



Conquering Contracts: Negotiating, Administering, and Terminating within the Law

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Disclaimer

Today's presentation is informational only and is not intended to constitute legal advice. Consult with counsel for legal advice pertinent to your organization.



Overview

- Contract foundations
- Reaching an agreement
- Interpreting common contract terms
- Independent contractors and other considerations
- Contract considerations during COVID-19 and beyond



Contract Foundations



What is a contract?

- A set of promises between two parties
- Entitles one party to remedies if the other party breaches or fails to perform
- Terms are negotiable
- Can be oral or written
- Can have many names



All contracts have three elements

- Three basic elements:
 - offer
 - acceptance
 - consideration
- “Meeting of the minds”



Why bother?

- Clarifies responsibilities: establishes the basic understanding of the parties as to how the relationship is going to work
- Tool to identify and assign risks
 - Addresses the “what ifs?”
- Legally binding



Many different types of contracts

- Vendor contracts
 - Power imbalance?
 - Wait... how long am I stuck with this lemon of a copier? (termination provisions)
 - Pricing
- Leases
 - Commercial vs residential
 - Escalation/real estate taxes
 - Habitability
 - Sublease or assignment?
- Waivers and releases
 - Can be used to limit liability
 - Not enforceable against minors but still recommended
- Independent contractor agreements



Reaching an Agreement



Reaching an agreement

- A contract establishes the parties' basic understanding about the relationship over time
 - The drafting process can help solidify the parties' understanding and/or surface new issues
- Before *drafting* a contract, have as clear an understanding as possible of the business terms
 - May start with a term sheet or memorandum of understanding ("MOU")
- Before starting to negotiate, know your bottom line & who has what power
 - Are you prepared to walk away?



Negotiations

- Goal: a clear and unambiguous contract
 - Lack of clarity is a key reason for litigation
 - Do not rely on oral assurance from counterparty about how issues will be handled: put it in the contract
- Contract terms matter
 - “Its a standard provision” – don’t fall for this line
- If possible, start with your organization’s form of contract



Contract Approval Process

- Who conducts due diligence when selecting vendors or contract counterparty?
- Identify lower risk contracts (dollar threshold?)
- Clear internal designation of contracting authority
- Legal review
- Remember program and finance staff review, in addition to legal review



Interpreting Common Contract Terms



Typical Contract Provisions

- Recitals
- Term (length)
- Definitions
- Conditions
- Scope of Services
- Representations and Warranties
- Indemnification
- Amendments, Termination
- Governing Law, Dispute Resolution



Scope of Services

- Opportunity to specify expectations
 - Performance standards
 - Reporting obligations
 - Time frame
 - Invoicing/payment terms
- Analyze the responsibilities: Do they make sense? Can you live with them?



Representations and Warranties

- Common terms:
 - good standing and tax exempt status
 - duly authorized
 - in compliance with “all applicable laws”
- This is frequently the part that leads to litigation, especially in a loan agreement (parties can sue for fraudulent/misleading reps)
- As a general rule, you want to
 - provide reps & warranties that are as limited as possible
 - demand the broadest possible reps & warranties from the other party



Merger Clause

- A merger clause provides that the written contract constitutes the entire agreement between the parties.
- Emails or assurances from counterparty's staff don't override the contract!
- In order to be binding, side letters or earlier letters of intent must be referenced in the final agreement.
- *Note: City contracts often incorporate the terms of an RFP, but if there is an inconsistency between the RFP and the contract, the contract governs*



Amendments/Modification

- States that modifications to the contract must be in writing
- Is contained in all government contracts - makes contract manager's agreement to make a budget modification meaningless without a supporting letter



Amendments/Modification (cont'd)

- Are there any instances where only one party can amend? Look for language such as “in [X]’s sole discretion”

