REVIEWING & ACCEPTING CONTRACT TERMS

1. FORMATION

A. **Battle of the legal forms** – Generally speaking, the last document signed by both parties will prevail. There are a number of ways that a contract can be created.

a. Acceptance of Offer – usually stated in the Buyer's purchase order as some version of "this is an offer and can be accepted by signing (Buyer's) acknowledgement or by performing work without accepting formally. Usually, states that Vendor's contrary terms are not valid unless accepted by Buyer in writing.
b. Acknowledgement of Offer – usually when Vendor responds to Buyer's purchase order or contract by taking exception to certain terms or by offering alternative terms. Must be accepted by Buyer to be effective, either by actual signature or by incorporation into a revised purchase order.
c. This is as important (if not more important) than the actual proper preparation of the quotation. Unless a quotation (or its content) is incorporated into the purchase order (or made part of the Acknowledgement and accepted by the Buyer), the Buyer's terms and specifications will prevail.
d. When quoting a large company, always ask for a copy of their Purchase Order or Subcontract Terms & Conditions and then make sure the quotation clearly accepts (by reference number and date) or takes exception by specific clause or point. Make sure those same exceptions are carried into the Acknowledgement – NEVER believe the Buyer if he/she says ". . . we never enforce that clause. . ." – just ask them to confirm that statement in writing to see if they are serious.
e. If the Buyer says that he/she cannot change the actual words of the terms & conditions, that is a solvable problem. Just submit an errata sheet that (on a clause by clause basis) makes changes to the terms & conditions in questions – then all the Buyer has to do is to include a statement in the PO that Vendor's exceptions dated xx/xx/xxxx are accepted and incorporated by reference – and it is a done deal. By the way, in a large company, the Buyer is probably not kidding about not being able to (easily) change terms – so it is up to the Vendor to give the Buyer a "way out" in dealing with the Buyer's legal department.

B. **Acceptance vs. Acknowledgement** – Even though it may irritate a Buyer, the practice of acknowledging orders using the vendor's own terms & conditions is usually worth the effort – even if only as a starting point. Problematic terms & conditions should not be accepted by ignorance or by reluctance to negotiate with a Buyer. If the Buyer will not negotiate or explain their position (in writing), beware – you are either dealing with an amateur or a dishonorable person.

a. If the Buyer has made it clear that certain terms must be accepted and will not budge, try to establish a limit of liability (i.e. a percentage of the total amount

actually paid to Vender, etc.), particularly if the term has anything to do with warranty, delivery, on-site damages, changes, or performance.

b. If the realistic risk represented by the clause is potentially greater than the profit to be realized on the job, then seriously question whether or not the quote should be submitted. "Desperation" quotes have a nasty habit of being successful. ALWAYS assume that the exact words of the clause WILL be enforced to the letter because usually they will.

C. **Content of the Purchase Order** – This seems obvious, but always take exception to any specifications or references that were not furnished with the Request for Quote package or which are not readily available to the Vendor. If the quote is in accordance with a specification or other defining document, be sure to include a specific reference by title, number and date. Never quote against a specification in the process of being created unless you enjoy playing Russian roulette.

a. Always challenge delivery or milestone dates that are given as calendar dates. Try to get them changed to days or weeks after (some defining event). Many terms & conditions include "time of the essence" or similar clauses and when they are combined with a calendar date, a disaster is in the making (discussed later).
b. Make sure that payment terms line up with performance milestones and that the events or times that trigger invoices are very clear. Terms of payment are usually not negotiable after the order has been accepted or acknowledged so do it in the quote/acknowledgement.
c. This also seems obvious, but make sure that quantities, item descriptions and pricing match what the Vendor plans to deliver.
d. Require the Buyer to spell out in a separate item of the purchase order any unusual or special requirements or, if that is not able to be done, then the Buyer should include an Attachment or Exhibit in the purchase order defining any non-standard requirements.

D. **Corrections / Changes to a purchase order** – Generally, a purchase order should not be accepted until it is formally changed to reflect all of the Vendor's changes and the agreements reached between the parties. If the delivery is urgent, the only other acceptable method is to go through the purchase order and (literally) line out and write in every change desired, then initial and date each such change and return the purchase order to the Buyer for his acceptance of every change. DO NOT begin work without something like that in place.

2. **TERMS & CONDITIONS**: In the Table following are comments about regularly encountered terms & conditions describing the potential negative consequences and offering alternatives or change suggestions that may work with the Buyer. This is not a "formula" for blind contract acceptance or a legal advice section, but is a negotiating approach that has hundreds of variations based on the circumstances and the goals of each side.

