UNDERSTANDING AND NEGOTIATING KEY CONTRACT TERMS

National Network of Fiscal Sponsorship
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Disclaimer

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Introduction & Goals

- Introduction: Who you are and what do you need from this presentation
- Goals:
  - Understanding of standard contract terms
  - Identification of key terms
  - Understanding of how contract terms can protect your organization
  - Framework and tips for negotiations
FISCAL SPONSORSHIP & MANAGEMENT SERVICES

COLLABORATIVE SPACE

THE ADVOCACY FUND
What is a Contract?

• Legal Definition: an agreement, upon sufficient consideration, to do or not to do a particular thing.

• Layman’s Terms: an exchange of goods, services or lawful tender between two or more parties.
Why does this matter?

If the fiscal sponsor enters into the contract, it is responsible for performance.
Types of Contracts Nonprofits Enter

- Leases
- Employment
- Services
- Purchases of Goods
- Grant Agreements
Common Misconceptions

• Contracts must be in writing to be binding.

• An MOU is not binding.

• An amendment to a contract doesn’t have to be in writing.

• Terms in a company’s form contract can’t be changed.

• Crossing out terms that the parties agree to take out is ok.
Key Terms

• Identification of the parties.

• Specific details of each party’s obligations.

Party 1 agrees to pay $10,000 by a specific date. Party 2 agrees to perform services by a specific date.

• Term of the contract.
Additional Key Terms

- Intellectual property
- Independent Contractor clause (if applicable)
- No assignment
- Merger clause/No modification clause
- Choice of law/Venue /Dispute resolution
- Insurance
- Indemnification
Intellectual Property

• Identifies who owns the deliverables.

• Consideration: Deliverables paid for with tax-deductible funds cannot be used for a private benefit.
Independent Contractor Clause

Confirmation that the relationship between the parties is **NOT** an employer-employee relationship.

Note: A clause stating that the contractor relationship exists is not enough. The regulatory agencies and courts look at multiple factors relating to control and independence of the contractor.
Assignment Clause

Determines whether a party can have a third-party perform its obligations in its place (i.e. sub-contract the work to another).
Merger Clause

All the terms are in this document. There is nothing else to consider.
No Modification Clause

Nothing else can change the terms of this agreement.

Usually accompanied with a requirement that changes must be in a signed writing.
Choice of Law

Identifies the state or country whose law applies to the contract.

Generally want the law that will protect you best—usually the law you know (or the law your lawyer knows).
Venue

Identifies where the parties will resolve a dispute.

Usually want it where you are located.
Dispute Resolution

• Identifies how the parties will resolve a dispute.

• Options:
  • Civil court
  • Good faith negotiations
  • Mediation
  • Arbitration
    • Binding
    • Non-binding
  • Combination

• No dispute resolution clause = civil court.
Insurance

- Specifies insurance coverage requirements.

- Considerations:
  - What are your policy coverages?
  - What are you at risk of losing?
Indemnification

Party 1 agreeing to be responsible for the damages/losses Party 2 sustains as a result of the Party 1’s actions in performing its obligations.

• Considerations:
  • Limiting responsibility to negligent or willful actions
  • Mutual indemnification
  • Capping liability
More Additional Terms

- Early Termination Clause
- Available Funds
- Certifications required by grant agreements
Negotiations

Remember: the terms are to protect you

Best practices:

• Use your own template
• Read the terms of their contract
• Ask and explain
• Be persistent
Things to Consider

Balancing Test:

- Contract cost
- The relationship with the vendor
- The need for the contract
- Likelihood of possible worst case scenarios
- Potential cost of worst case scenarios
Key Take-Aways

• The entity entering into the contract is the responsible party.

• Contract terms are a way to protect your organization in the event the worst case scenario occurs.

• Terms are negotiable.

• READ the terms!
Additional Resources

On-line Resources for Form Contracts:

• Rocket Lawyer
• LegalZoom
Additional Resources
Pro Bono Counsel

• Community Organization Representation Project, Justice & Diversity Center of the San Francisco Bar Association. Contact: corp@sfbar.org

• The Community Development Project, Public Counsel (Los Angeles). Contact: www.publiccounsel.org.

• Lawyers Alliance for New York. Contact: www.lawyersalliance.org
QUESTIONS/COMMENTS

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