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Contract Essentials for Charities & NFPs: Make Sure You're Protected

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INTRODUCTION AND OVERVIEW

- Poorly drafted or unbalanced contracts can place charitable and not-for-profit (NFP) assets of an organization at risk
- This presentation will address some of the key elements, issues and processes that charities and NFPs should be aware of when entering into, negotiating and executing contracts

- Context
- Preliminary Considerations
- Key Contract Considerations
- Key Takeaways

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A. CONTEXT

- Despite the fact that they are non-commercial entities, charities and NFPs frequently engage in a wide range of commercial/business activities in the course of their operations
- For example, they may retain IT providers, web designers, bookkeepers, fundraisers or consultants, acquire goods or services or provide goods or services to another organization
- These arrangements can be mission critical to the charity or NFP, whether in terms of the dollar value of the contract or the nature of the services in question

- Yet, many charities and NFPs rely on trust/goodwill/relationships in agreeing to arrangements, are hesitant to “push back” on contract terms, and instead just sign on the dotted line
- In reality, to manage the risks associated with these arrangements, charities and NFPs need to ensure that they are entering into balanced, well-drafted, written agreements that are negotiated as fully as possible
- Further, directors of charities have a fiduciary duty to protect the charity from inappropriate risk
- This often means engaging legal counsel to identify, address and manage contract-related risk
- Legal counsel should be involved in the process as early as possible

B. PRELIMINARY CONSIDERATIONS

1. Agreements Should be in Writing

- In a perfect world, we could “seal every deal” with a verbal agreement and a handshake and know that they would be fully honoured and implemented
- In the real world, it is not good practice to rely on oral agreements
- They are risky and difficult, if not impossible, to enforce – how do you prove the terms in order to enforce them?
- A well written contract actually protects both parties – the written contract itself is evidence of the actual terms that were agreed to

- As charities are accountable to the CRA, to the Public Guardian and Trustee (Ontario) or the Attorney General in other provinces and to their stakeholders, their contracts should always be in writing
- Charities’ auditors may also be concerned if agreements are not written
- Note that some types of contracts are required by law to be in writing, such as those affecting real property, including leases

2. The Essential Elements of a Contract Must be Present for it to be Binding and Enforceable

- There must be a meeting of the minds between the parties demonstrating they both understand and agree to the essentials of the deal – clarity of terms is essential
- Consideration - something of value must be exchanged between the parties, such as cash, goods or a promise to do something
- There must be an agreement to enter into the contract - typically evidenced by both parties signing a written contract
- Each party must be legally competent - Human parties cannot be minors and must be of sound mind
- Corporate parties must be correctly identified

C. KEY CONTRACT CONSIDERATIONS

- The following is a high level overview of some key contract considerations that charities and NFPs need to be aware of when drafting and negotiating contracts:

1. Key Definitions

- Key terms need to be defined for clarity
- Defined terms are capitalized and should be used consistently throughout
- Well drafted contracts use defined terms for clarity, consistency and to avoid excess verbiage

2. Who are the Parties/ Signatories?

- Are the parties individuals, corporations or unincorporated associations (UAs)?
- If the party is a corporation, the correct legal name or registered business name must be used
- If the party is a corporation, the board of directors must authorize the corporation to enter into the agreement, either by a specific resolution approving the contract or by approving a delegation of authority policy that authorizes management to make such decisions
- A representation and warranty should be obtained to this effect from the other party in the contract

- If the party is a corporation, does the person signing have authorization to execute on behalf of the corporation? -this should be confirmed on the signature page
- If the party is a UA, an individual must sign since the UA does not have the legal capacity to enter **into** or be bound to a contract
- An individual signing in their individual capacity should obtain authority to contract on behalf of the UA or may be held to have contracted themselves personally
- Alternatively, an individual may sign as a trustee for the UA

3. Clarity on Business Terms is Essential

- As mentioned above, the contract must show that there is a meeting of the minds between the parties
- The contract must clearly set out the goods, services, scope of work, deliverables, milestones, schedule, invoicing, remuneration etc. that are being agreed to
- Some of these can be in schedules or statements of work appended to the contract and subject to its terms
- In most situations lawyers are not to advise on business terms of the contract

4. Term of the Contract

- The contract must be clear on when it starts and when it ends – certainty of contract
- Is it open ended or is there a fixed term?
- Can it be renewed or extended and on what basis?
- If so, are business terms determined in advance for a renewal or extension or is that to be negotiated later?
 - On what basis?
 - What if it fails?
- Automatic renewal clauses should be approached with caution because, if the agreement renews automatically, that can present a risk to the organization

5. Termination of the Contract

- Having a contract without an effective and enforceable termination clause can result in potential liability for non performance - *Monterosso v. Metro Freightliner Hamilton 2023 ONCA 413*
- Can the contract be terminated early and if so on what basis?
 - Can the parties terminate at will or only upon default of the other party?
 - How much prior notice is required, if any?
 - Will a defaulting party have the opportunity to remedy its default?
 - What obligations do the parties have during the notice period?

