

FirmDecisions

ebiquity

# Media Contract Guidance



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# Who is in the room?



- **Federica Bowman**
  - Global CEO



- **David Brocklehurst**
  - Chairman & Founder

# Introduction

# FirmDecisions is the largest contract compliance consultancy in the world\*

We are specialists and 100% focused, auditing media and marketing agencies only

55+ Qualified accountants, ex-agency, ex-agency finance, MNC brand marketing and procurement experts

BUT we are not lawyers. You must seek appropriate legal advice regarding terms of your contract

7400+ audits  
completed  
in 104 markets

In 2020, we  
audited \$41BN  
of marketing  
spend

16 global offices  
manage 500  
active local,  
regional &  
global clients

Unparalleled insight into agency income, costs, trading, processes to drive tangible outcomes

\* According to the WFA "Independent Media Advisors" survey

# Clauses for ALL media contracts

# Media Contract Principles

## Contract/MSA

1. Sign before commencement
- 2. The contract should cover all entities within the group,**
- 3. Annexures, appendices, KPI's completed**
4. Annual representation from Group CFO to confirm compliance
- 5. Can MSA be over-ridden by local agreement, local PO's or small print on media plans?**
6. Authorisation levels for variations to Global MSA

One media agency left its **trading** division out of the list of related parties that serviced our client business. The contract said that all rebates earned by those entities listed in the contract will be returned to the client. But all rebates were earned by the Trading division! The agency alleged that this division never worked directly on our client's business but across all clients.

End of year bonus time, but the contract was signed off without the KPIs and annexures being completed. For that year, it was a chat over a beer at the pub and agreement to go 50/50

Global contract required all rebates to be returned to client. Local contract said rebates retained by agency in return for a % of media savings. Global were not happy

The Global contract said that all media costs to be billed at Net. The local agency added small print to each Media schedule to say that, by signing this schedule, the client agrees to pay costs, as per the schedule. Hence, media was charged per the schedule, not the actual

## Digital Framework

**1. Do you have operating frameworks to cover brand safety, ad-fraud and viewability measurement & prevention (ad verification)?**

- How do you expect your agency to address breaches of your terms?
- Have you established liability & is there clarity on non-payment for breach?

**2. Disclosure of agency preferred DSP or client selection?**

**3. Ad serving & other tech platforms used:**

- Charged per actual or planned?
- Charged at cost or rate card?

Global MSA included a framework, but local agency was not implementing technology to manage ad verification putting the client at significant risk of ad fraud and brand safety

Not all DSPs or trading desks are the same, agencies will often have their own preferred solution, as they will have negotiated deals already in place. Make sure there is clarity in what solution is being used, why it is being used and transparency of fees for it's usage.

We often find that although the contract states ad-serving should be passed on at cost or on actual, campaigns are billed on estimate and not reconciled at the end of a period. This can be costly particularly if advertisers are paying on a rate card basis.

# Media Contract Principles

## Programmatic

- 1. Transparent model** – cost of media, data, tech, platforms and resource
- 2. Ensure full transparency into:**
  - **Component pricing & costs of the media, data & technology applied**
  - **Platforms used, and**
  - **Resources deployed**
- 3. Ensure audit access to:**
  - **4th party invoices**
  - **Agency trading desk systems**
  - **DSPs and other reporting interfaces (such as ad verification platforms)**
3. Ownership of rebates
4. Full disclosure on media plans

Examples of non transparent behaviours include:

- Blended pricing for tech and resource
- Blended pricing for different types of media traded through DSPs (i.e. display and video)
- Mark ups on 3<sup>rd</sup> party technology such as ad verification or DMPs
- Trading desk fees in addition to a fee for digital planning/buying

We've seen 4<sup>th</sup> party tech vendors being marked up by the trading desk, when contract clearly stipulates that only agreed fixed fee could constitute revenue generated by client's business. We were able to establish that the rate card provided by the trading desk was indeed a marked-up price. \$m impact for some advertisers.



# Media Contract Principles

## Inventory Media

1. Agency is principal, therefore potential conflict of interest
2. **Define what is or isn't Inv Media** e.g. free space or media benefits should not be re-packaged & sold as Inv Media
3. **Agency to justify benefits to client of Inventory media compared with "normal buy"**
4. No rebates to clients
5. No transparency
6. Clear approval process for use
7. If you approve, ensure its usage is identified on the plans and consider capping the % to be used

Inventory Media is Media space acquired by agencies at own risk & sold by agencies to clients on a non-transparent basis, with strict no-audit clauses that promise to deliver better pricing vs normal media buys.

