



Breaking Through the Boilerplate: New York City Human Services Contracts

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Lawyers Alliance for New York Services

- Review of **governance documents**
 - Bylaws
 - Conflict of Interest Policy
- Drafting **Board resolutions** to authorize transactions
- Creating **contract summaries** and advising on rights and obligations under funding contracts
- Drafting and negotiating **subcontract agreements**
- Advising on **lobbying** considerations in connection with City contracting



Context

- Contracting as a service provider is always challenging – government contracts are even more challenging
- Goals for today:
 - Key provisions in NYC Human Services Contract
 - Risk management



Polling Question #1

Which option best describes your organization?

- A) My organization currently has **one or more** NYC Human Services Contracts
- B) My organization **doesn't** currently have a NYC Human Services Contract, but we **expect or hope** to have one soon
- C) My organization **doesn't** have a NYC Human Services Contract, but we have **other type(s) of contracts** with NYC
- D) My organization **doesn't** have a NYC Human Services Contract (or any other type of contract with NYC) and we **don't expect** to have one any time soon



Highlights of NYC Human Services Standard Contract



Basic Contract Framework

- Standard Human Services Contract (April 2017)
- Riders
- Appendix A: General Provisions Governing Contracts for Consultants, Professional, Technical, Human and Client Services (January 2018)
- Appendix B: Scope of Work*
- Appendix C: Budget*
- Other Documents Incorporated by Reference
- Signature Page
- Other Required Forms & Certifications



Polling Question #2

How would you describe your personal level of familiarity with the NYC Human Services Standard Contract?

- A) Zero – I've never even seen one
- B) So-so – I've flipped through it before but haven't ever read it in detail
- C) Solid – I've reviewed it a few times and am pretty familiar with many of the key provisions
- D) Great – I practically have it memorized!



Key Provisions: Highlights

Standard Contract

- Term and Renewal
- Scope of Work (Appendix B)
- Budget (Appendix C) & Cost Allocation
- Record Retention
- Audits
- Procurement
- Employee Matters
- Board & Governance

Appendix A

- Assignment & Subcontracting
- Records & Audit
- Confidentiality & Publicity
- Intellectual Property
- Limitations on Use of Funds
- Insurance
- Termination



Term and Renewal

- **Term** (Section 2.01)
 - Providers often asked to provide services before contract is executed/registered
- **Renewal** (Section 2.02)
 - City may have option(s) to renew for specified periods
- **Future Funding** (Section 2.03)
 - When contract crosses City fiscal years (July 1 – June 30), funds will need to be appropriated for later years



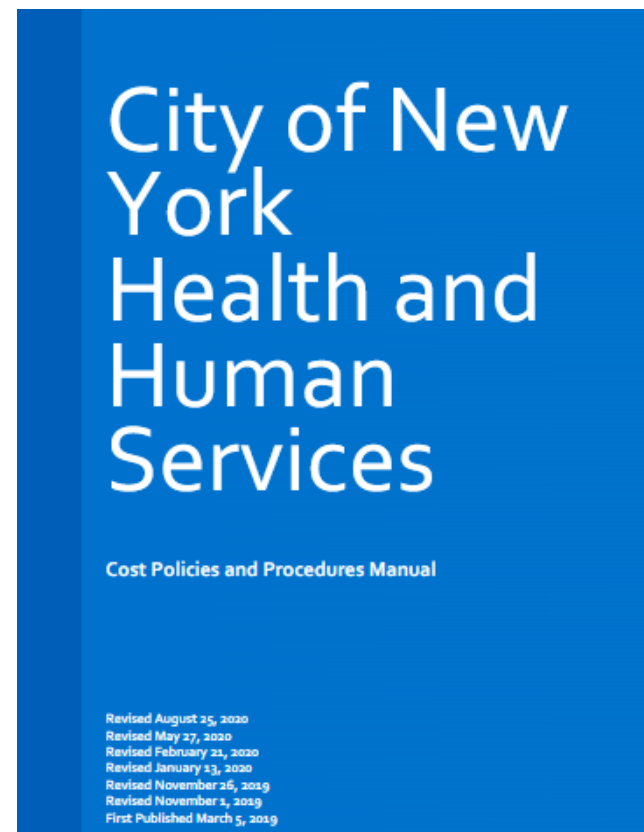
Scope of Work

- **Services & Activities** (Section 3.01A) – description of services attached as Appendix B
- **Appendix B (Scope)** should be specific to your contract. Focus on accurately describing programming and expectations:
 - Who will you be serving? (population, number, eligibility)
 - When/where will services be provided?
 - Clear target #s/standards for services
 - Any other responsibilities (e.g., reporting)?



