

# On Speaking Terms

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FORUM2014

# On Speaking Terms



# On Speaking Terms

- **Importance of Terms and Conditions**
- **Difference between Types**
- **Address Conflicts**
- **Minimize Risk**
- **Maximize Value**



# On Speaking Terms

## Importance Terms and Conditions

- **Comply with Laws and Regulations**
- **Describe Policies and Procedures**
- **Determine Bidder/Offeror Qualifications**
- **Legally Binding**



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## Importance Terms and Conditions

- **Help Enforce Contract**
- **Describe Legal Responsibilities**
- **Protect Public and Contractor**
- **Address Risks During Contract Administration**



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## Difference Between Types General Terms and Conditions

- **Required in all Solicitations**
- **Approved by Legal Counsel**
- **Non-Negotiable**
- **Incorporate Vendors Manual**



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## Difference Between Types Special Terms and Conditions

- **May Be Edited**
- **May Write for Unique Circumstances**
- **Negotiable**
- **May Include Supplementary Terms**



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## Difference Between Types Special Terms and Conditions

- **Five Mandatory Terms**

**Audit**

**Award of Contract**

**Cancellation of Contract**

**eVA Business-To-Government Contracts and Orders**

**Renewal of Contract**





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## Address Conflicts General Terms and Conditions

- **Vendors Manual**
- **Applicable Laws and Courts**
- **Precedence of Terms**
- **Default**



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## Address Conflicts Special Terms and Conditions

- Indemnification
- Prime Contractor Responsibility
- Subcontractors

### INDEMNIFICATION AGREEMENT

#### Featured Directories of Indemnification Agreements

This Indemnification Agreement (the "Agreement"), dated as of \_\_\_\_\_, 2010, between Financial Engines, Inc., a Delaware corporation (the "**Corporation**"), and \_\_\_\_\_ ("**Indemnitee**"),

#### WITNESSETH:

WHEREAS, Indemnitee is either a member of the board of directors of the Corporation (the "**Board of Directors**"), a director of a wholly owned subsidiary of the Corporation, an officer of the Corporation or an officer of a wholly owned subsidiary of the Corporation, or one or more of such positions, and in such capacity or capacities, or otherwise as an Agent (as hereinafter defined) of the Corporation, is performing a valuable service for the Corporation; and

WHEREAS, the Corporation is aware that competent and experienced persons are increasingly reluctant to serve as directors or officers of corporations or other business entities unless they are protected by comprehensive indemnification and liability insurance, due to increased exposure to litigation costs and risks resulting from their service to such entities, and because the exposure frequently bears no reasonable relationship to the compensation of such directors and officers; and

WHEREAS, the Board of Directors of the Corporation has concluded that, to retain and attract talented and experienced individuals to serve or continue to serve as officers or directors of the Corporation or its subsidiaries, and to encourage such individuals to take the business risks necessary for the success of the Corporation, it is necessary for the Corporation contractually to indemnify directors and officers and to assume for itself to the fullest extent permitted by law expenses and damages in connection with claims against such officers or

More at [agreements.org](http://agreements.org)



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## Address Conflicts Special Terms and Conditions

- **Confidentiality of Personally Identifiable Information**
- **Liquidated Damages**
- **Acceptance**



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## Minimize Risk

- **Price Escalation/De-Escalation Clause**
- **Insurance**
- **Limitation of Liability**



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## Minimize Risk

- **Cancellation of Contract**
- **Renewal of Contract**
- **Emergency Event Pricing**



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## Maximize Value

- Acceptance
- Warranties
- Changes
- Ordering Option



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## QUESTIONS ?

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## REFERENCES

Cole, Michael, JD. “Interpretation of Contracts.” *Inside Supply Management* December 2002:29.





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## QUIZ

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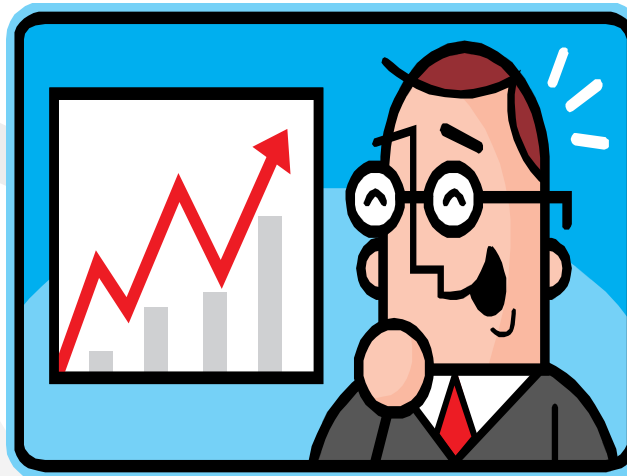
**Which clause protects the contractor?**



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## Which clause protects the contractor?

- Price Escalation/De-Escalation
- Allows for price increases



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**When and why would you use the Best and Final Offer (BAFO) clause?**



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## When and why would you use the Best and Final Offer (BAFO) clause?

