

March 16, 2020

## **Contract Considerations for Nonprofits During the Coronavirus Outbreak**

Can we cancel or postpone our gala? Do we have to continue meeting government contract deliverables? Do we have to pay the consultant who was going to run our now-cancelled conference?

As nonprofit organizations plan for and respond to the coronavirus outbreak, these are just some of the questions they are asking. Often, the answers to these questions are found in vendor, consultant, and funder contracts. This Legal Alert explains contract issues nonprofits should consider.

### **1. What contracts does our organization have?**

Nonprofits frequently have one or more of these types of contracts:

- lease
- vendor contracts
- agreements with funders
- consultant contracts
- insurance

### **2. What documents do we need to understand our contracts?**

Make sure you have a complete copy of each contract. Many leases and government contracts are renewed periodically – you may need the original contract, as well as any amendments. If the contract incorporates other documents “by reference,” those documents are also part of the contract. For instance, many government contracts include the government’s Request for Proposals and the contractor’s proposal as part of the contract, and most leases have separate “riders” that are part of the lease.

Make arrangements for access to your contracts in the event that you will need to work remotely. Consider assigning someone to bring home copies, scan any hard copies onto a drive you can access remotely, etc.

### **3. What parts of the contract are most relevant to our ability to change or cancel the contract?**

If you need to change or cancel a contract, pay particular attention to the clauses addressing when and how the contract can be amended or terminated. Paragraph headings and words to look for include: “amendment,” “termination,” “cancellation,” “breach,” “material adverse change,” “repudiation,” “force majeure,” and “Act of God.” Here are some issues those paragraphs may address:

Amendments: Who has the right to amend the contract? What must the party seeking amendment do in order to amend the contract? Do any amendments have to be put in writing? Do any amendments have to be signed off by or sent to a particular person?

*Tips:*

- *Make sure that anyone agreeing to amend a contract really has the authority to do so.*
- *Put all contract amendments in writing, and work with a lawyer to draft the amendment.*
- *Make sure notice of the amendment is sent to anyone who the contract lists as being entitled to receive notice.*

Termination

- Which party or parties can terminate the contract?
- Can the contract be terminated for any reason, for a limited set of reasons, or not at all?
- Must the party requesting termination give the other party notice first?
- What is the required timeframe for notice of termination?
- Does the contract specify how notice must be sent (e.g. by U.S. mail or hand delivery, or is e-mail allowed)?
- If the contract can be terminated based on a party's breach (violation) of the contract, does that party have a right to cure (meaning a right to correct the breach) before the contract can be terminated?
- How will payment for work already performed be calculated?

Force Majeure/ Acts of God: "Force majeure" means "a higher force." A force majeure clause covers what will happen if something outside the control of the parties interferes with their ability to fulfill the contract. Traditionally, parties to contracts were required to carry out the contract, and anything short of impossibility was no excuse. A force majeure clause may give one or both parties a reason to terminate the contract, or excuse certain types of nonperformance. Here are some issues to consider:

- Does either party have the right to invoke the force majeure clause, or does the clause excuse nonperformance by only one of the parties?
- How broad is the clause? Does it excuse nonperformance whenever it is caused by anything outside of the control of the parties? Does it specifically include or exclude disease, epidemic, pandemic, or quarantine as a qualifying event? Is nonperformance excused only if performance would be impossible, or also if it is inadvisable, impracticable, or unlawful?
- Will the clause apply if a party proactively takes steps that aren't required by law, regulation, or government order? For instance, if you decide to cancel a large gathering to protect staff and participants, but the government hasn't required you to do so, will the clause apply?
- Is there an obligation to mitigate damages?
- What is the effect of the clause? If a force majeure event occurs, can you postpone performance, excuse certain types or amounts of nonperformance, or terminate the contract entirely?

*Tips:*

- *Pay attention to orders and advice issued by the government during the coronavirus outbreak. Things are moving quickly. An event that may be allowed one day may be impracticable or even unlawful the next. Links to relevant government websites can be found at <https://lawyersalliance.org/coronavirus-information>*
- *Force majeure clauses can vary widely. Work with an attorney to understand the clauses in your contracts, and to draft them in new contracts going forward.*

#### **4. Can we negotiate a change in the contract?**

Even if a contract does not allow you to cancel or delay your obligations under the contract, the other party may be willing to do so. Consider what leverage you may have in this situation. Talk to the other side.

