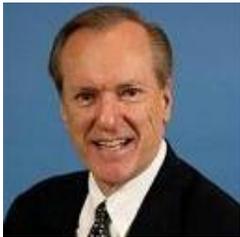


FSMA LEGAL BRIEF

A Legal Newsletter for Agencies from FSMA
General Counsel Maloney & Knox, PLLC

How to Obtain Changes to Contracts Submitted by Clients

(September 2019)



We are frequently asked how Agencies can obtain changes to the contracts submitted to them by their Manufacturers and Suppliers (“Clients”).

Usually, the Manufacturer submits the contract, and there appears to be very little leverage for Agencies to make changes. **Although it may be intimidating to request changes in the Client’s contract, we strongly recommend that at a minimum Agencies make two changes.** One, add an *“Evaluation of Performance”* provision and two, add an *“Arbitration”* provision in lieu of the of the Manufacturer’s Litigation paragraph.

There are many other sections of the *FSMA Recommended Contract Between Agency and Client* that should be considered, **primarily increasing the termination notice from 30 days to 90 days and providing for termination compensation of one month’s compensation for each year of representation.** However, it may be difficult to secure such changes in the Client’s contract prior to any experience in your representation. Therefore, we recommend that if you are unable to obtain such change, you consider inserting the paragraph below providing for an annual *“Evaluation of Performance.”*

Such a clause will permit a discussion and evaluation of an Agency’s services and give you reasons and opportunity for increasing the length of notice of termination and compensation on termination because of an Agency’s professional representation of numerous trading partners for the benefit of the Client. **Oftentimes Clients don’t understand the cost of doing business and the investments that are made by their Agencies for the long-term benefit of their Clients. At the review, an Agency can explain that the 30-day notice provision adversely affects each party’s commitment to the economic partnership.** Thus, after successful performance and review of your enhancement of a Manufacturer’s business, an opportune time exists for asking for changes to your contract. Accordingly, we recommend that each contract contain an Evaluation of Performance provision, as follows:

“Evaluation of Performance. *The performance of each party of the terms of this Agreement shall be evaluated every twelve months or sooner as to assure all responsibilities and objectives are being upheld. Within the (10) days of such evaluation, each party should notify the other in writing of their concerns.”*

Almost all Clients’ contracts will contain a “Litigation” provision as well as “Applicable Law” provisions. **Litigation is expensive, ties up management from their core business, and involves significant time delays until a dispute is resolved.** The Litigation provision usually states that the case will be litigated in the Courts located near the Client’s principal offices. The Applicable Law provision states that the law of the Manufacturer's home state shall control. Leave the Applicable Law provisions in the form that the Client chooses but **request that they replace the Litigation paragraph with the following Arbitration provision** from the standard form of Agency/Client Contract found in Paragraph 16 of the **FSMA Recommended Contract Between Agency and Client:**

“Arbitration. *Any claim or controversy arising under or relating to this Agreement shall be settled by arbitration in accordance with the rules of the American Arbitration Association at a hearing in the office of the American Arbitration Association closest to the Client’s nearest office of Agency. Judgment may be entered on the arbitrator's award in any court having jurisdiction thereof.”*

Neither the Client nor the Client’s attorneys should find either of the two foregoing changes adverse to their contact, and almost all will willingly make such changes. Of course, if Agencies need more support, they can say that such changes are from the **FSMA Recommended Contract Between Agency and Client.** **Copies of such contract,** including an option to change the contract for a longer term plus 3 important Policy Statements approved by the FSMA Board of Directors (covering #1 – Competitive Products and Conflicts; #2 – Consolidation of Agency Representation; and #3 – Policies of Fairness in Terminating Agency Contracts), **are available from FSMA General Counsel as noted below.**

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