Budget & Cost Allocation

- **Budget** (Section 3.02) - budget attached as Appendix C
 - Section 3.03: Maximum contract amount and basis for payment (e.g., line-item reimbursement)
- **Cost Allocating & Duplication** (Section 3.05)
 - Duplication not permitted – and City can withhold payments in connection with improper allocations
 - Fiscal Manual (vs. Cost Manual) challenge of interagency differences





Budget & Cost Allocation (Cont'd)

- **Cost of Living (COLA) Increases** (Section 3.06)
 - Requires contract amendment – *not* automatic
 - Costs may rise, but contract will not necessarily cover
 - Focus of advocacy efforts by NYC nonprofits
- **Failure to Spend Funds** (Section 4.08)
 - Must spend all funds within time frame indicated in Budget (City fiscal year) or *funds lost*!



Records Retention

- **Records to be Maintained** (Section 5.01)
 - Very broad: tax returns; audit reports; programmatic records; publications; financial records; Board member lists, ***Board minutes***, and attendance sheets; related contracts; etc.
- **Retention Period** (App. A, Section 5.02)
 - 6 years (minimum)
- Review your *Record Retention Policy* (if you have one) to ensure consistency



Audit

- **Federal Audit Requirements** (Section 5.04): If required under federal regulations (2 CFR Part 200), must complete audit and provide copy to Agency
- **NYS Audit Requirement** (Section 5.05): If filings and audit required by NYS law, must complete and provide copy to Agency
 - Even if exempt from filing, still required to provide certain equivalent disclosure reports (see Section 5.06)
- **Independent Audit by City** (Section 5.06D): City can conduct own programmatic and/or fiscal audits of Contractor



Procurement

- **Extent of Competition Required** (Section 4.05B)
 - Extent of competition required depends on dollar amount of goods/supplies/services purchased (includes consultants) over 1-year period
 - \$5,000 - \$25,000: conduct sufficient market research to determine price is reasonable
 - Over \$25,000 (or \$3,500 if federally funded): obtain at least 3 written estimates
 - Can't artificially divide contracts!
- **Procurement Records** (Section 4.05A): must maintain records to show compliance and document payments
- Again, review *Procurement Policy* (if any) for consistency



Subcontracting – Definitions

- Cost Manual definitions for Human Service Contracts:
 - **“Subcontractor”**: organization or individual engaged to perform or directly deliver a part of the prime contractor’s *programmatic* contractual obligations
 - **“Consultant”**: often a subject matter expert; does not perform or directly deliver a part of the prime contractor’s programmatic contractual obligations
 - **“Vendor”**: provides non-programmatic services or goods



Subcontracting – Examples

Nonprofit has contract with the City to provide after-school programming.

- Organization engaged to run programming on Mondays: **subcontractor**
- Individual engaged to provide input on draft curriculum developed by nonprofit: **consultant**
- Printing company hired to create curriculum booklets: **vendor**



Subcontracting – Requirements

- Advance approval required for subcontracts greater than **\$20,000** (App. A, Section 3.02A.2)
- All subcontractors (regardless of size) must be listed in City's Payee Information Portal (PIP) and payments reported within 30 days (App. A, Section 3.01H)
- Subcontracts must be in writing and contain required provisions (App. A, Section 3.02B)
 - City provides standard subcontract agreement template, but not very protective of prime contractor



Assignment

- No assignment by Contractor without approval (App. A, Section 3.01)
 - May need to provide information showing proposed assignee has necessary skills, resources, experience, etc. to perform services
- Includes assignment of “monies due or to become due” under agreement
 - See later slides re: bridge loans



Employment Matters

- **Employee Lists** (Section 6.02A): Provide list of key employees (Executive Director, CFO, COO, etc.) and compensation (incl. funding source) upon contract execution and on demand
- **Notification of Vacancies** (Section 6.02B): 10 days to notify of turnover in listed employees
- **Background Checks** (Section 6.04B)
 - Also remember Fair Chance Act
- **Drug Free Workplace** (Section 6.04C): Posting and notification requirements for staff convictions of criminal drug offense



Posting & Employee Notification Requirements

- **Drug Free Workplace Statement** (Section 6.03C) – must post “conspicuously” at facilities where services provided
- **Living Wage Law** (Section 6-109) – must post and provide employees copies of notices re: Living Wage Law protections (App. A, Section 4.04B.5)
 - Applicable to: homecare services, day care services, head start services, services to persons with cerebral palsy, building services, food services or temporary services
- **Paid Sick Leave Law (PSLL)** (App. A, Section 4.06E) – must provide written notice of rights under PSLL to employees
- **Whistleblower Protections** (App. A, Section 4.07A.3) – must post notice provided by City (attached to contract)