NOTE: These sample Terms are taken from multiple Customer Terms & Conditions and have not been corrected to reflect the same pronouns, etc. as if they were from a common document.

No.	Terms & Conditions Clause	Negative Consequences	Alternatives / Negotiation Position
1	**GENERAL**: Unless otherwise specified in a purchase order issued by Buyer, these Terms and Conditions supplement and are part of any such purchase order and, together with the other agreements, specifications and documents, if any, that are specified in any such purchase order constitute the COMPLETE AND FINAL AGREEMENT between Buyer and the Seller and may not be added to, modified, superseded, or altered except by Buyer's authorized representative ,notwithstanding any additional or other proposals, or terms and conditions that may now or in the future appear on Seller's invoices, quotations, acknowledgements or other forms, and notwithstanding any acceptance of shipments, payments or other similar acts of Buyer. Purchases by Buyer of Goods by credit card, check request, or any other method shall be subject to these Terms and Conditions and shall be deemed to be "Orders" under these Terms and Conditions.	This clause MUST be addressed prior to acceptance/performance of the Order or it is forever (at least contractually) lost. The only leverage is the threat of non-acceptance. Once accepted, you may be held accountable for EVERY comma in the terms and conditions even if it causes you great harm. Once in place, the only other chance to "undo" such a situation is to take advantage of the Changes clause and tie in a terms negotiation to a change requested by the Buyer – but that takes nerves of steel and can be countered by the Buyer by just leaving the order alone.	During negotiations, objections to the Buyer's terms and conditions must be clearly presented, along with the "Why" such terms are objectionable to you and the advantage to the Buyer to make the concession to you. If you make a good case, you may be able to obtain some relief. Always "rank" your objections so that the items that are unacceptable to you are separate from the items that are inconvenient or costly. If a Buyer believes that certain terms are really repugnant to you, they may back off on those but stand firm on others. WITHOUT EXCEPTION: A responsible person must read every paragraph of every page of terms and conditions, specifications, attachments, and addenda - anything less than that is foolishness and asking for trouble.
2	**SCHEDULE**: Seller shall strictly adhere to the shipment or delivery schedules specified in this contract. In the event of any anticipated or actual delay, including but not limited to delays attributed to labor disputes, Seller shall: i) promptly notify Buyer in writing of the reasons for the delay and the actions being taken to overcome or minimize the delay; ii) provide Buyer with a written recovery schedule; and iii) if requested by Buyer, ship via air or other expedited routing to avoid or minimize delay to the maximum extent possible. Unless Seller is excused from prompt performance as provided in the "Force Majeure" article of this contract, the added premium transportation costs are to be borne by Seller. Seller shall not deliver Goods excess to the order quantities or prior to the scheduled delivery dates unless authorized in writing by Buyer's Authorized Procurement Representative.	This is actually a "not bad" clause. If there were included a "Time is of the Essence" phrase, this clause would be terrible. The time of essence make any delay, no matter how small, a material breach of the contract. Time of the Essence, coupled with calendar date delivery dates, are a disaster about to happen because of the potential for being responsible for ALL damages associated with a delay – direct (make-up labor & material), secondary (costs of other departments or companies, expedite costs, etc.), or consequential (loss of profit, inefficiencies, lack of productivity). Extra goods or early deliveries may be returned at Sellers' expense and may count as negatives against Sellers performance.	As a rule of thumb, a small or mid-sized manufacturing company should avoid at all costs accepting a "time of the essence" clause. Unless the contract is priced at a premium due to the delivery priority, it is rarely worth it. If you are forced to accept such a clause, try to get a condition added: "However, in no event shall Seller be responsible for any damages or costs due in whole or part by Buyer's or any third party's negligent performance or deliberate malfeasance which impacts Seller's performance and/or the resultant costs/damages." Or, put a limitation of liability clause in: "Notwithstanding this requirement, Buyer's sole remedy and Seller's sole liability for any costs or damages caused by late delivery shall not exceed ½ of its expected 10% profit on the total order amount."

