

Sections 10.1, 10.2 and 10.4 require Consultant to defend [Organization's Name] from certain claims that arise out of Consultant's wrongful acts and to reimburse Organization for losses, damages, and costs associated with those claims. While many consulting services agreements provide defense and reimbursement coverage for intellectual property infringement claims only, this Section includes coverage for additional claims, including:

- coverage for personal injury and property damage claims (e.g. Consultant's personnel damage Organization property while performing Services on site); and
- protection for Organization arising out of Consultant's breach of the Agreement, including third party claims against Organization (e.g. Organization is sued by an Organization customer due to a disclosure of the customer's financial information by Consultant's personnel who had access to such information as part of the Agreement).

Because this is a key risk consideration for Organization, we recommend this relatively aggressive but defensible approach to defense/indemnification coverage.

Section 10.1 also sets forth the Parties' expectations if Organization's use of a Deliverable is threatened due to a third party infringement claim. The recommended provision requires Consultant to take the following steps to ensure Organization's continued use of the Deliverable:

- relicensure of the infringing Deliverable to permit continued use by Organization;
- replacement or modification of the infringing Deliverable without degrading functionality; or
- if neither relicensure nor replacement/modification is possible using best efforts, then Consultant may terminate Organization's right to use the infringing Deliverable subject to an obligation to refund all amounts paid for such Deliverable and other functionally-dependent Deliverables.

Note that the indemnities in this Section 10 are not limited to third party claims. Limiting the indemnity obligations in this Section to third party claims may be an acceptable compromise.

#### 10.1. Infringement.

(a) Consultant will indemnify, defend, and hold harmless Organization and its directors, officers, employees and agents (the "**Organization Indemnified Parties**")<sup>1</sup> against any and all losses, liabilities, judgments, awards and costs (including reasonable legal fees and expenses) in any claim, action, suit or proceeding (individually and collectively, "**Claim**")<sup>2</sup> arising out of an allegation that the Services and/or Deliverables, whether individually or in combination with any other work, infringes any third party's Intellectual Property Rights.<sup>3</sup> If a court or a settlement enjoins the use of any Deliverable, or if in Consultant's reasonable opinion any Deliverable is likely to become the subject of a Claim of infringement, Consultant will at no cost to Organization (i) modify such Deliverable so that it becomes non-infringing yet retains the same functionality and performance, (ii) substitute a substantially equivalent non-infringing Technology, (iii) obtain for Organization a license to continue using the Deliverable at no additional cost or liability to Organization or, if none of the foregoing are possible despite Consultant's best efforts, (iv) refund to Organization the entire cost of the Deliverable and any Deliverables that may be dependent upon or materially interrelated with the infringing Deliverable.<sup>4</sup>

(b) Organization will indemnify, defend, and hold harmless Consultant and its affiliates, directors, officers, employees and agents (the "**Consultant Indemnified Parties**") against any and all losses, liabilities, judgments, awards and costs (including reasonable legal fees and expenses) in any Claim arising out of an allegation that the Organization Technology infringes any third party Intellectual Property Rights.

<sup>1</sup> Organization requires indemnification/defense coverage for Organization, Affiliates and the individuals identified. Departure from standard requires approvals.

<sup>2</sup> This is a broad definition of remedy categories available to Organization in the event of a Claim. Resist Consultant's attempt to limit remedies to "amounts awarded pursuant to a final judgment" as this excludes amounts awarded in settlement, as well as applicable losses, liabilities, damages, expenses and fees incurred by Organization as a result of Consultant's acts.

<sup>3</sup> Organization requires indemnification coverage for the Intellectual Property Rights identified. Departure from standard requires approvals. Territory limitations (e.g. U.S. Copyrights only) are permitted so long as use outside of such territory is not contemplated. Propose the Berne Signatory Countries as a compromise if Consultant objects to an unlimited field. For an unofficial list of the Signatories, go to the web site for the World Intellectual Property Organization: <http://www.wipo.org>.

<sup>4</sup> The refund remedy is a key provision here. Consultants rarely object to a refund remedy for IP claims since it will not cause revenue recognition problems. Do not delete the right to obtain a refund for functionally dependent Software without approvals. Consultant may request that the refund depreciate in proportion to the useful life of the Deliverable. Depreciation over a five year period is common (i.e. Organization would be refunded the fees paid for the Deliverable less depreciation equal to 1/60 of the fees paid for each month of use).

**10.2. Bodily and Property Damage.** Consultant will indemnify, defend and hold harmless the Organization Indemnified Parties from and against any and all Claims relating to personal injury, bodily injury or death or damage to tangible personal property to the extent arising directly out of any negligent or wrongful act or omission of Consultant or Consultant's Agents in the course of performing Consultant's obligations hereunder.

**10.3. Notice and Assistance.** An indemnified Party under Sections 10.1 and 10.2 shall: (i) notify the indemnifying Party promptly in writing of the Claim; (ii) permit the indemnifying Party sole control to defend, compromise or settle the Claim (provided the indemnifying Party may not settle any Claim without the consent of the indemnified Party where the settlement involves a remedy other than the payment of money); and (iii) provide all available and commercially reasonable information, assistance and authority at the indemnifying Party's expense to enable the indemnifying Party to defend the Claim. The indemnified Party may participate in the defense or settlement of any Claim at its own expense. A failure by an indemnified Party under this Section 10.3, shall only affect an indemnifying Party's obligations under Sections 10.1 and 10.2 to the extent such failure materially prejudices the indemnifying Party's ability to defend a Claim under such Sections.<sup>5</sup>

**10.4. Indemnity for Breach.** Consultant shall indemnify, defend, and hold Organization harmless from and against any and all losses, damages, liabilities, costs and expenses, including reasonable attorneys' fees, arising out of any breach of this Agreement by Consultant or Consultant's Agents.<sup>6</sup>

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<sup>5</sup> Some Consultants attempt to make indemnification obligations contingent on compliance with the notice and assistance requirements, regardless of whether non-compliance prejudices Consultant's defense. The limiting language set forth in this sentence should not be deleted without approvals.

<sup>6</sup> This provides very broad coverage for Organization. In the event Consultant resists this level of coverage, it may be appropriate to fall back to coverage for third party claims and if that is not acceptable, then third party claims arising out of breach of Consultant's confidentiality requirements. Please make a notation of this change in the Executive Summary.