Section 10.02 Reductions in Federal, State, and/or City Funding

A. This Agreement is funded in whole or in part by funds secured from the federal, State and/or City governments. Should there be a reduction or discontinuance of such funds by action of the federal, State and/or City governments, the City shall have, in its sole discretion, the right to terminate this Agreement in whole or in part, or to reduce the funding and/or level of services of this Agreement caused by such action by the federal, State and/or City governments, including, in the case of the reduction option, but not limited to, the reduction or elimination of programs, services or service components; the reduction or elimination of contract-reimbursable staff or staff-hours, and corresponding reductions in the budget of this Agreement and in the total amount payable under this Agreement. Any reduction in funds pursuant to this Section 10.02(A) shall be accompanied by an appropriate reduction in the services performed under this Agreement.



Dispute Resolution

- Can require the parties to submit to binding mediation or arbitration (which is not always cheaper or faster)
- May want to carefully limit which disputes go to arbitration/mediation because depending on the seriousness of the breach, it may be preferable to litigate it



Indemnification

- One party agrees to indemnify the other:
 - if any personal, financial or other injury occurs because of my actions, I will make you whole
- The value of the indemnification is only as strong as the assets of the party promising to indemnify (so require insurance, too)
- If you are the one promising to indemnify, consider limiting scope to match your insurance coverage
- How can we mitigate our risk?



Limitations on Liability

- Used to limit damages for which either party may be held liable
- Different ways to structure, e.g.:
 - limit liability to foreseeable losses (most broad)
 - limit liability to losses arising out of certain types of claims
 - include a cap on total losses



Assignment

- Particularly helpful if organization is contemplating merging or runs into financial difficulties
- Assignment is presumed to be allowed unless the contract specifically disallows it
- Why might the party receiving a service prohibit the other party from assigning its obligation to perform to a third party?
 - May want to keep obligation to perform but allow assignment of right to be paid
- Option: Assignment only with written consent, which cannot be "unreasonably withheld"



Termination

- Gives the parties to the contract the right to cancel the contract
- Establishes:
 - any notice that is required prior to termination
 - how to calculate the payment for work performed up to the date of termination
- Usually, both sides are given the right to terminate



Termination as a Risk Management Tool

- Long term contracts vs. shorter term contracts
- Ability to terminate without fault, or only with fault
- Termination upon material breach
 - require notice & right to cure?
- Right of renewal?



Intellectual Property

- Consider your own IP (name, logo, curriculum)
- Will something be created? Who owns the work product?
- What happens if your contractor uses IP owned by a third party?



Independent Contractors



Who is an Independent Contractor?

- Generally is in the business and controls the "when, where and how" of his/her work.
- Numerous factors are evaluated to determine if a person is properly classified as an independent contractor.
- Overall circumstances are more important than any one factor
- Facts on the ground control over words in a contract.
- *But a poorly drafted contract will be used against you.*



Factors to Consider

A person is likely an employee if the employer...

- Has the right to control the **method, manner, and means** by which the work is done:
 - sets working hours
 - controls where and how to perform the job
 - requires compliance with performance policies
- Provides a salary and benefits
- Gives the individual a title
- Provides tools & reimburses expenses

A person is likely an independent contractor if she...

- Is in business for herself and offers services on the free market (via business cards, website, advertising)
- Assumes the risk of profit or loss; may have a significant investment in facilities or equipment
- Is engaged to produce a result, and controls manner, methods, and means by which work is accomplished
- Is free to provide services to other organizations, competitive or noncompetitive
- Independent contractor relationship is documented in a **well-written agreement**



Independent Contractor Agreements

In NYC, Independent Contractors Must Have a Contract!