- What are the consequences of termination?
 - Are there penalties?
 - Some IT contracts require payment in full for the balance of the contract if it is terminated early
- What property or information must be delivered or returned to the contracting parties, such as work product, data and confidential information provided during the term of the contract?
- Disputes over termination rights and obligations are among the most frequently litigated matters
- Having detailed termination clauses will reduce the risk of litigation

6. Other Obligations of the Service Provider

- The contract should set out the service provider's obligations such as:
 - Covenanting to provide the services according to a certain standard
 - Covenanting to comply with certain laws, regulations, policies *etc.* in the performance of its obligations under the contract
 - Covenanting to screen, oversee and be liable for the acts of its employees/contractors
- Large organizations frequently resist such covenants because they have template agreements that they do not like to modify

7. Intellectual Property (IP)

- The contract should clarify who owns any IP created, used or modified in the course of performing the contract
- This is essential in protecting a charity's or NFP's brand and IP assets (as well as the assets of the other party)
- The contract may provide for the licensing of IP to one or both parties or to third parties
- IP is among the most important assets of a charity or NFP and therefore need to be carefully protected in any contract

8. Confidential Information

- Confidential information generally refers to a party's confidential business, financial, operational, legal and similar information
- The contract should address whether one party has the obligation to protect the other party's confidential information, or whether they have a mutual obligation to each other
- This often turns on whether services are being provided by one party to the other or whether it is more of a collaborative relationship, e.g. an MOU

- Among other things, the party assuming the obligation should have to protect the other party's confidential information, not be permitted to use it for any purpose other than to perform its obligations under the agreement, and should be liable for breaches of the confidentiality obligations by its employees or other representatives
- The issues of liabilities and penalties for breach should be addressed in the agreement
- Confidential information provided to a party during the term of the contract should have to be returned or destroyed upon termination of the agreement or request of the other party

9. Privacy and Personal Information

- Personal information means information about an identifiable individual and can refer to information about employees, volunteers, clients, donors and other stakeholders
- Every contract should require each party to protect personal information but is most important when personal information will be processed by both parties or by either party on behalf of the other
- Examples include contracts with cloud service providers or outsourcing of back office services such as payroll, bookkeeping or donor management

- These covenants are particularly important when dealing with extremely sensitive information, such as health or personal financial information
- The agreement should impose requirements to comply with applicable privacy laws and to implement appropriate safeguards to protect personal information, among other covenants
- Penalties for breach should be imposed
- Personal information obtained by a party during the term of the contract should have to be returned or destroyed upon termination of the agreement or request of the other party
- The contract should address where personal information will be stored – within or outside Canada

10. Indemnities

- These are very common and usually highly negotiated clauses
- An indemnity means that one party agrees to compensate the other party if it causes the other party to incur a loss or damages
- Indemnities are important because they allow a party to protect itself from damages and lawsuits caused by the other party
- When purchasing goods or services, a charity or NFP should be indemnified by the provider for any losses or damages the provider, its products or services may cause

- But providers' standard contracts often do not reflect this and often provide for the reverse, seeking to cause the client or customer (the charity or NFP) to bear all the risk
- Indemnities can be subject to intense negotiation and the risk to charities and NFPs can be mitigated in certain circumstances
- Charities and NFPs should not sign a contract containing an indemnity without first obtaining legal advice as they may be assuming too much liability, thus placing the assets of the charity or NFP at risk

11. Limitation of Liability

- These are common clauses that set a limit or “cap” on the maximum amount that a party will have to pay to the other in the event of a breach of contract or third party lawsuit
- Providers’ standard contracts often limit their liability to the amount of fees paid to them under the contract or to a fixed maximum amount
- Liability may also be limited by excluding certain types of damages, such as punitive damages, loss of profit, loss of reputation or loss of goodwill so that the charity or NFP will not be compensated at all for such losses

- Negotiation can result in increasing or eliminating caps or exclusions, or by having no limit on certain types of claims such as those related to breach of privacy, for example
- Again, charities and NFPs should obtain legal advice before agreeing to a limitation of liability clause
- Agreeing to a provider’s standard limitation of liability clause may mean that the charity or NFP is placing the assets of the charity or NFP at risk

12. Insurance

- For many contracts it is important for the provider a charity or NFP is dealing with to carry appropriate liability insurance coverage
- The specifics of the coverage should be set out in the contract - types of insurance (general liability, professional errors and omissions, cyber-liability, workers compensation, *etc.*), and monetary limits
- Insurance coverage adds an additional layer of protection in the event the other party is unable to pay contractual indemnity obligations
- In some contracts the charity or NFP can be added as an Additional Insured on the other party's liability insurance

13. General Matters

- General matters, so-called “boilerplate” clauses, are not merely filler and can have significant implications
- These includes clauses such as:
 - Which jurisdiction will govern the contract – an Ontario charity does not want to be stuck litigating in a foreign jurisdiction
 - Entire agreement – essentially erases all pre-contract documents and understandings unless specifically included
 - Force majeure – when and for how long parties will be excused from complying with the agreement

- How, to whom and when notices must be delivered to the other party during the contract


- Whether and how the contract can be amended


- Whether and how the contract can be assigned and by whom


- How the agreement is to be signed and delivered, e.g. electronic signature and delivery


- These clauses should be carefully reviewed to ensure they fit the circumstances and negotiated and revised as needed

D. KEY TAKEAWAYS

 Charitable as well as NFP assets can be placed at risk by poorly drafted or unfair contracts

 There are many types of clauses that can present pitfalls

 Charities and NFPs should seek legal advice for contracts, especially when they are mission critical and/or include indemnities and limitation of liability clauses

 Directors have a fiduciary duty to ensure that charitable as well as NFP assets are not being placed at risk by inappropriate or unbalanced allocation of liability in agreements

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