#### **5. What do our government contracts say about force majeure?**

Government contracts tend to be long, with many attachments and a lot of standard language. It is important to try to understand this language, though. It is binding on both parties, and is not “just boilerplate.”

Government contracts can vary widely. Here are some sample clauses from government contracts entered into by many New York nonprofits. Do not assume the clauses are the same in your contracts: always check your actual contract.

#### Appendix A to NYC Standard Human Service Contract (2018 version)

This contract defines a force majeure event as an act or event beyond the Contractor’s control and fault. It does not specifically exclude pandemics. If a Contractor asks the City to excuse any nonperformance because of force majeure, the City must use “reasonable discretion” to determine whether the Contractor can comply, and the City “shall” excuse nonperformance if it determines that the Contractor cannot comply. Here is the relevant language:

##### **Section 10.04 Force Majeure**

A. For purposes of this Agreement, a force majeure event is an act or event beyond the control and without any fault or negligence of the Contractor (“Force Majeure Event”). Such events may include, but are not limited to, fire, flood, earthquake, storm or other natural disaster, civil commotion, war, terrorism, riot, and labor disputes not brought about by any act or omission of the Contractor.

B. In the event the Contractor cannot comply with the terms of the Agreement (including any failure by the Contractor to make progress in the performance of the services) because of a Force Majeure Event, then the Contractor may ask the Commissioner to excuse the nonperformance and/or terminate the Agreement. If the Commissioner, in his or her reasonable discretion, determines that the Contractor cannot comply with the terms of the Agreement because of a Force Majeure Event, then the Commissioner shall excuse the nonperformance and may terminate the Agreement. Such a termination shall be deemed to be without cause.

C. If the City terminates the Agreement pursuant to this Section 10.04, the following provisions apply. The City shall not incur or pay any further obligation pursuant to this Agreement beyond the termination date. The City shall pay for services provided in accordance with this Agreement prior to the termination date. Any obligation necessarily incurred by the Contractor on account of this Agreement prior to receipt of notice of termination and falling due after the termination date shall be paid by the City in accordance with the terms of this Agreement. In no event shall such obligation be construed as including any lease or other occupancy agreement, oral or written, entered into between the Contractor and its landlord.

NYS Master Contract for Grants (2014),

<https://grantsmanagement.ny.gov/system/files/documents/2018/09/nys-mcg-standard-terms-and-conditions.pdf>

This contract defines a force majeure event as “any unforeseen circumstances and acts beyond the control of the State which render the performance of its obligations impossible.” This clause does not say what should happen if such an event makes it impossible for the *grantee* to perform.

f) Force Majeure: The State may terminate or suspend its performance under the Master Contract immediately upon the occurrence of a “force majeure.” For purposes of the Master Contract, “Force majeure” shall include, but not be limited to, natural disasters, war, rebellion, insurrection, riot, strikes, lockout and any unforeseen circumstances and acts beyond the control of the State which render the performance of its obligations impossible.

In addition to these clauses, there is a lot of other relevant language in government contracts. See the response to question 3 above for more information.

#### **6. What other resources exist for questions about New York government grants?**

- Your contract officer, and the website of the government agency responsible for your contract.
- NYC Mayor’s Office of Contract Services has general information for government contractors, <https://www1.nyc.gov/site/mocs/index.page>
- NYC government’s central coronavirus page has information for particular types of government contractors, <https://www1.nyc.gov/site/doh/health/health-topics/coronavirus.page>

*Lawyers Alliance for New York may be able to help eligible nonprofit organizations analyze their contracts and negotiate and draft amendments. Existing clients can contact their usual staff attorney contact or Client Relations Associate Gina Pujols-Johnson at [gpujols-johnson@lawyersalliance.org](mailto:gpujols-johnson@lawyersalliance.org) or (212) 219-1800 ext. 278. Information about becoming a client is available at <https://lawyersalliance.org/becoming-a-client>.*

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