3	**PACKING & SHIPPING**: Seller will pack, mail, label, and ship all Goods in an appropriate and suitable manner selected by Seller (if not directed by Buyer) that will ensure the best quality and prevention of shipping damage as well as the lowest transportation cost for which Buyer is responsible. In the absence of a packing list that can be verified against Goods, the Buyer's count shall be final. Sell will inform Buyer immediately of any occurrence which will or is expected to result in any delivery at any time, or of any quantity, not specified in the Order and Seller's action being taken to minimize or prevent that from occurring.	This kind of a "Packing" clause makes the Seller responsible for knowing how to pack its products to not be damaged in shipment. If coupled with an FOB destination clause, the entire hassle with the shipping company will be the responsibility of the Seller. Even with an FOB Origin, this clause may make Seller responsible to Buyer for any damage that the Goods incur during shipment.	There is no defense against this liability other than to develop a knowledgeable way to pack your own products to minimize shipping damages. Obviously, if the Buyer specifies the method of packing, all you have to do is to be able to prove you followed their method. If you follow your own method, you are stuck with the result unless you can show unusual circumstances or negligence on the part of the shipping company.
4	**QUALITY CONTROL:** Seller shall establish and maintain a quality control system acceptable to Buyer for the Goods purchased under this contract. Seller shall permit Buyer to review procedures, practices, processes, and related documents to determine such acceptability. Seller shall have a continuing obligation to promptly notify Buyer of any violation of, or deviation from, Seller's approved inspection /quality control system and to advise Buyer of the quality and specific identity of any Goods delivered to Buyer during the period of any such violation or deviation.	Depending on the type of Goods being produced, this could be a "normal" requirement or could be a significant extra cost. Generally, for companies that have a quality system and have it documented, this is not a hardship and can be accepted. If the quality system is just an inspection system, this clause could get into big trouble AFTER THE FACT and you could be forced to pay damages for any costs associated with defects that got through your defective quality system. The dangerous part is the notice requirement since if you don't provide the notice, you are concealing the defect which will go against any certification or warranty you make.	The preferred manner in dealing with any quality, configuration, data control, or other production system requirement is to have a document that describes what you actually do and what you believe works and then accept such a clause as: "accepted in accordance with our QC Policy ABC, dated xyz" Then you are on the hook for what you are supposed to do anyhow. This is where it is important to read EVERY-THING in an order for a specification driven product– tucked away in the specifications or an attachment could be a quality requirement that is foreign to you and could be expensive to implement – nonetheless, you are on the hook to do it even if it only shows up as a defect after the fact (the worst time for a defect to show up).
5	**INSPECTION:** At no additional cost to Buyer, Goods shall be subject to inspection, surveillance and test at reasonably times and places, including Seller's subcontractors' locations. Buyer shall perform inspections, surveillances and tests to as not to unduly delay work being performed. Seller shall maintain an inspection system acceptable to Buyer for the Goods purchased under this Contract. If Buyer performs an inspection or test on the premises of Seller or its subcontractors, Seller shall furnish, and require its subcontractors to furnish, without additional charge, reasonable facilities and assistance for the safe and convenient performance of these duties.	Generally, an inspection clause is ordinary and not a negative; however this one has a twist. By including subcontractors, you must have included that requirement in your PO or subcontract or the subcontractor can say "No." The supply of facilities and assistance should be defined to not include labor or ordinary tools. The clause gives them the right to inspect, not to have you re-inspect under their supervision.	Practically speaking, this is one of the costs to do business with a big company and there is not much recourse except to monitor them closely and to charge them for any unreasonable scheduling demands or support requests. As described above, the Inspection System should be included in the Quality Control Policy and Customers ought to be welcome at any reasonable time.

