This Contracts Checklist contains provisions found in many business-to-business agreements, and is particularly relevant to technology, licensing, purchase and sale of goods, and services agreements.

DISCLAIMER: The information in this Contracts Checklist is: (a) provided “as is” without any representations or warranties, express or implied, (b) solely for general informational purposes in connection with commercial agreements, and (c) not provided for the purpose of giving legal advice. You must not rely on the information in these materials as an alternative to legal advice from your attorney or other professional legal services provider. Use of the information in these materials does not create an attorney-client relationship between Mayner Business Law, P.S. and the user or browser.

I. SCOPE OF WORK
   A. □ Description of goods, services, or licensed materials
   B. □ Procedure for adding/defining specific work (such as statements-of-work, work orders, license addenda)
   C. □ Permitted use by, and rights of, affiliates
   D. □ Territorial restrictions
   E. □ Exclusivity rights
   F. □ Licenses
      1. Grant
         a. □ Definition of licensed product
            i. □ Software
            ii. □ Hosted services
            iii. □ Patents
            iv. □ Copyrighted materials
            v. □ Trademarks
            vi. □ Trade secrets
            vii. □ Other proprietary right
         b. □ Term of grant
            i. □ Perpetual
            ii. □ Fixed term
            iii. □ Automatic termination of license (such as if there is a change of control)
         c. □ Scope of grant
            i. □ Personal
            ii. □ Purpose, such as to display at an event, to use for internal business purposes, to manufacture an item
            iii. □ Exclusive/non-exclusive/co-exclusive
            iv. □ Sublicensable, assignable, transferrable
            v. □ Territory
            vi. □ Revocable/irrevocable
            vii. □ Blanket license or per unit
            viii. □ Inclusion of upgrades, modifications, improvements
            ix. □ Use, access, manufacture, publicly perform, stream, distribute
            x. □ No. of users
            xi. □ Right to create of derivative works
            xii. □ Right to grant sublicense/assign
            xiii. □ Right to make copies
            xiv. □ Use of documentation
      2. □ Payment of fees
         a. □ One-time, monthly, per-user, percentage of profits
         b. □ Timing of invoicing rights
         c. □ Royalties
      3. □ Conditions of grant
         a. □ Payment of fees
         b. □ Compliance with specific terms
         c. □ Use subject to prior review and approval
         d. □ Obligation to comply with branding guidelines and trademark rules
         e. □ Use inures to the benefit of licensor
      4. □ Revocation/termination
      5. □ Denial of access
      6. □ Right to audit usage
      7. □ Applicability of embedded end-user license agreements and click-throghs
      8. □ Restrictions on use
a. No resale, service bureaus, sublicensing, distribution
b. No combining
c. No creating derivative works
d. No reverse engineering, decompiling, decoding, decrypting, transmitting
e. Limitations on reproduction
f. No commercial exploitation
g. Obligation to leave proprietary notices in place

9. Licensee’s responsibilities
a. Acquisition, installation, and operation of communication lines and tangential software
b. Configuration of equipment or devices
c. Maintain confidentiality of licensed product

10. License to use 3rd party materials
a. Limitations on use of 3rd-party materials

11. All other rights reserved for licensor

12. Support services/on-going maintenance
a. Updates
   i. Obligation to provide updates
   ii. Obligation to install provided updates
b. Obligation to provide maintenance for defined period of time

14. Escrow requirements

G. Service Level Agreements (SLAs)
1. Uptime requirements
2. Error types
3. Response times
4. Reporting requirements
5. Credits or refunds

H. Data (see also Part IV, SECURITY)
1. Access and use rights/restrictions on use/3rd party use
2. Time limits on permitted use
3. Storage requirements (such as onshore requirements)
4. Ownership of inbound/outbound data and combined data
5. License rights to use data
6. Protection of data
7. Privacy
8. Obligation to return data
9. Obligation to destroy
10. Format requirements
11. Encryption requirements
12. Notification of breach or suspected breach

I. Approvals
1. Right to review and approve work prior to launch or use

J. Method of delivery of content or software

K. Subcontractors/personnel
1. Obligation to train
2. Right to approve/reject personnel
3. Right to, or prohibition against, subcontracting
4. Obligation to remove subcontractors/personnel
5. Obligation to pay subcontractors/personnel
6. Guaranty of subcontractors’ performance
7. Key personnel
8. Background checks

L. Shipping
1. Title/risk of loss
   a. Free on Board (FOB)
   b. Free carrier (FCA)
   c. Cost insurance and freight (CIF)
   d. Incoterms
2. Carrier billing
3. Packing

M. Time and place for performance
N. ☐ Return of goods
O. ☐ Mechanics/material persons liens
P. ☐ Security interest/right to file financing statement
Q. ☐ No commitment or promises re: volume of work
R. ☐ Inspection and acceptance
   1. ☐ Acceptance period
   2. ☐ Acceptance criteria
   3. ☐ Obligation to repair or replace
   4. ☐ Period of time for repair or replacement
   5. ☐ Failure to reject deemed acceptance

