

ACE NZ // ADVISORY

DIGITAL AGREEMENTS

What you need to know when
contracting for the delivery of digital
services.

The purpose of this advisory is to give general guidance to ACE members when creating or editing a contract for digital engagement services.

Whether you're delivering data in an interactive or digital format, building a website, web-based tool or app or providing software for results of analysis, a contract will be required between the client and the consultant.

This advisory helps you to decide whether you can edit a traditional consultancy agreement, like a CCCS, to include the new digital scope of work, or whether you need to create a new digital agreement. We'll also help you to understand when and why you need legal advice for digital services.

1 Definitions

For the purposes of this Advisory, the following key terms are defined.

Client: Owner or principal

Consultant: Engineer, planner or designer engaged by the client to provide a service or solution

2 Defining a Digital Agreement

There are many variations of a Digital Agreement. In essence, a digital agreement is where the application of consultancy work is delivered digitally. This may include, but not limited to:

- The provision of services delivering data in an interactive or digital format
- The provision of services delivering outputs in the form of electronic data systems
- The provision of a website or web based tool
- The provision of apps which run on devices
- The development or provision of a software tool to provide a particular result or analysis
- The provision of services delivering outputs via a third-party software application(s)
- The provision of electronic editable files as a deliverable; and / or
- Services which involve writing software code of some nature

Given the complex and evolving nature of the digital field, a Digital Agreement is defined broadly.

Often, some grey area will exist in the case of services which are partly traditional and partly digital in nature, particularly as the nature and methods of delivery of consultancy services is evolving and developing over time. This Advisory seeks to provide discussion on the issues to consider in contracting for digital services. It may not be appropriate to apply these notes to the traditional consulting services component of an engagement. There is no one size fits all approach, and in some cases a traditional consultancy services contract like CCCS may still be appropriate (potentially with special conditions to cover the digital component). In other cases, the digital component may be delivered subject to separate terms, such as terms of use for software as a service (SaaS).

3 Reasons for digital contracts

3.1 Benefits of implementing Digital Agreements

Having appropriate terms tailored for the delivery of digital services is important because:

- Software tools (which may increase efficiency of services) often have separate license terms that must be shared and complied with
- Innovation is enabled and supported
- Digital products may require ongoing updates or upgrades which can provide benefit for the client
- Fair risk allocation
- To clarify each of the parties' rights to digital assets particularly data sets, intellectual property, and software products

3.2 Disadvantages of not implementing Digital Agreements

Using a traditional consultancy service agreement for delivery of a digital solution may mean key items are not addressed. The following are notable areas which must be properly considered and clarified:

- The ownership of intellectual property and the rights a client receive in relation to that IP
- The application of applicable software and data licenses particularly in relation to third parties
- Acceptance criteria and quality assurance, including responsibility for 'defects' and ongoing maintenance and fixes
- Consultant's liability in relation to system or software performance
- Obligations in relation to backing up and recovery of data
- For the provision of support, the reporting, availability and service requirements may be unclear
- Potential privacy issues
- Traditional consultancy charging models may not adequately reflect the value of the service to the client or responsibility for relevant costs
- Price escalations may be required for ongoing support or fee changes in third party software products

4 Areas of guidance

4.1 Intellectual property

The standard position provided in CCCS is for joint ownership of new intellectual property, which works well to accommodate traditional professional services. However, this default position does not account for potential issues which may apply in relation to the delivery of digital solutions and services. In Digital Agreements, intellectual property is more commonly owned by one party or the other and licensed to the other. Having a conversation early about the future of the digital deliverable or solution will often help the parties to decide on the best ownership model.

The consultant may want to retain ownership of intellectual property including newly developed IP and grant to the client a 'right to use' (license). This protects the consultant's ability to deliver value through continued innovation, ensures that clients in the future can benefit from many cycles of development and improvement, and takes away the need for the client to maintain the deliverable.

If the client is to obtain ownership of the "digital solution" delivered by the consultant, the consultant should consider clarifying its ongoing ownership of background technology used to provide this solution, and any improvements and developments to that background technology. It can often be difficult to usefully separate 'new' intellectual property when the provider is bringing a substantial amount of background intellectual property as part of the commission, and it may be that a broad license for the client to use the digital outputs (with the consultant retaining ownership) is just as effective for the client.

If the consultant is to retain ownership of intellectual property, it is important to consider whether licensing provides any necessary rights. For example, consider whether a third party can provide support or maintenance in the future.

If the client is providing content or requesting integrations with other solutions, the consultant should consider obtaining an indemnity or warranty from the client. The indemnity or warranty protects the consultant from intellectual property breaches relating to the client-provided content or solution. This is a complex area of law and specialist advice should be sought.

It is likely that the client will seek a similar indemnity or warranty from the consultant. As always, check insurance coverage with respect to any indemnity provided.

4.2 Licensing

A license is simply a right to use with a set of limits around that use. Things to consider include how long the client can use the deliverable – for a limited period or forever? Can the client grant further rights to third parties to use the deliverable or to make changes to and maintain the deliverable? Can the client modify or copy the deliverable? Can the client use the deliverable for commercial purposes?

In addition to considering the licensing arrangements between consultants and clients, you may also need to consider the upstream licensing from any third-party suppliers which contribute to the solution, including third party data sets. Do you need to incorporate the third-party license terms to any material performance or warranty gaps between third party contributors and the contract terms for Digital Agreements?