6	**ACCEPTANCE & REJECTION**: Buyer shall accept the Goods or give Seller notice of rejection or revocation of acceptance, notwithstanding any payment, prior test or inspection, or passage of title. No inspection, test, delay or failure to inspect or test or failure to discover any defect or other nonconformance shall relieve Seller of any obligations under this contract or impair any rights or remedies of Buyer. If Seller delivers non-conforming Goods, Buyer may at its option and at Seller's expense: i) return the Goods for credit or refund; ii) require Seller to promptly correct or replace the Goods; iii) correct the Goods; or iv) obtain replacement Goods from another source. Seller shall not redeliver corrected or rejected Goods without disclosing the former rejection or requirement for correction. Seller shall disclose any corrective action taken. Repair, replacement and other correction and redelivery shall be completed within the original delivery schedule or such later time as Buyer's Authorized Procurement representative may reasonably direct. All costs and expenses and loss of value incurred as a result of or in connection with nonconformance and repair, replacement, or other correction may be recovered from Seller by equitable price reduction or credit against any amounts that may be owed to Seller under this contract or otherwise.	This is a standard acceptance/rejection clause but it must be read in conjunction with your Warranty. If you do not cover the labor involved in removal and replacement, then that exception must be noted here too. However, the very last sentence (i.e. set-off capabilities) is extremely dangerous. The temptation will be for the Buyer to try to set-off claims (i.e. allegations of defective Goods that have not been accepted as such by you or that are the subject of a dispute. Also, the set-off right will be used for contracts not related to the Goods alleged or actually defective. Buyer may owe you money for Contract A and have a claim or dispute on Contract B and use that set-off as a reason for reducing or not paying Contract A. The "or otherwise" language of this clause clearly allows it.	The set-off right should always be resisted on the basis that it is an unfair interference with a small business's cash flow and represents an intimidation tactic by a large company. If set-off is to be allowed, it should be restricted to be against monies owed on that same Order or Contract for the Goods in question and not against any other Order or contract. Such right should also be limited to be only available for claims for defective Goods that have been agreed to by the Parties (i.e. the defective determination accepted by the Seller), adjudicated through the Disputes clause, or in the event that the Seller cannot repair or replace the Goods.
7	**WARRANTY**: Seller warrants that all Goods furnished under this contract shall conform to all specifications and require-ments of this contract and shall be free from defects in materials and workmanship. To the extent the Goods are not manufactured pursuant to detailed designs and specifications furnished by Buyer, the Goods shall be free from design and specification defects. This warranty shall survive inspection, test, and acceptance of, and payment for, the Goods. This warranty shall run to Buyer and its successors, assigns, and customers. Such warranty shall begin after Buyer's final acceptance. Buyer may, at its option, either: i) return for credit or refund, or ii) require prompt correction or replacement of the defective or non-0conformaing Goods. Return to Seller of defective or non-conforming Goods and redelivery to Buyer of corrected or	This is a pretty standard Warranty for material and workmanship and is generally acceptable. The section on goods designed by Seller, you will have to make some kind of design warranty; however the warranty of merchantability or fitness of use can be very bad since the Seller will not always (or ever) know what actual use for which the product is being used. The warranty against counterfeit Goods is becoming more prevalent with all of the fake goods in circulation. This is very important	If you have a defined and detailed Warranty Policy, you can always take exception to the Customer's Warranty provision and substitute your own. This is not unusual, but be aware the by doing that, you leave yourself no leeway at all, since it is your warranty and it will be enforced to the letter – ALWAYS us the term: "Limited Warranty" and never use the term Warranty or Guaranty standing alone. Many companies limit their liability to strictly replacing and repairing without any liability for labor or materials used in disassembly, packing, shipping, reassembly, start-up, etc.. You must negotiate use of your own Warranty before

	replaced Goods shall be at Seller's expense. Goods required to be corrected or replaced shall be subject to this article and the "acceptance and Rejection" article of this contract in the same manner and to the same extent as Goods originally delivered under this contract, but only as to the corrected or replaced part or parts thereof. Even if the Parties disagree about the existence of a breach of this warranty, Seller shall promptly comply with Buyer's directions to: i) repair, rework or replace the Goods, or ii) furnish any materials or parts and installation instructions required to successfully correct the defect or nonconformance. If the parties later determine that Seller did not breach this warranty, the parties shall equitably adjust the contract price. Seller further warrants that it shall not furnish "Counterfeit Goods" under this contract, defined as Goods or separately-identifiable items or components of Goods that: i) are an unauthorized copy or substitute of an OEM item; ii) are not traceable to an OEM to ensure authenticity in OEM design and manufacture; iii) do not contain proper external or internal materials or components required by the OEM or are not constructed in accordance OEM design; iv) have been re-worked, re-market, re-labeled, repaired, refurbished, or otherwise modified from OEM design but are represented as OEM authentic or as new; or v) have not passed successfully all OEM required testing, verification, screening , and quality control processes. Counterfeit Goods shall be deemed non-conforming to this contract and shall be subject to the remedies set forth above.	in any aerospace, vehicle, machine tool, production process equipment, or any device which, if it fails, can injure or kill workers/users or cause significant damage. If such damage is caused by a counterfeit part and you have warranted it, you are on the hook and will have been expected to test or inspect or validate that it is a real OEM part.	accepting the Order. Always clearly (in large bold type) disclaim any liability for incidental, secondary, or consequential damages, however arising to avoid any liability for loss of profit, loss of productivity, inefficiency, expenses incurred by third parties, etc.. At the same time, you should also disclaim any liability for "merchantability" or "fitness for use intended" since the Seller has no control over what the Buyer or its customers use the Goods for. The most you should warrant for design is that the product will perform in accordance with its specifications and that no warranty will be made for any end use, which is the responsibility of the user to determine. If you do not have any program in place to detect counterfeit Goods, you should consider taking exception to this clause or at least identifying the limits of your ability to comply. You also need to get input from your liability insurance company on this subject.
9	**<u>TAXES, INVOICES, & PAYMENT</u>**: Unless this contract specifies otherwise, the price includes, and the Seller is liable for and shall pay, all taxes, impositions, charges, and exactions imposed on or measured by this contract except for applicable sales and use taxes that are separately stated on Seller's invoice. Prices shall not include any taxes, impositions, charges, or exactions for which Buyer has furnished a valid exemption certificate or other evidence of exemption. Unless otherwise authorized by Buyer's Authorized Repre-sentative, Seller shall issue a separate original invoice for each delivery of Goods that shall include Buyer's contract number and line item number. Seller shall forward its invoice to the address specified elsewhere in this contract. Unless	These are pretty standard clauses; however, they should not be taken lightly. Taxes are a potentially aggravating item that can get very confusing. Generally speaking, Buyers do not allow any deviations from Invoice terms so to get prompt payment, the invoice must be correct.	Always pay strict attention to the details of presenting an invoice. The least deviation may allow the Buyer to stall payment by returning the Invoice for correction. Note that they are only obligated to pay a "correct" invoice. Discounts are always a sore subject and should not be even offered unless Seller is willing for the Buyer to take the discount in any event and then fight with them later. Note the multiple methods of calculating when "due" occurs. Once these terms are accepted, they are impossible to change.