### Is it Inventory Media?

- Does it have up-front investment from the agency group to ensure it should be sold on a principal and non-audit basis?

### Is it fit for the strategy?

- Establish how much Inventory Media you want to entertain in your media plans

### Price vs Transparency

- Benchmark that the price of the Inventory Media is below the net-net price of a comparable media buy and then judge what level of price benefit / discount is worth this trade off

Once the above 3 questions are resolved, manage the process:

- Establish process to continuously manage the questions above
- Establish clear contractual requirements for provision of Inventory Media
- Establish robust approval process for Inventory Media

## Data Management

### 1. Ensure your data is only used as per your agreed

#### Scope of work

It is commonplace now for contracts to include guidelines for the use of campaign related data.

### 2. Ensure your programmatic activity is using a unique platform

Separating your data from everyone else's ensures the agency or group are not able to use data gathered from your campaigns to inform other client activity.

### 3. Agree how your campaign data will be managed within the agency

Particularly with programmatic activity, it may be worth investigating the benefit/risk of having your own seat on DSP platforms to separate all your data from others. It also enables you to take your own data with you if you decide to move agencies. It may however incur a higher rate for platform use.

### 4. Follow the regulations & legislation for management of client owned data

### 5. Determine what happens with the data if the client's relationship with the agency is terminated

## Unbilled Media

### 1. Permanent or timing differences?

- Permanent to be returned back upon realisation
- Timing to be returned within agreed timeframe

### 2. Regular reporting

### 3. Stipulate agreed treatment of balances and timings of returns

### 4. Not to be offset against other campaigns without explicit client approval

The Client cancelled their planned magazine colour DPS in a magazine. Agency cancelled it with the publisher, but left it on the schedule. So, client was billed for it and the agency Held the money. No investigation. Just Held.

In China, some agencies withhold payment to the vendors for so long that the vendor goes bankrupt, thus creating a permanent difference.

Vendors close off their accounts at year end and have their statutory audit. It is rare that they will re-open the previous year's books to detect and invoice unbilled media invoices. So, while agencies can refer to the Statute of Limitations as the reason they need to hold the unbilled media balances, it doesn't really make logical sense.

## AVBs / Media Benefits

### 1. Clearly defined:

- Fair share or fixed or minimum?
- Cash? Offsets? Free space?

2. If your spend results in rebates, then they are yours, regardless of the agency entity that earns them

3. **Digital rebates are borderless.** All rebates earned from your billings should be yours, no matter where they are received

4. **Affected by vendor payment terms?**

5. **Timing of reporting/repayment to client**

6. **All vendor relationships should be subject to contract**

7. Audit access to validate all calcs

8. SLAs in lieu of volume rebate

In the US, one agency CEO put his hand on his heart and promised that “my agency receives no rebates from client income in the US”. That was true – because that agency’s rebates were banked in Spain

Some vendors will only pay out rebates if they are paid on time. We have found instances where the client paid on time, but agency paid late – lost rebates. Or, where client was not told of the specific vendor payment terms. So the agency paid the vendor before receipt from client and retained the rebate  
Contract needs to deal with treatment of inadvertent, lost rebates

Some agencies wait til the last rebate has been received before passing them through to the client. There is no reason why the rebates cannot be passed back on a regular basis – say quarterly, from June

When we audit agency rebates, we ask for vendor contracts. Sometimes, these are not available. How can we prove the existence (or not) of a rebate clause, if there is no contract?

