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RISK-AWARE CONTRACTING:
WHAT YOU DON'T KNOW COULD COST YOU

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OVERVIEW

During the next hour we will be covering:

- ❖ The elements of a contract
- ❖ The components of a contract
- ❖ Basic terms
- ❖ Contract amendments
- ❖ Renewals and extensions
- ❖ Identifying and changing "boilerplate" contracts
- ❖ Working with independent contractors
- ❖ Contracts with disqualified persons
- ❖ Waivers and indemnification
- ❖ Insurance
- ❖ Force majeure clauses
- ❖ Risk of loss
- ❖ Hidden charges
- ❖ Purchase orders
- ❖ Using the right contract for the job
- ❖ Getting the right people to sign
- ❖ Contract routing protocols
- ❖ Contract management programs

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BEFORE WE BEGIN

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What is a contract?

- MOU
- Letter of agreement
- Agreement
- Lease
- Permission
- License
- Purchase order
- Signed proposal

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BEFORE WE BEGIN

Risk is the possibility that something good or bad could happen

To protect your organization against bad risks:

- Be aware of what they are
- Know how to identify them
- Know how to take action to protect your organization

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ELEMENTS

Offer + Acceptance = Contract

There must be a “meeting of the minds”

An offer by one party to perform the basic components of the contract must be accepted by the other party

Courts will uphold contracts if the basic elements of offer and acceptance are present

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COMPONENTS OF A
CONTRACT
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Remember your high school English teacher - ask who, what, when, where, how and why

- Who – name the parties to the contract
- What – the subject matter of the contract
 - A simple description of the basic understanding will suffice

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COMPONENTS OF A CONTRACT
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➤ **When – list all the important dates**

- Beginning and ending dates
- When payments and performance are due
- When either party must take certain actions to terminate or extend the contract

➤ **Where –**

- Only include if it matters
- Leases
- Hotel and convention contracts

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COMPONENTS OF A CONTRACT

➤ **How –**

- Special skills or equipment
- The amount of money to be paid

➤ **Why –**

- Each party's motivation

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BASIC TERMS

Every contract should contain these basic terms

❖ Identification of parties	❖ Breach
❖ Product or service	❖ Termination
❖ Price	❖ Notice
❖ Delivery dates	❖ Warranties

➤ **TIP:** Use checklists when you are reviewing contracts to make sure that essential terms are not omitted.

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CONTRACT AMENDMENTS

Opportunity to change some of the terms of the contract

- Requires the agreement of both parties
- Document in a writing signed by both parties
 - Shows that both parties agreed on the change
- TIP: You might want to develop and use a template for contract amendments.

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CONTRACT AMENDMENTS

What's in a contract amendment?

- Reference the original contract
- Describe the change
- Dated and signed by all parties

Signatory authority required to sign amendments

Number amendments if there are multiple amendments

- Helps to keep them in order
- Sometimes an amendment changes the terms of a previous amendment

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RENEWALS AND EXTENSIONS
Cont'd next page . . .

Beware of the automatic renewal provision

Usually only benefits the party being paid

Often requires lots of notice to cancel

- TIP: When presented with a contract that contains an automatic renewal provision, STOP and ask yourself if the auto renewal helps or hurts your organization

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RENEWALS AND EXTENSIONS
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When is an automatic renewal good?

- Payroll processing
- Website host
- Office lease (if it's a month to month)

➤ TIP: If you sign the contract → track the notice date

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RENEWALS AND EXTENSIONS

Extensions are really just contract amendments

Usually the only change is to the date of delivery or the contract end date

But, there might also be changes to the payment terms or other terms of the contract

➤ TIP: If there is a separate document extending the contract, read it carefully

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IDENTIFYING AND CHANGING "BOILERPLATE" CONTRACTS

Boilerplate lovers:

- Contactors
- Landlords
- Office equipment suppliers
- Telephone companies
- Utilities

Don't be intimidated by a preprinted contract form

Remember, everything is negotiable

- If it's not negotiable with this party, then look for someone else

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IDENTIFYING AND CHANGING "BOILERPLATE" CONTRACTS
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Form contracts are usually written to protect the party that drafts them

- Rarely fair to both parties
- Often use "legalese"
- Difficult to understand
- Not looking out for your organization

➤ TIP # 1: Never skip over the boilerplate in a contract because you think you can't change it

➤ TIP # 2: Look for "plain English" contracts

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IDENTIFYING AND CHANGING "BOILERPLATE" CONTRACTS

How to change boilerplate:

- Do it yourself
 - Strike through unacceptable terms
 - Handwrite changes
 - Initial and date all changes
- Ask drafter to make changes to form
- Draft an addendum that strikes out, adds to or replaces some of the language

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WORKING WITH INDEPENDENT CONTRACTORS

Develop a standard template for an independent contractor agreement

Use it when:

- An independent contractor doesn't have a contract
- Their contract is very bare bones

➤ TIP: Have your template drafted or reviewed by an attorney and check with the attorney before you make any changes to it

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WORKING WITH INDEPENDENT CONTRACTORS
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But we've worked with their company for years . . .