- Only RFP's
- Not as matter of routine
- If negotiations could linger
  - State end date



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**Why would you include the Certified Test Report clause in a solicitation and who would issue the certified test report?**



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**Why would you include the Certified Test Report clause in a solicitation and who would issue the certified test report?**

- If Certified Test Report is the only way to determine whether bid meets specifications
- Independent testing lab



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**Name the special term and condition (when used):**

**Substantial risk of 3<sup>rd</sup> party injuries/claims**

**Must get authorization from either**

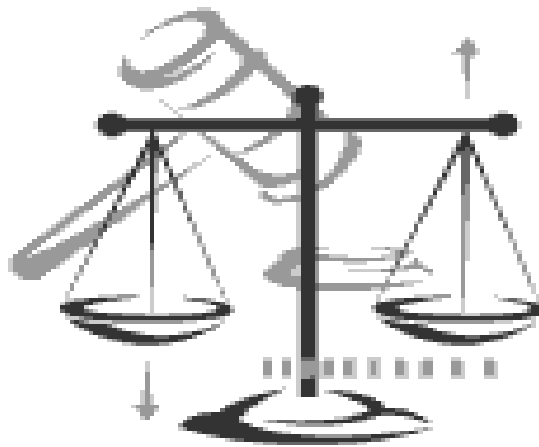
- **Department of Treasury/Div Risk Management**
- **Assistant Attorney General**



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**Name the special term and condition (when used):**

- Indemnification



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**When are you required to include the Small Business Subcontracting Plan in a solicitation?**

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## **When are you required to include the Small Business Subcontracting Plan in a solicitation?**

Solicitation > \$100,000 (if not set-aside)

When Plan is condition of award

Must fill in blank (state when evidence of compliance is due)

File must include written determination if not used when required



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**State Corporation Commission Identification  
Number clause is required in which solicitations?**

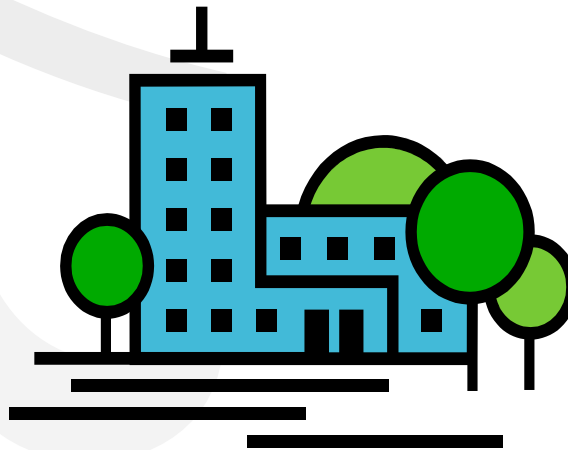


# On Speaking Terms

**State Corporation Commission Identification  
Number clause is required in which solicitations?**

All Sealed Bidding solicitations

All Competitive Negotiation solicitations



# On Speaking Terms

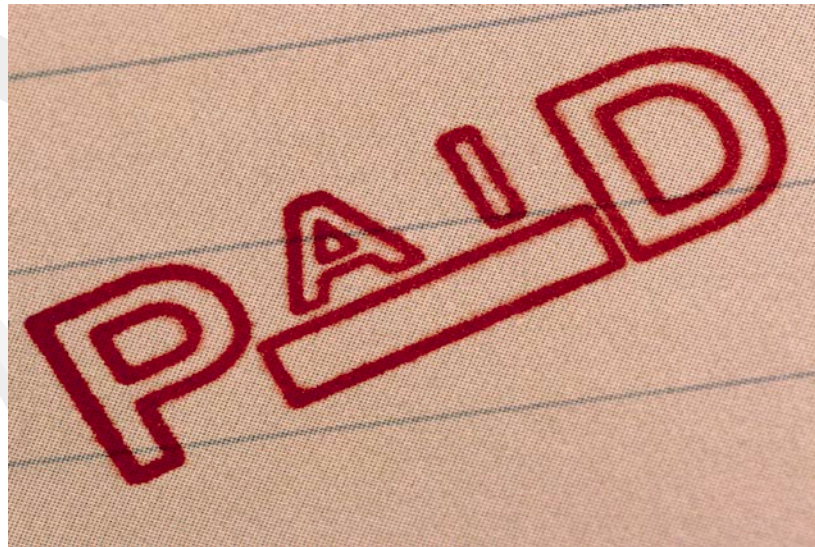
**When would you use the Prompt Payment Discounts term?**



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**When would you use the Prompt Payment Discounts term?**

When agency knows payments can be made within time frame specified



# On Speaking Terms

**When should you have begun to include the E-Verify Program Special Term and Condition in your solicitations?**





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**When should you have begun to include the E-Verify Program Special Term and Condition in your solicitations?**

In all services solicitations in excess of \$50,000 that you expected to have awarded on or after December 1, 2013



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**In what type of solicitation would it be appropriate to use the Indemnification Special Term and Condition?**

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**In what type of solicitation would it be appropriate to use the Indemnification Special Term and Condition?**

Snow removal

Solicitations for procurements involving substantial risk of third party injuries/claims

Note: Must be authorized by the Department of Treasury, Division of Risk Management or be directed by your Assistant Attorney General



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**What events led to the new special term Emergency Event Pricing?**



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**What events led to the new special term Emergency Event Pricing?**

Hurricane Sandy

Procurement Forum 2012



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