

Contracting Risk: Frameworks for Success



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Webinar Summary

Every nonprofit enters into contracts. From the simplest contract with a volunteer, to a complex agreement with a technology vendor, every contract is a potential risk management tool. But a poorly written contract can expose a nonprofit to greater risk than not having a contract in the first place. This webinar explores the key elements of sound contracting. By the end of this program you will know what you need to do to improve your nonprofit's contracting process or create a new framework for contracting if a process isn't already in place.



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Webinar Overview



- Contract Basics
- Common Errors
- Strategies to Improve Contracts
- Framework for Success



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I. Contract Basics



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Contract Basics

- **Promise** for which, if *breached*, there is a legal remedy
- Offer + Acceptance = Consideration
- Requirements:
 - Competent Parties
 - Consideration, and
 - Meeting of the Minds



What is a Contract?

- Lease
- Memorandum of Understanding
- Agreement
- License
- Signed Proposal
- Order Agreement



Why are Contracts Important?

- **Risk**
 - the possibility of an *action or event* that threatens to substantially impair or advance your mission or objectives
- **Protect your nonprofit from potential liabilities**



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Why are Contracts Important to YOUR Nonprofit ?

- **Awareness** – Contracts help to **identify** and **understand** risk events and consequences
- **Preparation** - Instead of waiting for something to happen, plan and play a role in *controlling* the results



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II. Common Errors



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Common Contracting Errors

1. Failing to HAVE a Contract

- Just because you've done business together before doesn't mean you don't need a contract this time
- Handshakes are NOT legally binding



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Common Contracting Errors



2. Failing to READ the Contract

- Read all the terms and provisions carefully
- If there are ambiguous or vague terms, DISCUSS them
- You don't want to be surprised by terms later when something goes wrong



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Common Contracting Errors

3. Authorizing Work BEFORE Negotiations are Concluded

- Sometimes the goals of the other group cannot be fully understood until negotiations are complete
- If the contract is complex, consider using legal counsel



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Common Contracting Errors

4. Failing to Consider the Possibility of Breach

- Include provisions in the contract about:
 - Who will bear the costs
 - What laws will apply
 - Any ADR requirements prior to institution of a lawsuit
 - Where a lawsuit must be brought



Common Contracting Errors

5. Failing to Limit Contracting Authority

- Policies and training on *who* is authorized to enter into contracts on behalf of the nonprofit
- Make clear to other parties who in your nonprofit has authority

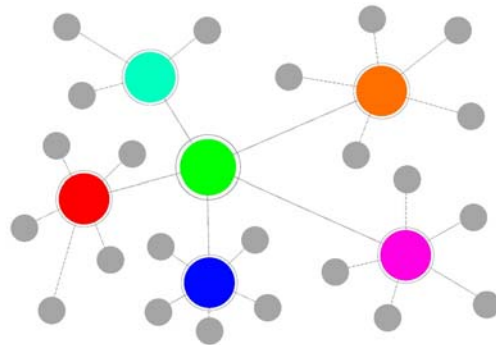


Other Common Contracting Errors

- Failing to **recognize that a contract exists**
- Failing to **apportion responsibility**
- Failing to **protect your nonprofit's assets**
 - Who owns what (including intellectual property)? What about items produced through the collaboration?
- Lack of **key information**



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III. Contracting Strategies



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Contracting Strategies

- **Review the legal effect of provisions**
 - You can do the primary work
 - Legal counsel can help fill in the gaps

- **Put a contracting process in place**
 - *When* must a contract be used
 - *Who* is able to enter into the contract
 - *What* terms must be included



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Contracting Strategies

- **Carefully read every bit of the contract!**

- **“Measure twice, cut once”**
 - Contract first, work later

- **Determine HOW & WHEN termination of the contract can occur**



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Contracting Strategies

- **Protect your assets**
 - Include language to protect ownership
- **Confidentiality**
 - Include provisions to protect your nonprofit, your clients, and your contracting partner



IV. Framework for Success

IV. Contracting Framework OVERVIEW

1. Who has **authority** to enter contracts?
2. What types of contracts are subject to **risk review**?
3. What is the role of **legal counsel**?
4. When is a contract sufficiently **comprehensive**?
5. Will your contract help **prevent negative results**?



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1. Authority

- Who has authority to *sign* on behalf of the nonprofit?
- Consider:
 - Specific types of contracts
 - What is the purpose of the contract?
 - What skills should the authorized person have? What should she know?



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1. Authority: Purpose of the Contract

- strengthen your nonprofit's relationship with the other party
- reduce uncertainty
- allocate risk appropriately
- improve understanding
- reduce the likelihood of uninsured losses



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2. Agreements Subject to Review

- What types of risk are you worried about?



