



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

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## Disclaimer

**Please note:** Today's presentation is informational only and is not intended to constitute legal advice. This presentation references both federal and state laws and regulations but primarily focuses on New York law. Please consult with appropriate counsel for guidance pertinent to your organization or situation.



# Overview





**Contract  
Foundations**

**Reaching an  
Agreement**

**Interpreting  
Contract Terms**

**Types of  
Contracts**



# 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
- Legal requirement



## Q: When is a contract **NOT** necessary?

**A**

When the obligations of the parties last for a very short period of time.

**B**

When the parties have known each other for at least ten years.

**C**

Never! You should always have a contract.





# Common types of contracts

## Programming

- Grant Agreement
- Partnership Agreement
- Service Agreement
- Waivers and Releases

## Intellectual Property

- IP Agreement
- Inventor Agreement
- Licensing Agreement
- Franchise Agreement

## Real Estate

- Lease
- Sublease Agreement
- License Agreement

## Employment

- Teaching Artist Agreement
- Employment Agreement
- Independent Contractor 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
- 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
  - “It’s a standard provision” – don’t fall for this line
- If possible, start with your organization’s form of contract



## Contract approval

- 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
- Board Review, check for possible conflicts of interest on who can approve each contract



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# Typical contract provisions

- Parties
- Recitals (“Whereas”)
- Consideration
- 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
- 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

- Three types of dispute resolution:
  - litigation
  - arbitration
  - mediation
- Contracts 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



# Arbitration vs mediation

## Arbitration

- Reaching a definitive outcome
- Getting assistance from a trained, impartial party
- Typically being a less complicated procedure (e.g., relaxed evidence and case presentation)
- Often costing less and being less involved than arguing a case in court

## Mediation

- Typically costs less than litigation and arbitration
- Doesn't bind participants to a specific outcome
- Is often less cumbersome than having a case argued in court



## 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
- Insurance – affects the liability the parties are exposed to and impacts costs \*\*\*



# 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
- Reasons to terminate
- Termination upon material breach
  - require notice & right to cure?
- Right of renewal
- Consequences of termination





## 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"




# Intellectual property

- Existing IP (name, logo, curriculum)
  - how might you use another party's IP?
  - how might another party use your IP?
- Ownership of any IP created
  - owned by the organization
  - owned by the contractor
  - jointly created works
- Licensing
- Third party IP
  - What happens if your contractor uses IP owned by someone else?



## Other provisions

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



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## Independent contractor agreements

- In NYC, independent contractors **must** have a written agreement
- 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
- Generally is in the business and controls the "when, where and how" of their work.



# Independent contractor agreements

## 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**



## Waivers, releases or parental consents

- Activity/participation waivers
- Field trip/activity waivers
- Photo/video release

### **A note on enforceability:**

- Waivers/releases may have limited enforceability
- BUT can serve as a deterrent to litigation, help evidence that parents were informed





# Real estate contracts

- Leases are contracts
  - Terms of the lease must be included in the lease or an amendment to the lease signed by both the landlord and the tenant
  - A lease is a real estate conveyance and is subject to the Statute of Frauds
    - All leases longer than one year must be in writing to be enforceable. NY Gen Oblig L § 5-703
- Sale of real estate



## 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



## Contracts 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



# Contract Management



## 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 and termination dates



## 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



## 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





## Practical tips for future contracts

- 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!

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations and social enterprises that are improving the quality of life in New York City neighborhoods.

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