## Right to Audit

1. **Client's choice of audit firm**
2. **Don't limit the documentation available for audit**
3. Don't be limited to one entity.
4. Rebates may need to be audited elsewhere
5. Validate zero rebates.
  - Cannot prove a negative.
  - Contact vendor direct if no contract
  - Obtain vendor confirmation
6. How many years after termination?
7. **Auditor not to work on contingency basis**
8. **Any recoveries should be repaid by agency within certain timeframe**
9. Possible penalty for agency if material non-compliance
10. **Agency to provide MRL**
11. Ensure learnings from the audit are reflected in the on-going contract

Audits are not Statutory audits. You don't need a Chartered accountant. You need to be able to choose the firm that you believe suits your needs – the agency should not be able to (unreasonably) influence your selection

Agencies should not be able to limit access to paperwork. Basically, the audit should be able to review everything required to confirm whether or not the agency has complied with the contract. In a way, the Contract represents the SOW

Many clients ask us to work for a contingency because they have no budget for our fees. I can tell you 7 reasons why this is a very bad idea. Ask me later

1. We often come back to do the audit again next year and find that nothing has changed. Agreed recoveries were ignored and practices are the same. We could submit the same audit report!
2. In a number of audits, after presenting the report, we find that the client is convinced to leave the auditor out of the loop. Then the agency delays and argues the findings. Finally, 6 months later, we get brought back to help finalise the audit recoveries. Hence, there needs to be a stated time frame for repayment of any non-compliant findings.

Some agency groups reject our request to provide MRLs to confirm their compliance with the contract. Unless the contract requires this, they will continue to refuse

## Payment terms

### 1. Cash neutrality?

- Interest payable to agency if they pay vendors before receipt of funds from client, but interest accrues to client for time funds held by agency before paying vendor
- Sunset clauses for LPI

### 2. Credit notes to be advised to client

- 3. Client told of availability of EPD and related payment terms

In one audit, the agency charged our client 0.05% per day for late payment. This worked out to interest of 18.5% pa  
Even though the Late payment was based on number of days after due date from client, the agency had not paid the vendor. So, there was no cost to the agency's cash flow. The agency was holding 3 years of rebates because they had deducted the LPI off the rebates and asked the client to sign the Rebate memo as acceptance of the net amount. As the client refused, the rebates had been withheld. Interestingly, the LPI had not been mentioned in the contract. The agency charged it as "good commercial practices".

We found \$1.6m in credit notes being held by the agency because they said one of the brand managers had rejected an earlier credit note as he didn't want to re-open the PO. The agency then held all subsequent Credit notes, without informing the client.

# Media Contract Principles

## Remuneration

1. Agreed at beginning & fair
- 2. Establish the preferred fee model: commission vs Fee**
3. SOW to be crystal clear at beginning.
- 4. How is OOS work managed/accounted for?**
5. Clarify your expectations:
  - Reconcilable fee?
  - Standardised vs actual hours?
  - Timesheets – accurate & auditable
  - **One FTE = 1.0 FTE**
6. Agency's revenue limited to this fee
7. Identify any extra fees to be charged
8. Costs charged at cost (net)

Long, long ago, I was invited to address an agency group's Regional Finance Director Conference being held in Vietnam – tell them all the things we find in our audits so they can understand why clients have become mistrusting of agencies. The discussion moved onto remuneration models. They asked, "*What's the best remuneration model*". Answer: *There is no "perfect model". Each remuneration model needs to reflect the needs and objectives of the client and the capability of the agency in meeting those needs & objectives.*

When we are auditing the agency's Fee recs, we often find that the fee has been billed as a Fixed fee, despite the defined scope of work being reduced during the year. Yet, OOS jobs were billed as OOS with no offset having been allowed for the reduced SOW. This was as per the contract. However, future contracts may choose to allow OOS work to offset reductions in the defined annual scope.

Many agencies tell clients that they have spent more time on their account than was planned and prove this by providing the number of hours worked on their account.

1. They may then divide the total hours by, say 1600, and state that FTEs were much greater than included in the fee. But this assumes all staff work 1600 hours a year.
2. We also compare the agreed FTE list with those on the timesheets and often it emerges that more hours were spent on the client account because more junior people worked on it, instead of the more senior (& expensive) staff from the originally agreed FTE list

# Questions?



# FirmDecisions

# ebiquity

Thank you for your time.

David Brocklehurst  
Chairman & Founder  
[David.brocklehurst@firmdecisions.com](mailto:David.brocklehurst@firmdecisions.com)

Federica Bowman  
Global CEO  
[Federica.bowman@firmdecisions.com](mailto:Federica.bowman@firmdecisions.com)

## About FirmDecisions

FirmDecisions is the largest [independent](#) global marketing contract compliance specialist. We provide advertisers with transparency into any of their marketing agencies, including media, creative, digital, events, point of sale, direct marketing or BTL agencies.



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