Note that if the product or services incorporates any 'open source' content, you should make sure the Digital Agreement includes licensing provisions appropriate to the type of open-source content being used (for example, 'copy left' or 'copy right'). 'Open source' refers to software with source code that anyone can inspect, modify, and enhance, in a collaborative and public manner. There are several different open-source protocols which might be applicable, and it is recommended you seek specific expertise on how to incorporate this appropriately into your Digital Agreement.

4.3 Hosting

Digital Agreements are unique in that the service or "solution" may be hosted by the consultant or a third party. This can raise issues in relation to privacy and control over the solution and ensuring it is clear who is responsible for the solution (and for paying to host the solution) longer term.

Often the hosted solution will endure beyond the initial development and / or supply described in the Digital Agreement. It is therefore important to consider how this will operate and be managed in the future.

Key terms relating to third party host should be consistent to provide clarity and fair risk allocation, such as in relation to security, availability, and force majeure (events beyond a party's reasonable control).

The consultant should exclude liability relating to the availability of the solution, to avoid being held responsible for any disruption due to third-party "down time". Additionally, consider the level of control and access which third parties shall retain.

If the solution is hosted by a third party which operates outside of New Zealand, issues relating to privacy and the transfer of personal information may arise.

4.4 Liability

Appropriate liability limits for Digital Agreements are different than traditional consultancy agreements, and generally are closer to a one times fee multiplier than the traditional three to five multiplier we would see in the traditional consultancy agreement (such as CCCS). It is common practice to exclude indirect and consequential losses (as per CCCS) and liability for other risks beyond the provider's reasonable control. Liability caps and risk appetite are individual decisions for consultants but do ensure that insurance cover includes for the type of digital service you will be providing.

4.5 Maintenance and support obligations

Maintenance (ongoing updates and minor changes) and support (issue management and resolution) may be provided on a monthly, quarterly or annual basis under the initial Digital Agreements or under a separate support arrangement. Some solutions are provided on a subscription basis in which case some form of maintenance and support would generally be included.

Pricing for maintenance and support is generally aligned to the agreed support period and payable in advance with specific service levels and response time offered. Consider appropriate exceptions, such as events outside the consultant's control that may impact the ability to meet such service levels, and pricing / services for upgrades.

4.6 Warranties, delivery and quality assurance

Warranties in software agreements are typically different to those in professional services agreements, and are often tailored to the particular product or service being provided. For example, a proof of concept or more experimental technology may be accompanied by a clear 'zero warranties' statement, and others may have their own Service Level Agreement (SLAs) or specifications which the client can expect from the software. Warranting any digital based solution, but especially when software is involved, is fraught with risk and should be avoided in lieu of committing to a paid for support arrangement. In some cases, acceptance criteria and processes for user acceptance testing will be detailed to provide both parties with certainty as to when a digital deliverable or solution is 'complete'.

Other common warranties can relate to maintaining information security practices in accordance with a reasonable standard or generally accepted industry practice.

Responsibility and liability for data sets within the solution should be considered. For example, if data is provided by the client, the consultant should exclude responsibility for the accuracy or completeness of that data, unless the scope of services includes verification of the data. Ensure that you do not provide warranties for any components of the solution provided by a third party that are not backed up by that third party.

It would be usual for both parties to provide warranties in respect of their own intellectual property, and that it will not infringe on the rights of others. If professional services are to be provided as part of the digital offering (like implementation or training services) then usual warranties regarding the standard of due care skill and diligence would still often be included.

4.7 Privacy

All consultants must understand their obligations under applicable privacy laws in relation to the collection, use, disclosure, storage, and retention of personal data. When delivering a solution for the first time this might include undertaking a Privacy Impact Assessment and reviewing the suitability of existing privacy statements with the new tool or deliverable.

4.8 Price and payment

Traditional consultancy charging models may not accurately reflect the value of the digital services to the Client or responsibility for relevant costs. In addition, price escalations may be required to cover the costs of any ongoing support.

Consultants should consider the inclusion of a license fee or subscription payments, as opposed to following a time-based cost model, or moving away from a cost-based model towards a valued-based pricing model which focuses on the value of the output to the client.

Price and payment aspects which are often covered in Digital Agreements include:

- Terms which set out the basis upon which pricing changes can be made
- Rights around dispute of invoices and payment means
- Rights to suspend services if payments aren't made
- The ability of the supplier to reflect price increases and at what intervals
- Depending on the nature of the service there may be an expectation of credit card payment facilities which attract additional complexity

4.9 Insurance

If digital services are to be provided, Consultants will need to evaluate whether this is consistent with their insurance coverage. Insurance brokers can provide consultants with advice in terms of the adequacy of their insurance coverage for digital services.

5 Conclusion

As the nature and methods of delivery of consultancy services evolve and develop over time, particularly with fast paced technology advances, opportunities for delivery of digital services are increasing. Digital Agreements are becoming more common place and provide opportunities for both Clients and Consultants to ensure appropriate terms are in place to reflect the value, enable fair risk allocation, and provide clarity for both parties.

6 Acknowledgements

ACE New Zealand acknowledges the collaborative input of the ACE New Zealand Legal Forum in compiling this Advisory, and thanks individual members of the Forum for their time and commitment to providing content for this Advisory.

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