	freight or other charges are itemized, Buyer may take any offered discount on the full amount of the invoice. Payment due date, including discount periods, shall be computed from the later of the scheduled delivery of Goods date, the actual delivery of goods date, or the date of receipt of a correct invoice. Payment shall be deemed made on the date Buyer's check is mailed or payment is otherwise tendered. Seller shall promptly repay Buyer any amounts paid in excess of amounts due Seller. Except for amounts invoiced under "Termination for Convenience" or "Cancellation for Default" the Buyer shall be deemed to have waived all charges and fees that are not invoiced within ninety (90) calendar days after the end of the calendar year in which the charges were incurred.		It may seem obvious, but the requirement to submit all charges within a calendar year is a potential "trip point" and must be carefully monitored to avoid grief. Internal cost collection and milestone reporting systems must be set up to assure invoicing of all charges.
10	**CHANGES:** Buyer's Authorized Representative may, without notice to sureties and in writing, direct changes within the general scope of this contract in any of the following: (i) technical requirements and descriptions, specifications, statement of work, drawings or designs; (ii) shipment or packing methods; (iii) place of delivery, inspection or acceptance; (iv) terms and conditions of this contract required to meet Buyer's obligations under Government prime contracts or subcontracts; and, if this contract includes services, (vii) description of services to be performed; (viii) time of performance (e.g. hours of the day, days of the week); and (ix) place of performance. Seller will immediately comply with such direction. a. If such change increases or decreases the cost or time required to perform this contract, Buyer and Seller shall negotiate an equitable adjustment in the price or schedule, or both, to reflect the increase or decrease. Buyer shall modify this contract in writing accordingly. Unless otherwise agreed in writing, Seller must assert any claim for adjustment to Buyer's Authorized Representative in writing within 25 days and deliver a fully supported proposal to Buyer's Authorized Representative within 60 days after Seller's receipt of such direction. Buyer may, at its sole discretion, consider any claim regardless of when asserted. If Seller's proposal includes the cost of property made obsolete or excess by the change, Buyer may direct the disposition of the property. Buyer may examine Seller's pertinent books and records to verify the amount of Seller's claim. Failure of the Parties to agree upon any adjustment shall not excuse Seller from performing in accordance with	Changes clauses are a key part of any design or performance contract and must be carefully monitored and administered. The Seller must be conscious of when a change is being made and must be aware the it can run both ways – increasing or decreasing costs/schedules. The terms an schedule for changes negotiations must be strictly followed. In particular, the conduct of a Buyer's technical or production representative (as opposed to the Authorized Representative) can be very troublesome. Field personnel will try to accommodate and please ALL Buyer personnel, even those who have no authority to ask or requires changes, and, of course, such work may not be reimbursed.	In any contract involving design to a specification and/or field installation, the changes clause represents either a "pot of gold" if properly managed or a "disaster in process" if ignored. The Seller must actively look for occasions to bring the changes clause into play as an administrative ploy to maintain control over the Buyer's non-authorized representatives and personnel – in particular the technical and field production personnel. A very clear-cut system of cost and schedule impact assessments must be made for both Seller and Buyer actions and delays so as to not be blind-sided by such actions. Many times, the presentation of a potential charge or schedule delay for a requested change may eliminate or reduce the request altogether. The second rule of changes is to over-document and over-prepare all submittals. Time well spent to get paid for extra work done (not always recognized as "extra" by the Buyer) or to not have to give back for "cost savings" proposed by the Buyer (that are not accepted as such by Seller). Negotiations usually will take place later after much of the "evidence" and "facts" will be gone, or hidden, or destroyed, so careful documentation will be extremely valuable. This can be the "make or break" point of a large contract.