Treat your consultants and other contractors as professionals

Have a written contract spelling out:

- Products or services to be provided
- Obligations of both parties

➤ TIP: A good contract protects both parties

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WORKING WITH INDEPENDENT CONTRACTORS

Payment Terms:

- No uniform payment method
- Partial payments popular - 1/3 upon signing, 1/3 at midpoint and 1/3 upon conclusion
- More frequent payments if contract lasts over many months

Be careful your independent contractor doesn't become your employee

More information about this can be found on the IRS's website at www.irs.gov

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CONTRACTS WITH DISQUALIFIED PERSONS

"Disqualified person" - someone who has the ability to influence decisions of the organization

- Officers and directors
- Senior staff
- Major donors

See IRS rules and state statutes on contracts with disqualified persons

- Do not pay more than the fair market value for products or services
- Approval process set forth in statutes

Conflicts of interest should be addressed in bylaws

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CONTRACTS WITH DISQUALIFIED PERSONS

Approving a contract with a disqualified person:

- Check bylaws and statutes for process

Directors with conflicts - process options:

- Director may participate in the board's discussion and vote
- Director may participate in discussion but not vote
- Director must be absent from the room and not vote

Any contract with a disqualified person must be reported on your organization's Form 990

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WAIVERS AND INDEMNIFICATION
Cont'd next page . . .

Waiver - a promise not to sue over any claims that might arise out of the contract

Valid waiver requires knowledge of the rights being waived

State law may limit ability to waive claims that have not yet occurred

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WAIVERS AND INDEMNIFICATION

Indemnification - one party agrees to pay or reimburse expenses incurred by other party in defending claims filed against them because of the contract

Contracts involving copyrighted works should include indemnification

Indemnification agreements are only as good as the party's financial condition or insurance coverage

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INSURANCE
Cont'd next page ...

Don't keep your insurance advisor in the dark

- > Types of contracts organization routinely enters into
- > Discuss potential new activities with risk
- > Review available new insurance products
- > Confirm minimum amount of insurance coverage in your contracts

Obtain certificates of insurance when required

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INSURANCE

Get advice on minimum limits and policies other parties should have to protect your organization

When both parties have insurance:

- > Contract might specify which party's insurance is primary
- > Primary insurance is used first to pay any claims
- > Secondary insurance only used if claim exceeds amount available under primary policy

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FORCE MAJEURE
CLAUSES
Cont'd next page ...

Force majeure events are out of the control of either party

- > Traditionally "acts of God" – severe weather such as floods, hurricanes or tornados or earthquakes
- > Modern version - wars, insurrections, strikes, utility failures, terrorist attacks, transportation shutdown
- > Excuse the party from performing their part of the contract

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FORCE MAJEURE
CLAUSES

But what if the other party has already performed?

If there is a force majeure event, both parties should be excused from performance and restored to original positions

Insurance coverage for force majeure events

- > Event cancellation
- > Business interruption

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RICK OF LOSS

Risk of loss – contract specifies which party bears the expense if the property is damaged prior to delivery

Have adequate insurance in place to cover the risk of loss

Don't assume your insurance will cover the risk

- > Check with your insurance advisor or broker
- > An additional policy might be required to cover the goods in transit

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HIDDEN CHARGES

Beware of hidden charges:

- Out-of-pocket expenses
- Travel expenses
- Automatic price increases on renewal

Prevention steps:

- Require expenses to be pre-approved or within a preapproved budget
- Require contractors to follow your travel expense policy
- Don't agree to automatic price increases
 - Use CPI or other formula to calculate price increases
 - Suggest another method of determining price on renewal

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PURCHASE ORDERS

How to handle purchase orders:

- Read the front and back
- Read the fine print
- Ask to see (and read) all referenced documents
- Look for additional referenced documents online

Remember -- they're not written in stone

- Strike terms that don't apply
- Fill in all blanks
- Negotiate terms you don't like
- Find another vendor

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USE THE RIGHT CONTRACT FOR THE JOB
Cont'd next page . . .

Some examples of contracts that your association might have:

- Employment contract
- Office lease
- Equipment lease
- Hotel or convention center contract
- Website hosting agreement
- Office supply contract
- Copyright assignment or permission
- Corporate sponsorship agreement
- Independent contractor agreement

The list goes on

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USE THE RIGHT CONTRACT FOR THE JOB

Basic components are the same but different contracts are used for different reasons

Examples of additional terms in contracts for special circumstances

- Attrition – hotel contracts
- Copyright assignment – research contracts

➤ TIP: Don't just download a form contract from the internet without knowing what you're doing – always use the right contract for the job

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GETTING THE RIGHT PEOPLE TO SIGN

Implement a contract review and approval process

- Articles or bylaws might specify contract authorization
- Board resolution authorizing staff to sign contracts

Know who is authorized to sign contracts

- Authorizations should be by title and not named individuals

Are there any restrictions on that authorization?

- Multiple signatures required
- Budget limitations

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CONTRACT ROUTING PROTOCOLS

Have all contracts negotiated, reviewed and signed by one person

OR

Set up a system to make sure everyone who needs to see the contract gets that chance before it's signed

Process can be high tech or low tech

- Contract routing sheet
- Electronic tracking log
- Contract management software

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CONTRACT MANAGEMENT PROGRAMS

Software programs to track contracts

- When contracts are up for renewal
- When payments or deliverables are due
- Notice period for early termination

Can also track expenses against budget

What to look for:

- Ability to enter subject matter, parties, cost, etc.
- Recording important milestones

Someone must be responsible for contracts

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CONCLUSION

Remember:

- All contracts are negotiable
- Use the right contract for the job
- Don't sign anything you don't understand
- Keep track of all contractual obligations

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