



## HOA Brief Newsletter

### Show Me the Contract: Why Attorney Review of Vendor Contracts is so Important

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One of the greatest and most underutilized benefits community associations can receive from their legal counsel is revision and/or preparation of vendor contracts. When association clients go to their attorneys with a problem concerning their vendor the attorney's usual first response is "show me the contract." Often, the contract was provided by the vendor and signed by the Board *without* attorney review and consequently contains little to no legal protections for the association that could have prevented the problem or at least mitigated the potential impact on the association.

Association managers and Board members need to keep in mind that a contract proposed by a vendor is not written for the association's benefit. Vendor contracts are typically written by the vendor's attorney (or sometimes just by the vendor) and, not surprisingly, favor the vendor. Vendor contracts are often incomplete, inconsistent, and lacking in any legal protections for the association.

Attorneys frequently receive a proposed vendor "contract" from their client that is nothing more than a bare proposal to do the work with no terms and conditions on how the work will be performed. Managers and Board members need to keep in mind

that a "proposal" is basically just a vendor price quote for a particular scope of work. It is *not* the same thing as a comprehensive contract containing all the details of how, when, and where the work will be performed and under what conditions.

Proposed vendor contracts are often reminiscent of the old commercial where the lady looks inside her hamburger bun and asks "Where's the beef?" They may look like a "contract" from the outside but there is no substance inside, at least not from the association's perspective.

If we lived in a perfect world where nothing ever went wrong, and disagreements never happened, then associations wouldn't need to have a comprehensive written contract. Of course, that is not the world we live in, and things often do go wrong, and disagreements and even innocent misunderstandings do arise. That is why having a balanced, well written contract is worth the cost of having an attorney prepare it for the association.

For example, we were recently involved in a contract dispute between a client association and its vendor concerning a contract to perform fire inspection and testing. The "contract" (which had been provided by the vendor and signed by the Board *without* legal review) consisted of

just three pages with little more than a price and a sparse scope of work.

The dispute arose because the vendor performed a flow test to what it claimed was the correct standard, but the city fire department in which the association was located insisted that the test had to be performed to a different standard and rejected the vendor's test results. The vendor refused to comply with the city fire department requirements without additional compensation because they were more expensive to conduct, leaving the association without a completed fire inspection in violation of the city's fire department requirements.

This dispute could have easily been prevented by simply including a provision in the contract that "all inspection and testing will be performed to current applicable local, state and federal requirements." That would have put the risk on the vendor to make sure they were familiar with the current local testing requirements. Instead, the association is now looking at potentially thousands of dollars in additional costs and legal fees to resolve the situation.

When preparing and/or negotiating a vendor contract for a community association, the association's attorney is going to make sure the association's interests are protected and risks clearly identified. Instead of one-sided terms and conditions favoring the vendor (or none at all) the association's attorney will include provisions protecting the association from foreseeable risks and make sure the Board is informed of any remaining potential risks *before* signing the contract.

In reviewing a vendor contract, the association's attorney is going to ask various questions, including the following:

- Are the parties to the contract clearly identified?
- Is the scope of work clearly identified?
- Is the term of the contract and schedule for performing the work clearly identified?
- Is the amount, manner, and timing of compensation clearly identified?
- Are the payment terms fair and reasonable?
- Are lien releases necessary as the work is performed?
- Is the use of subcontractors clearly addressed?
- Are there any special conditions for performing the work?
- Are vendor insurance requirements clearly identified (including general liability, workers compensation, and vehicles)?
- Is there an acceptable indemnification provision?
- Are vendor licensing and permit requirements clearly identified?
- Are any applicable warranties for the work addressed?
- Can the association terminate the contract with or without cause?
- How will disputes be resolved?

As can be seen from the above list, there are a lot of factors that need to be carefully considered when evaluating the acceptability of a vendor contract. And the larger the dollar value and complexity of the work, the greater the importance of having comprehensive and balanced terms and conditions included in the contract.

In conclusion, your association’s legal counsel can and should be used to not just resolve vendor problems after they arise but to prevent them as well through review and negotiation of appropriate vendor contracts *before* the contract is signed. The old adage “an ounce of prevention is worth a pound of cure” certainly holds true when it comes to contracts. It is generally much more cost effective to prevent potential problems by having legal counsel prepare a good contract before entering into it than having legal counsel deal with a bad contract after entering into it.

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