	Buyer's direction. b. If Seller considers that Buyer's conduct constitutes a change, Seller shall notify Buyer's Authorized Representative immediately in writing as to the nature of such conduct and its effect upon Seller's performance. Pending direction from Buyer's Authorized Representative, Seller shall take no action to implement any such change.		Regarding "change by conduct," some care must be taken to document such circumstances in a way so as not to become a point of contention or aggression and trigger a negative relationship; however, many Buyers deliberately use aggressive change tactics to obtain cost reductions or to avoid paying for correcting their own mistakes or specification changes, especially if the Seller is perceived as being over-supportive, timid or unassertive. The attitude of all Seller design and field personnel should be to know the Scope of Work of the contract better than the Buyer and to refuse to deviate from that Scope without written authority. If the Seller wants to do a "favor" or make an accommodation for the Buyer, it should be done as a conscious matter at a manager level and not at a troop level.
11.	**DISPUTES:** Any dispute that arises under or is related to this contract that cannot be settled by mutual agreement of the Parties may be decided by a court of competent jurisdiction. Pending final resolution of any dispute, Seller shall proceed with performance of this contract according to Buyer's Authorized Representative's instructions so long as Buyer continues to pay amounts not in dispute. The law to be applied to any such dispute shall be that of the state of Delaware, without regard to its conflict of laws provisions.	This is a very simple disputes clause and typical. Generally, the Buyer will set the legal jurisdiction and there is not much the Seller can do about it. There are alternative dispute clauses that are becoming popular that require mediation, leading to arbitration, and are a matter of preference among contract attorneys based on the industry, company practices, etc.	The form and content of disputes clauses are as varied as there are attorneys and companies; however, it is not a disadvantage for the Seller to know what mechanics are available to them to resolve differences with the Buyer. They should always be understood and, if at all odd, should be discussed with Seller's counsel before being accepted.
12.	**FORCE MAJEURE:** Seller shall not be liable for excess reprocurement costs pursuant to the "Cancellation for Default" article of this contract, incurred by Buyer because of any failure to perform this contract under its terms in the failure arises from causes beyond the control and without the fault or negligence of Seller. Examples of these causes are (a) acts of God or of the public enemy (b) acts of the Government in either its sovereign or contractual capacity, (c) fires, (d) floods, (e) epidemics, (f) quarantine restrictions, (g) strikes, (h) freight embargos and (i) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of Seller. If the delay is caused by delay of a subcontractor of Seller and if such delay arises out of causes beyond the	The existence of a Force Majeure clause is always a positive factor; however, this is a very limited clause and does not include many more recent incidents that have been held to prevent Seller performance liabilities.	Generally speaking, such a clause should always be "broadened" to include application for any significant occurrence of delay, not just for a default cancellation. The operative phrase should be changed to read: ". . . from causes beyond the reasonable control of, and within economically prudent bounds available to, Seller." This change avoids the "cure at any cost" mentality of some Buyers and recognizes the economic limitations of many situations. Also, the examples should be broadened to read:

	reasonable control of both, and if such delay is without fault or negligence of either, Seller shall not be liable for excess costs unless the goods or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit Seller to meet the required delivery schedules. Seller shall notify Buyer in writing within 10 days after the beginning of any such cause.		". . . Examples of these causes are, but are not limited to: (a). . ." so that the list is not read as being exclusive and an additional example of causes could be added as being the economic unavailability of labor or materials. This would be very important in the repurchase corrective action to use "other sources" where the original subcontractor purchase order does not allow cancellation for Force Majeure cause. It will be important to pass down such clauses to subcontractors.
13.	**CANCELLATION FOR DEFAULT:** Buyer may, by written notice to Seller, cancel all or part of this contract if (i) Seller fails to deliver the Goods within the time specified by this contract or any written extension; (ii) Seller fails to perform any other provision of this contract or fails to make progress, so as to endanger performance of this contract, and in either of these two circumstances, within ten (10) days after receipt of notice from Buyer specifying the failure, does not cure the failure or provide Buyer with a written detailed plan adequate to cure the failure if such failure reasonably cannot be cured within such ten (10) days and such plan is acceptable to Buyer's Authorized Representative; or (iii) in the event of Seller's suspension of business, insolvency, appointment of a receiver for Seller's property or business, or any assignment, reorganization, or arrangement by Seller for the benefit of its creditors. a. Seller shall continue work not cancelled. If Buyer cancels all or part of this contract, Seller shall be liable for Buyer's excess re-procurement costs. b. Buyer may require Seller to transfer title and deliver to Buyer, as directed by Buyer, any (i) completed Goods, and (ii) any partially completed Goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively "Manufacturing Materials") that Seller has specifically produced or acquired for the cancelled portion of this contract. Upon direction from Buyer, Seller shall also protect and preserve property in its possession in which Buyer or its Customer has an interest. c. Buyer shall pay the contract price for Goods accepted. Payment for Manufactured Materials accepted by Buyer and for the protection and preservation of property shall be at a price determined in accordance with the Buyer's	This is a pretty standard clause and does not require any special preparation other than to be aware of what can trigger it.	Seller's contract administration systems should be set up to give ample warning of potential default circumstances. Default is not, generally, a good negotiating ploy!