II. COMPENSATION AND PAYMENT TERMS
A. ☐ Payment rights and obligations
   1. ☐ Price, fees, and expenses
   2. ☐ Prepaid amounts
      a. ☐ Right to receive a refund or credit
   3. ☐ Currency
   4. ☐ Royalties
   5. ☐ Right to invoice at a certain time
   6. ☐ Special invoicing requirements
   7. ☐ Payment
      a. ☐ Right to dispute payment amounts
      b. ☐ Procedure for disputing and resolving disputed amounts
      c. ☐ Payment schedule
      d. ☐ Obligation to pay undisputed amounts
      e. ☐ Late payments
         i. ☐ Late fee charges/interest
         ii. ☐ Collection costs
      f. ☐ Early payment discounts
B. ☐ Late invoices/no obligation to pay after certain time period
C. ☐ Electronic payments
D. ☐ Taxes/tax audits
E. ☐ Most favored nation
F. ☐ Withholding/setoff rights

III. CONFIDENTIALITY
A. ☐ Definition of confidential information
   1. ☐ Specific types, such as source code, financial information, business practices
   2. ☐ Must be designated as confidential in writing or reasonably understood to be confidential
   3. ☐ Oral disclosures must be reduced to writing
   4. ☐ Information disclosed by 3rd parties
B. ☐ Disclosure to 3rd parties
   1. ☐ Right to disclose to employees and agents
   2. ☐ Need-to-know basis
   3. ☐ Employees and agents must be subject to written non-disclosure obligations
   4. ☐ Recipient guarantees performance of employees and agents
C. ☐ Limitations on use of confidential information (purpose)
D. ☐ Degree of care
   1. ☐ Reasonable measures
   2. ☐ At least those measures that recipient uses to protect its own most highly confidential information
E. ☐ Exceptions to non-disclosure obligations
   1. ☐ Information publicly available
   2. ☐ Information obtained properly from 3rd party
   3. ☐ Information already in possession of recipient
   4. ☐ Information independently developed
   5. ☐ Recipient's obligation to show evidence of exception
   6. ☐ Legal requirement to disclose
      a. ☐ Obligation to provide notice and opportunity to protect
F. ☐ Immediate notice of any unauthorized use or disclosure
G. ☐ Post-termination protection obligations
H. □ Residuals
I. □ Post-termination return and destruction obligations
J. □ Remedies
  1. □ Injunctive relief (non-exclusive)

IV. SECURITY
A. □ Compliance with security requirements
   1. □ Physical security
   2. □ Cyber security
   3. □ Specific standards (SAS, PCI)
   4. □ Compliance with facilities safety rules
B. □ Security audits
C. □ Security of 3rd party hosting providers
D. □ Data backup
E. □ Business continuity/disaster recovery plan
F. □ Notification of actual or suspected breach

V. REPRESENTATIONS AND WARRANTIES; REMEDIES
A. □ General/mutual representations and warranties
   1. □ Right to enter into the agreement
   2. □ Compliance with applicable laws, regulations, orders, and rules
   3. □ No conflicts
B. □ Specific representations and warranties
   1. □ Obtaining and maintaining all necessary permits, certificates, approvals and permissions
   2. □ Intellectual property
      a. □ Power and authority/right to grant rights and licenses
      b. □ Ownership
      c. □ Non-infringement
   3. □ Right to grant licenses/convey title
   4. □ Standard of performance for services
      a. □ Professional manner consistent with generally accepted industry standards
      b. □ Work provided in accordance with specific documentation or specifications
   5. □ Good title/no liens or encumbrances
   6. □ Specific warranties against defects
      a. □ Free from defects in design, manufacturing, and workmanship
      b. □ Warranty period
      c. □ Obligation to provide notice of any defects or non-conformities prior to end of warranty period
      d. □ Performance warranties
   7. □ Software warranties
      a. □ Free from defects
      b. □ Software will meet licensor’s published specs
      c. □ No viruses, malware, worms, Trojan horses, or other disabling devices
      d. □ No public/open source software
   8. □ Pass-through of 3rd party warranties
C. □ Remedies (and identification of which remedies are sole and exclusive)
   1. □ Repair or replacement
   2. □ Refunds or credits
   3. □ Right to terminate (specific work or entire agreement)
   4. □ Liquidated damages
D. □ Product provided “as-is”
E. □ Disclaimer of all other warranties, including implied warranties:
   1. □ Of merchantability
   2. □ Of fitness for a particular purpose
   3. □ Arising from course of business or course of dealing

VI. DEFENSE AND INDEMNIFICATION OF THIRD-PARTY CLAIMS
A. □ Indemnifiable claims
   1. □ Breach of contract (or breach of representations and warranties)
   2. □ Negligence and willful misconduct
   3. □ Infringement and misappropriation
### Contracts Checklist v.1 November 2014

