

DRAFTING AND NEGOTIATING EFFECTIVE CONTRACTS

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ANTITRUST POLICY STATEMENT FOR SPRAY POLYURETHANE FOAM ALLIANCE MEETINGS

- It is and shall remain the policy of the Spray Polyurethane Foam Alliance (“SPFA”), and it is the continuing responsibility of every SPFA member company, SPFA meeting or event participant, as well as SPFA staff and leadership to comply in all respects with federal and state antitrust laws. No activity or discussion at any SPFA meeting or other function may be engaged in for the purpose of bringing about any understanding or agreement among members to (1) raise, lower or stabilize prices; (2) regulate production; (3) allocate markets; (4) encourage boycotts; (5) foster unfair or deceptive trade practices; (6) assist in monopolization; or (7) in any way violate or give the appearance of violating federal or state antitrust laws.
- Any concerns or questions regarding the meaning or applicability of this policy, as well as any concerns regarding activities or discussions at SPFA meetings should be promptly brought to the attention of SPFA’s Executive Director and/or its legal counsel.

Contract Considerations

- How often are your contract forms reviewed and updated? By who? With your legal counsel?
- Contracts with clients/customers vs. contracts with subcontractors. Different issues, different concerns.
- Are your contracts actually negotiable? What terms are and are not negotiable?
- What are you most concerned about protecting?

Identify the Parties

- Identify your firm in full, i.e. corporation, LLC, etc.
- Full business address and address of customer/client
- If doing work for another company, have them specify their state of incorporation. Having this information up front can facilitate matters in the event of litigation

Scope of Services

- Single greatest source of disputes/confusion
- A well drafted scope of services protects you and your client/customer.
- Use sufficient specificity so that you and the client/customer know what work is being done.
- If necessary, incorporate a more detailed schedule of services or addendum.
- Do you specify materials to be used?
- What about changes in scope of services?
- Do you use change orders? Signed?
- Any conflict in interpretation of a provision will be interpreted more harshly against the drafter of the agreement.

Standard of Performance

- What level of performance standard do you reference in your contract?
- Workman-like?
- Consistent with industry standards?
- According to standard practices?
- Do you provide warranties? If so, what do you warrant?
- Do you reference manufacturer' s warranties?

Term of Agreement

- When do you start? What is the end date?
- Is time of the essence?
- How about service or product contracts with third party vendors?
- Be wary of long term contracts and be conscious of contracts with automatic renewal clauses.

Compensation

- What are the terms and conditions of payment?
- Is payment in full due up front? Deposit now, remainder upon completion?
- It' s your call, but be very clear as to how much is due and when. This protects both parties.
- What are the consequences for late or non-payment?

Insurance

Commercial General Liability Insurance

- Scope of coverage – coverage for bodily injury and property damage

Excess Liability or Umbrella Coverage

- Liability limits over and above CGL

Business Property Coverage – Confirm property and equipment values annually

Workers' Compensation – List all states

Professional Liability/Errors and Omissions

- Coverage for losses arising out of performance of professional service

Certificates of Insurance - Frequently ignored

Insurance

- Do you know what's in your policies?
- Have you ever read them?
- How often are they reviewed? Are they reviewed with your agent or broker?
- It's a contract. Do you sign business contracts without reading them?
- What's excluded? Know what's not covered.

Limitations of Liability

- Does your contract include disclaimers of liability?
- Are they highlighted, in bold, larger type and in clear language?
- “To the extent permitted by law,.....”
- What do you warrant in the way of services or products used?
- Do you reference manufacturer warranties for products used?

Warranties

- What is a warranty? A promise or guarantee to stand behind a product or service made by the installer or manufacturer or seller at the time of a major purchase or transaction.
- Must be made available to read BEFORE a purchase under federal law.
- They can be express or implied, depending upon whether the warranty is explicitly provided and the jurisdictional requirements.
- Warranties provided in the sale of goods vary by jurisdiction, but most new products are sold with an implied warranty that they are as advertised.

Warranties- Continued

- *Used* products may be sold “as is” with no warranties, depending upon state law.
- Various state and federal laws may apply, including the UCC, which provides implied warranties.
- Implied warranties are *unwritten promises that arise from the nature of the transaction*.
- UCC provides that two warranties are implied unless specifically disclaimed in writing: *the warranty of merchantability* and *the warranty of fitness for a particular purpose*.

Warranties- What to Consider

- How long do you want the warranty to last?
- When does warranty period begin and end?
- What conditions or events may void the warranty?
- What obligations are imposed on the consumer or purchaser?
- Who is the contact to assert the warranty?
- What do you do if the product or service fails and the warranty is asserted?
- Do you replace the product? Redo the work?
- What conditions or limits are placed on the warranty? Some warranties only cover if the product is used or maintained as directed.

Warranties- What to Consider

- To be effective, a disclaimer of an implied warranty must be clearly and explicitly stated at the time of the contract.
- Use wording that clearly communicates the risk to the consumer/buyer.
- Disclaimer of the two implied warranties must be in writing and conspicuous.
- In most instances use of “as is,” “with all faults,” or “there are no warranties beyond those described” are sufficient to disclaim the implied warranties. Language will be strictly construed against the seller.

Indemnification

- In any agreement with a subcontractor be sure to include indemnification language.
- Never agree to one sided indemnification, where you agree to indemnify, but where there is no reciprocal duty back to you.
- Mutual indemnification is fair and equitable and hard to argue against.
- Who is included in the party to be indemnified?
- Harder to require when contracting with governmental entities. Insert, “To the extent permitted by law.....”

Dispute Resolution

- How do you want a contract dispute to be resolved? Civil litigation? Binding arbitration? Prefaced by mediation?
- Who is responsible for legal fees?
- What state law will govern the litigation?
- Do you have a favored venue to hear claims?

Termination or Default

- How can the contract be terminated? How do you terminate? How can the client/customer terminate?
- What constitutes a breach or default of the contract? Must it be a “material” breach?
- Is there a cure period stated?
- Is late payment grounds for termination?

Miscellaneous Provisions

- Notices under the contract – who is the proper party to notify? What is an acceptable form of notification?
- Don't make it too hard on yourself.
- In the event of litigation, who pays legal fees? Is each party on its own? Does prevailing party secure reimbursement of reasonable legal fees?
- Non-waiver of rights clause

Miscellaneous Provisions

- No assignment without consent of non-assigning party?
- Is the contract binding upon a successor or assign?
- Does the contract document merge all prior written or oral discussions or agreements?
Does it incorporate schedules or change orders that may subsequently arise?
- Can it be amended? How? Not without prior written consent of both parties.
- Are the signatories to the contract authorized to bind the respective parties?

Summary

- Review your form contracts regularly.
- Clearly define the nature and scope of your services.
- Establish the standard of performance your customer can expect and to which you can and will conform.
- How will you be paid? When?
- When will services start? When will you finish? Is time of the essence?
- Limitations of Liability – Clearly stated and fully disclosed up front. What warranties do you provide or disclaim?
- How will contract be terminated? What constitutes a default? Can it be cured?
- How will disputes be resolved and where?

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