	"Termination for Convenience" policies, except that Seller shall not be entitled for profit. Buyer may withhold from any amount due under this contract any sum Buyer determines to be necessary to protect Buyer or Buyer's customer against loss because of outstanding liens or claims of former lien holders. d. If, after cancellation, it is determined that Seller was not in default, the rights and remedies of the Parties shall be as if the contract had been terminated according to the "termination for Convenience" policies of this contract.		
14.	**TERMINATION FOR CONVENIENCE:** Buyer may terminate all or part of this contract, effective as of the date specified by Buyer, in accordance with the provisions of Federal Acquisition Regulation ("FAR") 52.249-2 (May 2004), "Termination for Convenience of the Government (Fixed Price)," which provisions, except for subparagraphs (d) and (j), are incorporated herein by reference. The terms "Government" and "contracting Officer" shall mean "Buyer, "Contractor" shall mean "Seller," and the phrase "1 year" is deleted each place it occurs and "six months" is substituted in its place. The time for requesting an equitable adjustment under subparagraph (l – lower case letter "L") is reduced to 45 days. Settlements and payments under this article may be subject to approval by the Contracting Officer and the Settlement Review Board.	This clause is almost entirely limited to application under some aspect of a government contract and is generally not included in commercial contracts – with the exception of some R&D contracts or engineered product design contracts.	If this clause is present, be sure to understand the rules for reimbursement of costs since costs not kept will be costs not reimbursed. Always assume that a convenience cancellation clause will be used – it is a tremendous lever on the side of the Buyer – especially in times of budgetary uncertainty or during any kind of transition of ownership or control within a company.
15.	**ASSIGNMENT, DELEGATION, AND SUBCONTRACTING:** Seller shall not assign any of its rights or interests in this contract or subcontract or all or substantially all of its performance of this contract, without Buyer's prior written consent. Seller shall not delegate any of its duties or obligations under this contract. Seller may assign its right to monies due or to become due. No assignment, delegation or subcontracting by Seller, with or without Buyer's consent, shall relieve Seller of any of its obligations under this contract or prejudice any of Buyer's rights against Seller whether arising before or after the date of any assignment. This article does not limit Seller's ability to purchase standard commercial supplies or raw materials.		
16.			

	PATENT, TRADEMARK AND COPYRIGHT INDEMNITY: Seller will indemnify, defend and hold harmless Buyer and its customer from all claims, suits, actions, awards (including, but not limited to, awards based on intentional infringement of patents known at the time of such infringement, exceeding actual damages and/or including attorneys' fees and/or costs), liabilities, damages, costs and attorneys' fees related to the actual or alleged infringement of any US or foreign intellectual property right (including, but not limited to, any right in a patent, copyright, industrial design or semiconductor mask work, or based on misappropriation or wrongful use of information or documents)(and arising out of the manufacture, sale, or use of Goods by either Buyer or its customer. Buyer and/or its customer will duly notify Seller of any such claim, suit or action; and Seller will, at its own expense, fully defend such claim, suit or action on behalf of the indemnitees. Seller will have no obligation under this article with regard to any infringement arising from (a) the compliance of Seller's new product design with formal specifications issued by Buyer where infringement could not be avoided in complying with such specifications or (b) use or sale of Goods for other than their intended application in combination with other items when such infringement would not have occurred from the use or sale of those Goods solely for the purpose for which they were designed or sold by Seller.	These are very common clauses nowadays and the Seller must be careful to make sure that its designs for proprietary products do not infringe patents, trademarks or copyrights.	Be sure to read the actual clauses which will cause an indemnity to occur. It is very important not to "trigger" any occurrence of an Intellectual Property indemnity clause. These are very expensive to defend.
17.	**CONFIDENTIAL, PROPRIETARY, AND TRADE SECRET INFORMATION AND MATERIALS:** Buyer and Seller shall each keep confidential and protect from unauthorized use and disclosure all (a) confidential, proprietary and/or trade secret information; (b) tangible items and software containing, conveying or embodying such information and (c) tooling identified as being subject to this article that is obtained, directly or indirectly, from the other in connection with this contract or other agreement referencing this contract (collectively referred to as "Proprietary Information and Materials"). Buyer and Seller shall each use Proprietary Information and Materials of the other only in the performance of and for the purpose of this contract and/or any other agreement referencing this contract. However, despite any other obligations or restrictions imposed by this article, Buyer shall have the right to use, disclose and reproduce Seller's Proprietary Information and Materials, and make derivative works thereof, to fulfill	This is a standard clause for any contract containing proprietary information.	In particular, the requirements covering Seller's subcontractors are very serious and must be taken carefully into consideration when subcontracting work that contains the embodiment of a proprietary design. It can be breached without much effort. Care must be taken to "flow-down" the same type of clause into the subcontractor's order. Rights in data are very serious business, particularly in commercial product, aerospace, capital equipment, or R&D work and must be carefully protected.

