of IP in non-core business areas*

Pre-existing/old IP

It is important to recognise for both parties there will be a body of information and knowledge that each party owns or develops separately to the discussions underway in relation to a particular project. It is commonly accepted that this information should be treated separately to the discussions in relation to new IP. It is also entirely reasonable that beyond the rights each party may need to use pre-existing IP of the other party for the purposes of the project, no further rights should be acquired in relation to it. Similarly, where IP is developed by either party independently of the project, it should be of no interest or consequence to the other party.

Residuals

Each party will in the ordinary course of working together on a project via the individuals engaged acquire general knowledge, skills and experience about the services, the Client, the industry etc. Consultancy projects involve a two-way relationship with the reality being that teams work very much cheek to jowl (regardless of whether Supplier or Client personnel).

Therefore, it is often the case that each learns from the other. This is to be encouraged and supported as it fosters a stronger relationship between the working parties. This is in no way to be confused with the importance of maintaining the confidentiality of any confidential information. Confidentiality provisions apply in relation to confidential information regardless of an acknowledgement that there will be a sharing and retention of know-how by each party.

7. Confidentiality

Confidentiality should not be a controversial issue within the contract. However, that is not to say it is never controversial. The overarching principle which typically both parties seek to secure is a contractual provision that states that both parties will respect and keep confidential the information of the other party.

Sometimes Clients seek to put in place a non-disclosure agreement separate to the contracts in relation to a particular project. The first question to ask is "Do we really **need** to enter into a separate confidentiality agreement?"

- There may be existing confidentiality provisions within a MSA that could be deemed to provide for the required confidentiality.
- Certain Suppliers may already have professional obligations of confidentiality in any event. For example, by virtue of being a member of a professional body such as the Institute of Chartered Accountants of England and Wales.
- There is also a duty of confidentiality in any event by virtue of common law where information is shared in confidence. These obligations continue regardless.

The potential areas of contention in relation to confidentiality provisions relate to the following:

Scope of confidentiality requirements:

The Supplier will be asking the following questions: Are there any conditions that may restrict our ability to perform our work? (e.g. where the discloser is a third party, a prohibition to disclose the information to our Client, or generally, the access to the information is to be restricted to too few individuals in the engagement team, unduly onerous requirements to secure confidential documents, etc.). Basically, it would be perverse if the restrictions in a confidentiality agreement were so narrow that they prevented the Supplier from carrying out the work it has been engaged to do and to consult internally as appropriate. Therefore, clauses restricting access to the information to too few individuals, or requiring unduly onerous measures to be taken to secure confidential documents (one such example being a request by a Client to keep all confidential documents in a bank vault), may not actually serve the parties' interests.

Normally the Client (as the party disclosing most confidential information) tries to define confidential information as widely as possible – whilst the Supplier may try to define it as narrowly as possible. In all instances, we need to consider whether the definition of confidential information is practical given the context of the engagement or transaction.

It is important to set out in the agreement whether all information passing between the disclosing party and recipient relating to the transaction in question is confidential or whether only certain categories of information are confidential.

It is established market practice that both the Supplier and the Client need to be able to disclose the confidential information without consent in specific circumstances. Examples include where a party has a duty to do so (for example, upon suspicion of money laundering) or where a party is required to do so by an order of court or a regulatory notice. There are other commonly accepted scenarios, such as, when the confidential information is in, or subsequently comes into, the public domain or where it is independently developed by a third party.

Return of confidential information

Do the confidentiality provisions require return or destruction of confidential information once an assignment is complete?

It is common for Clients to want all information returned once work by the Supplier is complete. It is also often necessary for the Supplier to retain a copy of Client documentary material and information to enable it to meet its professional and regulatory obligations. With regard to the destruction of confidential information, again the ability of a Supplier to do so will depend on its record keeping requirements. It is increasingly difficult in this technical age for information that has been stored or received electronically to be returned or destroyed as multiple copies are often made and indeed electronic files are backed up and stored. Clients should seek to establish whether it is necessary to mandate the return or destruction of information particularly as obligations of confidentiality continue beyond the end of a project.

Individual confidentiality undertakings

It is increasingly common for Clients to insist that all recipients of confidential information comply with the terms of the agreement or, alternatively, that the recipients themselves enter into a written agreement in which they agree to be bound by the confidentiality obligations. From the Client's perspective this ensures that the necessary terms are drawn to the attention of each employee engaged. From the Supplier's perspective, this is considered unnecessary as employees have confidentiality clauses in their employment contracts requiring employees to comply, and the Supplier's do not wish to expose their employees by requiring them to enter into direct contractual relationships with Clients, which have a personal liability attached. Indeed, for the individuals concerned, this creates a very difficult situation of having two contractual commitments covering the same matter, often in a slightly different way.

