

CONTRACT BASICS

HOW TO PROTECT YOUR ASSOCIATION

It does not take much to create a binding contract under the law. The four basic requirements to establish a legally binding contract are: 1) an offer; 2) an acceptance; 3) the intention to create a relationship; and 4) consideration/payment in return for goods or services. This means that one page work proposals, email quotes or a signed description of services can often be sufficient to create a binding contract under the law, but in most times are woefully inadequate to fully protect the interests of an association.

The ultimate goals of an association when engaging the services of a vendor should include reducing the risk of disputes over the work to be performed or the quality of services and the payment, as well as to ensure the association has a reasonable means to terminate or enforce when a dispute does arise. The best way to protect the interests of the corporation is by getting it down on paper. Not every job will require a twenty page contract or contract review. However, as a general rule of thumb, if there is significant work, significant time, or significant expense at stake, the association should have good contract to back it up. The following are key contract provisions to focus on when creating or reviewing a contract:

Scope of Work. The scope of work or services to be provided or that was expected to be provided under a contract is often the subject of litigation. It is of utmost importance to outline in detail the exact expectations of the parties with respect to the work or the services to be provided under the contract. Language that is vague or allows room for interpretation should

be avoided. The scope of work should include, to the extent possible, the exact materials to be provided, the quality of work expected and/or the level of service to be provided.

Payment and Payment Terms.

If possible, the contract should address the total price for all the

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parts, labor, material or services that is expected to be performed under the agreement.

However, if

the nature of

the work is such that you and your vendor cannot determine the exact price of an item, or whether or not certain items or services will be necessary at an additional cost, the contract can provide that the price will be as later determined by agreement of the parties, but will not exceed a certain amount. In this way, the association will have reasonable expectations as to the final contract sum.

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- Drafting amendments, guidelines, and rules and regulations
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- Closing community association loans

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If the contract calls for scheduled payments, then, other than the typical down payment for project start-up costs, the remainder of the work performed under the contract should always be ahead of the payments. This will give the association leverage over the vendor to ensure quality and completion of the work. If a down payment is required in order to acquire materials, the contract should list, where possible, the materials that will be acquired with the down payment.

Term and Termination. The term and termination provision can be the most important provision of the contract. In most cases, the term and termination provision is not favorable to the association and makes it very difficult for the association to terminate the contract and end the relationship. Contracts for the provisions of services should always be subject to termination without cause with a short notice period, such as thirty days. This allows an association to get out of a contract for any reason, and will allow for better ease in terminating a bad relationship.

Insurance. Contracts should require the vendor to carry liability insurance to cover any claims against personal injury and property damage which may arise from, or out of the work or services being performed under the contract. The vendor should be required under the contract to furnish a certificate of insurance showing the proper insurance coverage prior to the commencement of the work, and the vendor should be required to ensure the insurance remains in full force and effect for the term of the contract. If the vendor is not properly insured or not insured at all, the association can be held responsible for any claims of damages or injuries caused by the vendor.

Indemnification. The indemnification provisions go hand-in-hand with the insurance provisions. The contract should contain a provision requiring the vendor to indemnify or hold harmless the association and all related parties from any and all damages and claims that are caused by the vendor or the vendor's employees. An indemnification provision basically requires the vendor to cover the association in the event the association is sued because of the actions of the vendor. Often, the indemnification is picked up by the vendor's insurance carrier, so it is important to ensure that there is insurance to cover the indemnification provision. Otherwise, the indemnification provision is only as good as the worth or assets of the vendor.

Many times, a contract will have a reciprocal indemnification provision, requiring the association to indemnify the vendor.

Any such provisions must be carefully reviewed to ensure that they are not overly broad and require the association to indemnify the vendor or its employees for their own negligent or intentional acts.

Worker's Compensation. Where necessary, the contract should also require the vendor to carry worker's compensation insurance covering the vendor's employees. Although most contracts will state that the vendor and its employees are independent contractors and are not employees of the association, when a dispute arises, a court will look at the actual relationship between the parties in determining whether or not an employee-employer relationship exists. If a vendor is required to obtain worker's compensation insurance for its employees, it helps establish evidence that the persons performing work are employees of the vendor and not of the association. Also, most associations do not carry worker's compensation insurance that would cover vendors or vendor employees. If the contract requires worker's compensation to be covered by the vendor, the association can circumvent any claims or lawsuits by vendor employees injured on the job.

Lien Waivers. If the contract calls for the vendor to supply labor or materials to the association, the contract should require the vendor, as a condition of final or interim payments, to furnish a lien waiver. The lien waiver is an affidavit certifying that all laborers, subcontractors and suppliers have been paid, and it furthermore relinquishes any claims of payment from the association. If the association does not obtain a lien waiver, any subcontractor or supplier of materials who has not been paid by the vendor has the right, under Georgia law, to pursue a claim for payment directly against the real property where the work was performed.

By ensuring any major contract for work or services contains the foregoing provisions, an association can go a long way towards protecting itself and its members in the event of a dispute. When it comes to high dollar contracts, or for complicated work or services, it is always a good idea to have legal counsel review the proposed contract.