**Contracts Checklist**

**Mayner Business Law, P.S.**

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#### VIII. INTELLECTUAL PROPERTY /OTHER PROPRIETARY RIGHTS

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d. ☐ Obligation to return/destroy data  
e. ☐ Obligation to pay outstanding amounts  
f. ☐ No further obligation to pay  
g. ☐ Refund of any pre-paid, unused amounts  
h. ☐ Penalties for early termination  
i. ☐ Post-termination transition  

8. ☐ Survival of terms  
a. ☐ Defense and indemnification  
b. ☐ Warranties  
c. ☐ Confidentiality  
d. ☐ Payment  
e. ☐ Payment of taxes  
f. ☐ Limitation of liability  
g. ☐ Governing law; venue  
h. ☐ Dispute resolution  
i. ☐ Notices  
j. ☐ Contract interpretation  

IX. LIMITATION OF LIABILITY  
A. ☐ No indirect/consequential damages  
1. ☐ Lost profits, revenue, goodwill  
B. ☐ Cap on direct damages  
C. ☐ Exceptions to limitation of liability (examples):  
1. ☐ Indemnification obligations  
2. ☐ Confidentiality obligations  
3. ☐ Gross negligence and willful misconduct  
4. ☐ Property damage and personal injury  

X. INSURANCE REQUIREMENTS  
A. ☐ General/deal-specific coverage  
B. ☐ Minimum policy amounts  
B. ☐ Certificates of insurance  
C. ☐ Adding a party as additional insured  
D. ☐ Quality of insurance carriers  
E. ☐ Subcontractor insurance requirements  
F. ☐ Subrogation rights  
G. ☐ Requirement to give notice of cancellation or material change  

XI. MAINTAINING RECORDS; AUDIT RIGHTS  
A. ☐ Obligation to maintain records for specified period of time  
B. ☐ Right to audit records  
1. ☐ Auditing party must provide X days notice  
2. ☐ Audit must occur during normal business hours  
3. ☐ Audit may not unreasonably interfere with business operations  
4. ☐ Frequency of permitted audits  
5. ☐ Audits may not be contingent-fee based  
6. ☐ Third-party auditors subject to NDA approved by party being audited  
7. ☐ Audits limited to certain records only  
8. ☐ Access to premises subject to security policies  
9. ☐ Auditing party bears all costs and expenses  
10. ☐ Right to refund based on audit findings  
11. ☐ Right to charge audit expense based on findings  

XII. STANDARD BOILERPLATE; MISCELLANEOUS  
A. ☐ Governing Law/venue  
B. ☐ Dispute Resolution  
1. ☐ Arbitration  
2. ☐ Mediation  
3. ☐ Informal dispute resolution
4. □ Right to file claim  
5. □ Attorneys’ fees  
6. □ Waiver of jury trial  

C. □ Equitable relief  
   1. □ Injunction  
   2. □ Specific performance  

D. □ Notices  

E. □ Force Majeure  
   1. □ Events defining force majeure event  
   2. □ Obligation to give notice  
   3. □ Obligation to use reasonable methods to resume  
   4. □ Delay excused only to extent of delay and only for those obligations affected  
   5. □ No obligation to pay fees during delay  
   6. □ Right to terminate after certain period of time  

F. □ Assignment and delegation rights and prohibitions  
   1. □ Prohibition against assignment or transfer of the agreement or obligations  
   2. □ Right to assign to affiliates, or in the event of merger, acquisition, sale of assets  
   3. □ Agreement binding on successors and assignees  

G. □ Incorporation of exhibits, schedules, appendices  

H. □ 3rd party beneficiaries  

I. □ Relationship of the parties/independent contractors  

J. □ Failure to object not a waiver  

K. □ Order of precedence  

L. □ Severability  

M. □ Headings  

N. □ Waiver of statute of limitations  

O. □ Merger/integration  

P. □ Further assurances  

Q. □ Interpretation  
   1. □ Agreement result of negotiations after consultation with respective legal counsel  
   2. □ Agreement not construed against drafter  

R. □ Remedies are in addition to any other remedies at law or in equity (except where expressly provided otherwise)  

S. □ Amendments to agreement (must be in writing and mutually agreed to by the parties)  

T. □ Counterparts; exchange of documents by facsimile; e-signatures  

U. □ Restrictions on signature (minimum requirements for authority)  

V. □ Other terms non-binding (such as terms in POs)  

W. □ Non-solicitation of employees and agents  

X. □ Prohibition against gratuities and gifts/other fraud and ethics requirements  

Y. □ Divestiture of entities  

Z. □ Export restrictions and requirements  

ABOUT

Andrea Mayner is an attorney in the Seattle area who provides transactional services to institutional clients, focusing on reviewing, drafting, and negotiating commercial agreements for large, Pacific Northwest companies.