Board & Governance Requirements

- **Board Compensation** (Section 6.02C): Must report all Board compensation upon contract execution and annually (salary, stipends, payments for services, etc.)
- **Anti-Nepotism Requirements** (Section 6.05)
 - Board members can't vote on personnel matters involving family members
 - Family members can't be in supervisory position
- **Minimum Board Size** (Section 6.05D): If over \$1M in City contracts over 12-month period AND City contracts are more than 50% of total revenue, must have at least **5** Board members
 - NPCL only otherwise requires **3** Board members
- **Conflict of Interest Policy** (Section 6.06): If required by NPCL, also required by contract
 - NPCL requires *all* nonprofits to have COI Policy



Confidentiality & Publicity

- All information provided to or gathered under agreement must be treated as confidential (App. A, Section 5.08A)
- Must restrict access to persons who have legitimate work-related purpose to access and instruct employees, etc. to maintain confidentiality (App. A, Section 5.08C)
- **Data Breach** (App. A, Section 5.08B): Must inform Agency of any breach of security containing SSNs or other personal identifying information
 - *See also* Identifying Information Rider
- **Press & Publicity** (App. A, Section 5.08D) Must coordinate with Agency in advance of any intended statements to the press and/or issuing of material for publication (print, TV, radio, internet, etc.) regarding services



Intellectual Property (App. A, Article 6)

- Any materials (reports, data, photos, drafts, etc.) produced under agreement are exclusive property of the City
 - All materials considered “work-made-for-hire” and City is the copyright owner
- If the Contractor publishes a work dealing with any aspect of performance under agreement, the City has a royalty-free, non-exclusive license to reproduce and use
- Contractor may request license to use the materials
 - Would need to be separately negotiated/documentated



Other Limitations on Use of Funds & Activities

- **Real Property** (Section 4.06): no purchase or improvement of real property without approval
- **Political Activity** (App. A, Section 13.07): no partisan political activity or any activity to further the election or defeat of any candidate for public, political, or party office
 - Already prohibited by IRS for 501(c)(3)s
- **Religious Activity** (App. A, Section 13.08): no religious worship, instruction or proselytizing



Required Notifications to Agency

- Changes to bank accounts where contract funds maintained – within 5 days (Section 4.02B)
- Change or substitution of authorized signer(s) on bank account – within 5 days (Section 4.02B)
- Resignations or appointments of key personnel (e.g., CEO, CFO, COO, etc.) – within 10 days (Section 6.02B)
- Conviction of staff member for violation of criminal drug statute in the workplace – within 10 days (Section 6.04C.2)
- Certain injuries, damage or theft (if enrolled in Central Insurance Program) – within 24 hours (Section 8.03)
- Allegations of abuse or maltreatment of program participant by staff or volunteer – within 24 hours (Section 9.03)
- Receipt of complaint (oral or written) regarding Paid Sick Leave Law – within 10 days (App. A, Section 4.06A.4)
- Data breach of personal identifying information – within 3 days (App. A, Section 5.08B)
- Intended statement to press or publication regarding services/data – at least 24 hours (press) or 5 business days (publication) (App. A, Section 5.08D)
- Notice of expiration or termination of required insurance policy – immediately (App. A, Section 7.05E)



Riders (Examples)

- Continuity of Operations Plan Rider
 - Security and Emergency Plan also required (Section 7.03A)
- Identifying Information Rider
- Access to Non-Public Areas Rider
- HireNYC/Public Assistance Hiring Commitment Rider
- Language Assistance Rider for HRA



Certifications and Other Documents

- Tax Affirmation
- Brokers Certificate
 - See Appendix A, Article 7 and Schedule A for specific insurance requirements
- Conflict of Interest Disclosure Certification
- Lobbying Certification



Signature Page

- Don't sign without receiving and reviewing copies of *all* listed documents!

IN WITNESS WHEREOF, the parties have duly executed this Agreement on the date first above written.

CONTRACTOR

CITY OF NEW YORK BY AND THROUGH
THE DEPARTMENT OF YOUTH AND
COMMUNITY DEVELOPMENT

Authorized Signature

Name

Title

Name:

Title:



NYC Contracts and Risk Management



Insurance Requirements

Separate Insurance

Central Insurance Program

- Offered by the City Agency or Department
- Such City Agency reserves the right to cancel or modify any CIP plan
- Contractor shall provide telephone notice to the City Agency within twenty-four (24) hours of an incident, followed by a written report on the approved Incident Report Form to be delivered within three (3) business days.