Use of third parties and the sharing of deliverables

The other area that often becomes contentious is the sharing of confidential information (which will include the sharing of the output of Supplier's services) with third parties. Client's often have a multivendor environment or a complex business structure which means that a broad requirement to share the Supplier's outputs (including confidential information) is necessary. However, the flip side of this is that the multivendor environment of the Client may well include a number of the Supplier's competitors whom the Supplier would not wish to access its confidential information.

Similarly, the Supplier may be concerned that the advice which it has prepared based on the particular facts relating to a Client entity is very specific in time and application to that entity and should another part of the business (or indeed a third party separate to the business) access or rely on it, that third party may find that the Supplier's advice is not suitable….with the Supplier's concerns being as below.

This area also ties in with discussion points on liability and indemnities. The Suppliers will seek to introduce protections into the contract to very much address this issue. The issue is that third parties who rely upon the Supplier's advice (albeit that advice was never intended for their circumstances) and may subsequently bring a claim for negligence. Any such claim would fall outside of the contract and would therefore be potentially unlimited. This is the Supplier's concern. To address this concern, the Supplier would include protections into the contract.

Examples of such protections are restrictions on sharing deliverables, extended confidentiality requirements, clarifications as to when outputs are to be shared for information purposes vis a vis when they can relied upon.

8. Client policies

Both parties should think about setting up a framework for success and policies and process to manage the on-going relationship. These will vary depending on the nature of the services being provided, where the services are provided and the sensitivity of any data being handled.

The main Client policies a Supplier may be asked to comply with include, but may not be limited to:

- **Data protection policy** which may set out compliance with Data Protection legislation and each parties responsibility
- **Information security** which may sets out information security management processes and may include encryption requirements and specific instructions for handling different classifications of information
- **On-boarding and security vetting requirements** which may set out any criteria personnel will be required to satisfy and security clearances which need to be held, for example, CRB checks where the services may be performed at a school or Baseline Personnel Security Standard (BPSS), clearance where you may be handling material marked 'confidential', as defined by the Cabinet Office.
- **Health and safety** which may set out processes and procedures for a safe working environment
- **Anti-Bribery Policy** which may set out requirements to comply with the Anti-Bribery Act 2010

Which policies are appropriate should be assessed in the context of the services being provided.

For example, if the services are supplied on the Client's premises, then it may be very important that the Supplier complies with Health & Safety policies in the course of providing the services.

Similarly, if the services require handling large volumes of Client data, then as a Client, it may be important for the Supplier to handle this in accordance with their Data Protection and/or Information Security policies.

However, the Client should bear in mind that the Supplier will have its own policies established and which all its personnel will be required to comply with.

As a Supplier strives on basis of its reputation and the delivery of consistent quality to a large spectrum of Clients of different sizes and specialisms, their policies will be geared to address high risk and therefore confirming that the Supplier has these policies in place may satisfy your requirements.

There may also be a conflict or inconsistency between the Client and Supplier policy, particularly so if the Supplier is itself regulated. These inconsistencies may create a conflict for the Supplier's personnel which would need to be addressed by reference to the specifics on each relevant policy. Further training to a Supplier account team may be required.

It is possible that the Client has policies which create compliance overhead for a Supplier and these costs may be passed back to the Client, so really consider the type of services being provided and whether the policy is relevant and clarify with the Supplier whether they have their own policies which satisfy the requirements.

Audit

The inclusion of a right to audit in a service contract helps the management of an on-going relationship but the scope of this clause will vary depending on the services being provided.

The Client's Perspective: Relationships with a Supplier can quickly change. A very low risk relationship can become high risk if the service propositions change for you. The inclusion of a right to audit in a service contract can help monitor and control the relationship against fraud and abuse, as well as a providing a means to review contract compliance against any Client policies, reporting requirements, service performance as well as accounting even after the services have been delivered.

The Supplier's Perspective: A Supplier will often be happy to agree to provide any information which is reasonably necessary for an audit and the performance of any legal requirements in this field.