	Buyer's obligations under this contract and for the purposes of testing, certification, use, sale, or support of any Goods delivered under this contract or any other agreement referencing this contract. Any such use, disclosure, reproduction or derivative work by Buyer shall, whenever appropriate, include a restrictive legend suitable for the particular circumstances. The restrictions on disclosure or use of Proprietary Information and Materials by Seller shall apply to all materials derived by Seller or others from Buyer's Proprietary Information and Materials. Upon Buyer's request at any time, and in any event upon the completion, termination or cancellation of this contract, Seller shall return to Buyer all of Buyer's Proprietary Information and Materials and all materials derived there from, unless specifically directed otherwise in writing by Buyer. Seller shall not, without the prior written authorization of Buyer, sell or otherwise dispose of (as scrap or otherwise) any parts or other materials containing, conveying, embodying or made in accordance with or by reference to any Proprietary Information and Materials of Buyer. Prior to disposing of such parts or other materials as scrap, Seller shall render them unusable. Buyer shall have the right to audit Seller's compliance with this article. Seller may disclose Proprietary Information and Materials of Buyer to its subcontractors as required for the performance of this contract, provided that each such subcontractor first agrees in writing to the same obligations imposed upon Seller under this article relating to Proprietary Information and Material. Seller shall be liable to Buyer for any breach of such obligation by such subcontractor. The Provisions of this article are effective in lieu of any restrictive legends or notices applied to Proprietary Information and Materials. The provisions of this article shall survive the performance, completion, termination, or cancellation of this contract.		
18.	**GRATUITIES:** Seller warrants that neither it nor any of its employees, agents, or representatives have offered or given, or will offer or give, any gratuities to Buyer's employees, agents or representatives for the purpose of securing this contracts or securing favorable treatment under this contract.	This clause is always in any level of a government prime contract or subcontract or one from a major multi-national company.	

19.	**COMPLIANCE WITH LAWS:** Seller shall comply with all applicable statutes and government rules, regulations, and orders, including those pertaining to the US Export Controls and those pertaining to US or Foreign Country anti-bribery and anti-corruption laws and regulations	These regulations have "teeth" in them and must not be ignored since the penalties for violation can be very strong, including criminalization in some areas of the world.	Because anti-bribery and anti-kick-back laws and regulations are becoming prevalent in many parts of the world, the Seller must be aware of the draconian penalties for violations of this policy and take steps to avoid any problems, especially with foreign representatives.
20.	**ENVIRONMENTAL, HEALTH AND SAFETY PERORMANCE:** Seller acknowledges and accepts full and sole responsibility to maintain an environment, health and safety management system ("EMS") appropriate for its business throughout the performance of this contract. Buyer expects that Seller's EMS will promote health and safety environmental stewardship, and pollution prevention by appropriate source reduction strategies. Seller shall convey the requirements of this clause to its suppliers. Seller and its subcontractors shall comply with all Federal and State regulations affecting employee health and safety.		General benefit clauses like this are very dangerous. As a minimum, such a clause in a specification or contract should have the following exception take: ". . . accepted only to the extent that each law and implementing regulation has been legally published and is publically available to Seller as of the date of its quotation. . . ." This may protect you from the changing of requirements by act of law or regulation in mid-contract. It at least gives you a basis for appealing any adverse ruling.