Why sign the TechServe Alliance IC Agreement?

Because it’s the smart thing to do!¹

As you establish yourself as an Independent Contractor (IC), and commence an independent contractor relationship with our company, you may have some questions about why it is required from you. Those questions may be in the form of “Do I really need to sign a formal, multi-part, IC Agreement?” or “Why is so much information required?” These are reasonable questions – ones that have been asked many times by information technology professionals in the same situations; we thought it may prove helpful to provide you with some background information about the IC Agreement and why we stress its importance in our relationship.

TechServe Alliance is the only association exclusively representing the firms that specialize in providing highly-skilled IT and engineering professionals. As an organization, TechServe Alliance is dedicated to promoting the importance of the IT and engineering staffing & solutions industry and the contributions of its consultants and member firms. Member education is but one tool upon which the association heavily relies and actively employs to achieve its objectives. Another primary focus of the organization is to identify and provide information and education about the industry to legislators and regulators, in an effort to enable them to shape future legislation and regulations, to benefit all parties within the IT services industry. Since its inception in 1987, TechServe Alliance has grown to over 300 members firms.

TechServe Alliance member firms have exclusive access to model agreements (protected under copyright law) that are periodically reviewed by TechServe Alliance legal counsel to assure that the established IC relationship complies with the ever-changing landscape of federal employment tax laws and regulations. The purpose of such a review is to reaffirm that the agreement demonstrated the consultant, the firm, and the client are (a) independent and separate from one another, and (b) in a business-to-business, as compared with, an employer/employee relationship. When the state of the law requires modifications, a new agreement is drafted and made available to members.

Section 1706 of the 1986 Tax Reform Act, which was enacted to supplement the IRS code, is a provision that singles out the technical services industry in an effort to reduce the use of independent IT contractors. Since that time, certain government agencies have conducted random audits of IT temporary services firms with the intent of identifying improper IC/firm relationships. If the government determines an improper IC classification, it imposes potentially vast penalties on the firm and the consultant. Obviously, these audits are risky business for you and for IT and engineering staffing & solutions firms and they antagonize clients. The way the consultant is hurt is through the government’s “reclassification” of the employment status from IC to employee. Once it is determined that the original IC classification was improper, all of us feel the pinch in the form of assessed back taxes, penalties and interest. These types of

¹ This letter is not part of the IC agreement, but serves to highlight key issue and to answer questions you may have.
assessments can and will be imposed despite the fact that all parties are current in their tax payments. In many circumstances, these government agencies further attempt to disqualify pension plans and disallow valid business expenses of ICs who are “re-classified” as employees, arguing that the party no longer qualifies for the benefits taken.

The current IC Agreement is a critical document that helps to demonstrate that the IC is in a business-to-business relationship with the client and the IT services firm, not an employer-employee relationship. One way to achieve that end is to show that neither the client nor the firm have the right to control the means and methods used by the IC. In dozens of cases where a member firm has been audited, the IC Agreement has been the basis of successful defense of the government’s efforts to reclassify consultants. If you can meet the requirements of an IC, the TechServe Alliance IC agreement should be signed – it is for our mutual protection and is therefore the smart thing to do!

Now that you have an understanding of the IC Agreement, below are some frequently asked questions about specific sections of the agreement. This overview is not a substitute for reading the IC agreement carefully. If you have further questions, just ask. It is imperative that you understand the agreement before you sign; this is a document that will legally bind our company and you.

**RIGHT TO TERMINATE**

Paragraph 2 of the IC Agreement, entitled Term of Agreement, requires an IC to remain with a client project through the agreed upon termination date. This means that if an IC promises to provide technical services to a project through a given end date, the IC must be prepared to honor that commitment, or else incur liability. Additionally, paragraph 2 indicates that the client has the right to terminate the IC’s services on the project, but the temporary firm cannot make an independent decision to terminate the IC before the committed “end date”. These IC and firm restrictions on termination are required because the IRS has historically stated that an employee, and not an IC can (a) end an employment relationship at will without incurring liability, and (b) be terminated at will by an employer. If an IC retained the power to end the date on which s/he provided services, it could be construed by the government as something other than a business-to-business relationship.
FEES FOR STAFFING FIRM CLIENTS, EMPLOYEES AND OTHER CONTRACTORS

Paragraphs 3 and 8 of the IC Agreement, entitled Fees For Use of Staffing Firm Clients, Employees and Other Contractors and Conduct, Independent Status, and Benefits, clarify that an IC has the right to work for whichever clients and through whichever firms the IC desires. If, however, the IC works directly for any client within the Agreement’s stated time frame, and the client is one to whom the IC was introduced by the firm, or is a client for whom the IC worked through the firm, then the IC must pay the firm a fee. Also, if the IC hires for him/herself or for another party, any IC or employee to whom the IC was introduced or about whom the IC learned about through the firm, then the IC must pay the firm a fee, representing the value of putting the parties together.

Please keep in mind that, unlike firm employees, an IC has the unrestricted right to compete with us, after the duration of the IC agreement. In accord with industry standards and the underlying precepts of business practice, the firm deserves to be compensated for its marketing and recruitment efforts, if the IC benefits from the business relationship with the firm, beyond the scope of the agreement, to their own individual advantage. These parameters are the same ones placed upon firms by the clients with whom they do business.

INSURANCE

Paragraph 11 of the IC Agreement entitled Insurance requires that the IC provide General Liability insurance. Where applicable under state law, Paragraph 8 requires IC to provide Worker’s Compensation insurance. The government will often construe workers as employees if they are covered under an IT services firm’s insurance plans. By contrast, legitimate businesses insure against their own risks by buying their own insurance, at their expense. Additionally, most clients require that all ICs with whom they work be covered under their own insurance policies.

PAYMENTS

Paragraph 5 of the IC Agreement entitled Payment for Services, and the Purchase Order, require that the IC must assume the business risk of nonpayment. In a key ruling on Section 1706, the government specifically identified a critical outcome-determinative fact to distinguish ICs from employees. The distinguishing criterion is that an employee receives guaranteed wages, even if a client refuses to pay the firm. This differs from a business-to-business, IC relationship, where the risk of loss to the IC requires that no such IC guarantees be made. If the firm were to guarantee that the IC would be paid regardless of the client’s payment to the firm, history indicates that the government would attempt to reclassify any IC to whom such guarantees are made. This would result in required back tax payments, penalties, interest, disqualification of pension plans, etc.

In closing, please keep in mind that although proper contracts are essential to establishing an IC relationship, the parties to the agreement must also operate in a manner which indicates that the
IC is conducting his/her professional responsibilities as a valid business. Additional items to which the government pays particular attention in an audit are:

- Business name (d.b.a. or corporation) and Employer Identification Number (EIN); we do not recommend using an individual’s SSN
- Business letterhead, stationery, cards, and invoices
- Billing style and invoice billing technique
- Brochures and advertising (especially in directories, yellow pages, newspapers, trade journals)
- Separate business telephone lines
- Office and other itemized non-reimbursed expenses
- Business insurance policies and relevant licensing
- Maintenance of separate corporate books and records
- Simultaneous generation of income from more than one source/client
- Proper tax filings (Schedules C and SE for sole proprietors; or all forms 1120/1120S and certainly 940/941/W-2 for incorporated ICs)

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2 Please note: This document is not part of the IC Agreement and is not legally binding in any way. We encourage you to read the IC Agreement carefully.