However, where an audit takes place at the Supplier's premises, this could be problematic due to the Supplier's responsibility of confidentiality to all other Clients and so there will be an expectation that there will be a reasonable notice and an understanding of the scope of any information requirements to gather the information requested as there may be a number of sites, information may be held with other Client confidential information and the Supplier will need to safeguard its other Client's information security. Typically, Suppliers are willing to support Clients with their audit requirements but the nature and scope of that support is likely to vary depending on the size and scale of the Supplier, the nature of its business, any regulatory requirements which it faces as well as its own security, confidentiality and policy positions.

The Client may select a representative to conduct the audit who is a direct competitor which inevitably will be a difficult position for the Supplier to accept.

Some considerations for both parties:

- **Why is a right to audit required?** Are there any other remedies or standards (e.g. such as objective industry certification) that will provide the comfort the Client is seeking?
- **What is the right to audit in relation to?**

- **How often should audit rights be exercised?** It will depend on the type of services, the duration of a project and extent of the contract.
- **Will this cause disruption to my business?** To the extent audit is appropriate, these should be restricted to normal business hours on working days with reasonable notice and limited to relevant records only.
- **What is reasonable after the services have been completed?** Again, it will depend on the type of services, the duration of a project and extent of the contract. It will depend on the circumstances.
- **How long records should be held?** If they relate to tax or finance, you will want to ensure this meets HMRC requirements.
- **Who conducts it and who pays for it?** Is it appropriate for the Client to use a competitor of the Supplier to audit the Supplier and, by doing so, will it genuinely get an objective view? Are there other third parties suitably qualified to audit? What protections is it reasonable for the Supplier to take in relation to the identity of an organisation that will audit it (competitor or otherwise?) Examples would include confidentiality arrangements. With regard to payment for an audit, generally accepted industry practice is for the party who wants the audit to pay for it. However, some clauses provide that if the audit shows the Client was losing out in some way (for example incorrect invoicing), then the Supplier should bear these cost. You will also need to consider the cost of any copies of documents made in connection with the audit and who will bear these costs.

9. Working together effectively

The projects that Suppliers and Clients work together on are often key projects of critical importance to the business organisation of the Client and the credentials, reputation and Client relationship of the Supplier. The projects can vary in complexity and duration. However, it is true to say that more often than not there will be a real symbiotic relationship between the parties. Thinking about the on-going relationship, and setting up a framework for success is key. By this it is meant not only contractual provisions recognising that (i) the parties will have an on-going dialogue and relationship; and (ii) circumstances, requirements, personnel and timelines will change, but also actually living and breathing the contract. Moreover, keeping the document under review rather than tucking it away in a drawer so that it is the documentary embodiment of the reality.

The parties should think about the practical aspects of managing on on-going relationship for a particular project at the start.

Examples of areas which would typically be covered are as follows:

Change management

Over the course of a project lifecycle it is likely that there will be changes, significant or otherwise. The Supplier will base its price on a set of certain assumptions in terms of the overall environment, the involvement of the Client and any third parties at the outset. The Client will have agreed some expectations in terms of timing and scope of the projects as well as key personnel and stakeholders. Not all facts will have been known to the parties at the start. Some facts will change. By including – and critically applying – a change management process it will help the parties continue to properly assess the realities of the project and implications of changes. Clients are often concerned that the Supplier will use the change process to introduce more cost.

Suppliers may be concerned that the Client will keep changing the parameters of the project or indeed use the change management process for free impact analysis work. Neither should be the case. In fact, any on-going successful relationship requires trust, transparency and communication. The change management process will not itself deliver this but is the vehicle through which the contract can be updated to reflect a good relationship.

Governance

Communicate, communicate, communicate! Governance is essentially about making sure that the right framework is in place to let the right people know what they need to know and when. It is part of stakeholder management and it is equally important for the Supplier and Client. Without wishing to overlabour the point, most projects that go awry do so because the parties are not talking or, indeed, listening to each other. Think about the appropriate mechanisms to put in place on your project to make it easy for the parties in order to facilitate communication. A complex long term project may require a different forum for different people to meet to discuss regularly with people from many levels of governance. Even, a simple project, however, would benefit from some simple governance mechanisms e.g. a project manager on each side who is nominated as the appropriate point of contact.

Escalation

Again, in the same vein as the above, an escalation process is a good idea for both parties. With strong governance in place it is likely that the escalation process will not even come into play as the parties will be regularly discussing and briefing each other as to progress and feedback. This would result in nipping any potential issues in the bud. However, should a significant issue arise, an escalation process which sets out counterparts of increasing seniority within the two organisation that can meet to discuss and resolve it is a very good idea indeed.