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2. Agreements Subject to Review: Risk Management Review

- ☎ What risks are the nonprofit and the vendor assuming in this contract?
- ☎ Is the proposed risk allocation and transfer appropriate?
- ☎ Are the nonprofit's risk management techniques appropriate for this contract?
- ☎ Are the vendor's/contractor's risk management techniques appropriate/sufficient for this contract?



3. The Role of Legal Counsel

- Consider having a policy for *when* legal counsel must be involved
- Instead of hiring counsel to create the contract, do the legwork on your own
- Have any contract drafted by another party reviewed by counsel, especially if you do not fully understand, or are not comfortable with a provision

4. When is a Contract “OK”?

Ensuring Your Contract is Comprehensive

- Making sure you have all the important terms and provisions in your contract can be a daunting task – *what if you leave something out!!!?*
- **Useful Tools:**
 - Term sheets
 - Contract Checklist



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What is a Term Sheet?

- A term sheet is a summary document used in complex negotiations to ensure that important terms are discussed



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Using a Term Sheet

■ Terms to Include:

- What are the deal breakers?
- What are the terms pertaining to termination of the agreement with the other party or parties?
- Is the contract renewable, or limited in time?
- What risks are each of the parties assuming?
- Whose insurance covers what?



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What is a Contract Checklist?



- A contract checklist is a tool that can be used to ensure that the primary areas of risk in a contract have been covered



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Using a Contract Checklist

- **Consider major recurring concerns**
- Create a checklist that can be used for all your nonprofit's contracts, to ensure that they are consistent and cover the appropriate areas



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What Basic Terms Should ALWAYS be Included in a Contract?

- Identification of the parties
- Subject of the contract
- Price and payment terms
- Delivery dates or duration
- Breach
- Termination
- Notice
- Warranties



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4. When is a Contract “OK”?

Special Types of Contracts

- Leases and space sharing arrangements
- Contracts for goods and services
- Independent contractors



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Leases and Space Sharing

- Lease for Space Sharing
 - Informal is great until issues arise
 - Contracts provide a roadmap to help guide decisions and avoid traps



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Contracts for Goods and Services

- **Always include the basics:** Who, What, Where, When, How
- **Purchasing Process**
 - avoid apparent authority
 - contract approval policy
 - communicate contracting authority or lack thereof



Independent Contractor Contracts

- **Identify independent contractors:**
 - Control of hours & duties
 - Supervision of work
 - Supply of tools
 - Who pays the worker
 - Benefits provided
 - Duration of the work



Independent Contractor Contracts

- **Be consistent** – ALWAYS use a contract
- **Terms to Include:**
 - Name & contact information for contractor
 - Service description
 - Compensation and dates of payment
 - Duration of contract
 - *What else?*



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5. Preparing for Disputes

- What if your contract is unenforceable?
 - Can it still serve a purpose?
- How can you best prepare for the possibility of a lawsuit?
 - Tips & contractual provisions



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Unenforceable Contracts

- **When do they make sense?**
 - **Waiver of liability** - e.g. *waivers are unenforceable in Virginia, Louisiana and Montana*
 - **Contract with volunteers** (without consideration)
 - “Volunteer Agreement”



Unenforceable Contracts



- **What's the Point?**
 - Outline potential hazards and outcomes
 - Educate both parties about the risks and expectations
 - Reduce the likelihood of later disagreements or disappointments due to earlier misunderstandings

Contract Disputes

- Prepare for disputes by utilizing special provisions in the contract beforehand
- Limit lawsuit and associated costs
- Prevent misunderstandings from happening in the first place



Alternative Dispute Resolution (ADR)

- ADR is a broad group of methodologies that parties can use to resolve legal disputes *outside* of court to reduce costs
 - Arbitration
 - Mediation
- Put an ADR provision **IN** your contract to ensure that it must be utilized before a lawsuit can be filed

Choice of Law & Forum Clauses

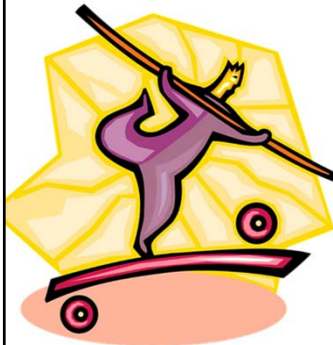
- Another way to reduce costs that may be incurred from lawsuits is through the use of clauses IN your contracts
- *Choice of Law* – choose the law to be applied to any potential dispute
- *Choice of Forum* – choose the location where any disputes must be heard



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Final Thoughts



- **Oral Contracts**
 - “detrimental reliance”
 - *Example:* Board makes offer of employment and candidate resigns from position - court might enforce despite lack of written contract
- **Contracts with Employees**
- **Legal Review**



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We Can Help!

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