Recommended provisions to ensure independent contractor relationship

- Contractor controls manner, means, details and methods of work
- Contractor controls his/her time and skills not devoted under the agreement
- No employer-employee type compensation or benefits (e.g., salary, bonus, health coverage, accident insurance, worker's compensation)
- No claim by contractor against the organization for payment of any employee compensation or benefits
- Organization is not responsible for reimbursement of ordinary expenses
- Company will not contribute to Social Security or other employment taxes
- Contractor is solely responsible for paying own taxes



Independent Contractor Agreements (cont'd)

Other recommended provisions:

- Contractor must submit an invoice
- Contractor's responsibilities and scope of services
 - fixed price vs. time-and-materials
- Contract term/deadlines
- Organization's reasonable satisfaction with deliverables
- Confidentiality *but no non-compete*
- Contractor will comply with all applicable laws with respect to its employees
- Contractor and its employees have proper skill, training, experience and licenses to perform services
- IP: Contractor's works belong to the company in perpetuity
- Indemnification
- Termination of agreement



Additional Considerations



Contracts with fundraising professionals

- Contracts with fundraising professionals are subject to registration with the NYS State Attorney General
 - Professional Fundraiser: solicits contributions, handles donations, or manages fundraising events
 - Fundraising Counsel: consults, advises or manages fundraising solicitation or event
- Contract must contain specific provisions:
 - start and end dates
 - clear narrative description of services to be performed
 - clear statement of financial agreement
 - nonprofit can cancel within 15 days of filing contract



Contract involving a conflict of interest transaction

- Contract between the nonprofit (or its affiliates) and director, officer or key person (or their families or entities they control) **must** be reviewed and approved in accordance with a conflict of interest policy
- NPCL requires:
 - disclosure of conflict, and recusal
 - review and approval of the contract by disinterested directors
 - concurrent documentation of the basis upon which the independent directors determined the proposed contract is fair, reasonable and in the best interest of the nonprofit



Confidentiality

- What constitutes confidential information?
- Should the terms of the contract be kept confidential?
- Beware one-sided provisions
- Consider
 - privacy rights (and regulatory obligations, e.g. HIPAA, FERPA)
 - publicity rights



Other Considerations

- Mitigation clause
- Data privacy
- Subcontracting
- Insurance requirement?
- Renewal provisions (automatic or requiring notice)
- Timing of payment
- Watch for personal guarantees!



Contract Considerations During COVID-19 and Beyond



Take stock of the contracts you have

- Get copies of every contract, including:
 - amendments
 - documents incorporated by reference (e.g. schedules, annexes, exhibits)
 - riders
 - subcontracts (if applicable)
- Ideally, have these documents electronically available so they can be easily accessible
- Make sure you know of any deadlines



Reviewing your current contracts

- Key provisions:
 - Termination
 - Scope of services/contract performance
 - Amendment
 - Force majeure
- Key words:
 - breach
 - cancellation
 - material adverse change
- Important to read the entire contract!
 - Not just the headings or just one or two provisions



Negotiating a change in your contract

- Even if your contract won't allow you to terminate or delay your obligations, you can still try to negotiate
- Consider what leverage you may have
- Talk to the other party
- Work with an attorney to determine what options you have



Contracts with upcoming termination dates

- In the near term, don't forget about contracts that will terminate or have deadlines over the summer or even next year
 - Review and understand your rights and obligations under the contract



Plan ahead

- Plan ahead for new contracting needs in the future
 - Aim for operations and programs to continue through times of disruption
 - Consider new risks and potential liabilities
 - Work with an attorney to draft appropriate language for any revisions to existing contracts or new contracts
- Focus on the “new normal”
 - Excusing performance based on unanticipated events will be less applicable to newly negotiated contracts



Negotiating new contracts

- Identify areas of difficulty under current restrictions or in a future outbreak
 - e.g. access to facilities and supplies, increased costs for cleaning and maintenance, absence of staff, remote technology needs
- Be clear about new costs and risks, and engage the other party to share risks for the known and the unknown



Practical tips for future contracts

- Make sure contracts reflect any new ways in which you will deliver services
 - e.g. virtual programming
- Revise/draft new contracts with protections against new costs and risks and flexibility where needed
- For standard form contracts (i.e. “contracts of adhesion”) that cannot be negotiated or revised, be sure to read them carefully to understand your rights and obligations and areas of risk



Thank you!

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