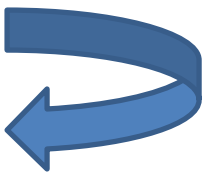
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Milestones in NYC Contracting

NPF Main Street wants to take on a NYC contract to supplement its programming. What are some things they should consider?

- Strategic decision making – the role of the board?
 - Procurement process
 - Executing contract
 - Providing services
 - Renewal
 - Audits
- 



Polling Question #3

Has your organization provided services before executing a contract?

a) Yes

b) No



Delayed Contract Registration

- In Fiscal Year 2019, 76% of all new and renewal contracts* arrived at Comptroller's Office for registration **after** their start date
 - Rate was 79% for human services contracts*
- In Fiscal Year 2021, 29% of contracts* were more than **6 months** late
- Be careful to consider the implications on cash flow and staffing!

*Excludes discretionary contracts, which are always submitted for registration after their start date.



“Retroactive” Contracts

- No Contract Registration = No Payment
 - Consider your cash flow / reserves: plan for the timing risks associated
- Potential Reasons for Contract Registration Delays
 - Responsibility determinations
 - Contract orientation meetings and final budget submissions
 - Final budget and contract review (legal and DOI reviews, OMB budget approvals, final inquiries into PASSPort or warrants, cautions, liens)
 - Comptroller takes full 30 days allowed to review and register
 - Discretionary Contracts are always retroactive



NYC Discretionary Awards

- Grants awarded by City elected officials
 - Submit Council Discretionary Funding Application, and possibly Supplement Application (for new awardees or new entities)
- Health and Human Services Solicitation Process
- Contract awarded through City Agencies (i.e., DYCD or DFTA), often as stand Human Services Contracts
 - Submit documents to MOCS and/or City Agency
 - Training required
 - Subcontracting
 - Fiscal Conduit



Mitigation Options: Bridge Loan

- “Bridge Loan” – MOCS Returnable Grant Fund (RGF) loan
 - Issues loans to 501(c)(3) nonprofits awaiting contract registration with the Comptroller
 - Must have active contract pending registration, a grant or another funding agreement
 - Only supports contracts delayed by the City



MOCS Returnable Grant Fund (RGF)

- Collaboration among the Mayor's Office, the Office of Management and Budget (OMB) and the Fund for the City of New York (FCNY)
- Since 1992, the RGF has made over 4,000 loans totaling more than \$380 million
- RGF loans have no interest or service fees and are typically made within 24-48 hours of receiving the request from the Mayor's Office of Contract Services (MOCS)
- Typically cover 1-3 months of critical program expenses (e.g., rent, utilities, and payroll)
- All New York City 501(c)(3) nonprofits whose contracts are not yet registered with the Comptroller's Office are eligible for a Returnable Grant Loan. The amount of the RGF loan is determined by the contracting agency and MOCS



Bridge Loans and Anti-Assignment Clause

- Assignment (App. A, Section 3.01)
 - Contractor prohibited from assigning monies due
 - Could cause difficulty if Contractor needs to access bridge loan funding



Mitigation Options: Contract Advance

- Contract Advance
 - The nonprofit may be able to borrow (i.e. get an advance) from the City once the contract is registered.
 - Contracts are eligible for advance payments of at least 25% of their annual budgets at the start of the fiscal year.
 - *Request through HHS Accelerator Financials.*
 - Still requires contract to be **registered**



Expanding Services - Contract Specific Legal Risk

- NFP Main Street would like to:
- Provide Home and Community Based Services to its Seniors—Medicaid expansion to non-medical social determinants of health
- Begin serving as referral service for health related services on behalf of its members

Do's and Don'ts

- Do consider whether your programs will subject the organization to new regulatory obligations
- Do have a plan for ongoing compliance, including monitoring changes to the law
- Don't neglect to consult insurer and attorney regarding new or altered programs
- Consider how a new contract will impact your agency



Other Resources

Nonprofit Resiliency Committee (NRC)



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Nonprofit Resiliency Committee Resources

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Contact the NRC

Below are NRC resources and tools. Click on the links to learn more.

Mayor's Office of Contract Services



The Mayor's Office of Contract Services (MOCS) manages and supports the policy initiatives of the NRC by designing and implementing technology solutions that drive policy success.



Questions?



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