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Contracting Tips for Nonprofit Organizations: Practical Tips for Non-Attorneys

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For most nonprofit organizations, it is no surprise that every dollar counts, even when it comes to budgeting for legal review of a contract. Even with the assistance of organizations like PBPO and their team of volunteer attorneys, it is often a practical impossibility for nonprofit organizations to obtain legal assistance for every contract that emerges during an ordinary course of business. The goal of this article is to highlight a few notable areas of contracting for those with or without a legal background to keep in mind when entering into a new contract on behalf of a nonprofit organization.

1. Termination

Many nonprofit organizations rely largely on both individual and institutional donors to cover the costs of daily operations. This creates a unique challenge for nonprofit organizations when dealing with multi-year contracts because it is not always clear whether the funds will exist to cover expenses in the future. Whenever possible, avoid entering into an evergreen clause (where contract auto renews until the organization provides timely, non-renewal notice) and negotiate for the right to terminate for convenience (where contract can be terminated with notice for any reason).

> ***Sample Termination for Convenience:***
> *[Org Name], in its sole discretion, may terminate this Agreement at any time, without cause, by providing at least thirty (30) days' prior written notice to [Other Party's Name].*

Alternatively, a nonprofit organization can try to include a provision to address termination for financial hardship so that it is not locked into a continued contractual relationship and related payment obligations. In a typical contract, events such as adoption of plan of liquidation, petition for bankruptcy, or other official indication of financial stress already qualifies as a "for cause" event that triggers contract termination rights on behalf of the party that is not going through financial challenges. The

> ***Sample Termination for Financial Hardship:***
> *[Org Name] may terminate this Agreement in the event of financial hardship by providing at least thirty (30) days' written notice to [Other Party's Name]. In the event of such termination for financial hardship, [Org Name] shall be relieved of any and all further payments of any kind to [Other Party's Name].*

underlying concern in such context is to protect the financially stable party from providing goods or services where the likelihood of payment is uncertain. However, for nonprofit organizations, it is possible that a financial hardship that does not quite rise to the level of bankruptcy (or similar official status) should still be considered as a valid reason for terminating the agreement at the nonprofit organization's election. While it is most advantageous to keep the "financial hardship" terminology in a generic manner to ensure broad applicability, it is likely that parties may need to have some discussion regarding exactly what types of instances should be considered as "financial hardship" and be ready to include such clarifications, if necessary, as part of the agreement.

2. Reputation (or Morality) Clause

One of the greatest assets of a nonprofit organization, especially those that rely on donor support, is its reputation and goodwill. As such, even when entering into a sponsorship relationship or similar support arrangements, it is critical for the nonprofit organization to reserve the right to disassociate itself from individuals or companies in the event of misconduct, negative media coverage, or otherwise offensive behavior that threatens the reputation of the nonprofit organization. As a prudent measure, always consider adding a reputation (or morality) clause in any agreement where a sponsor is publicly recognized so that the nonprofit organization may withdraw any and all recognition and affiliation in the event of potential negative publicity. It is critical for reputation clauses to make sure that any such termination allows for immediate (or otherwise expedient with a defined time frame) process to minimize any negative impact that could result from negative publicity.

Sample Reputation (or Morality) Clause:

[You] shall use all reasonable efforts to ensure that you do not engage in any activity which may (i) bring the [Org Name] into dispute; (ii) disparage [Org Name]; (iii) damage the goodwill of [Org Name], or (iv) be prejudicial to the image or reputation of [Org Name]. [You] acknowledge that the breach of this Section will be considered a material breach and [Org Name] shall have the right to immediately and without penalty, cease all recognition of [You] and terminate this Agreement.

3. Defining Clear Ownership

Small to medium-sized nonprofit organizations often use the services of an independent third party (often individual freelancers) who is hired on a one-off basis to perform a task. Often, such arrangements are provided at a discount or a fixed price in an informal manner and parties feel comfortable without proper documentation based on the existing relationship. This is a common mistake made by nonprofit organizations for fear that it may appear ungrateful (especially if the work

is performed for free or at a significant discount) or unnecessarily formal ("we've known this person for X years"). Without generalizing how an independent third party relationship can evolve, it is always a good idea to make sure that expectation between the parties—especially as it pertains to ownership—is clearly defined in an executed agreement. For example, if someone is tasked with creating or managing the nonprofit organization's website, the ownership of the underlying content, design, and domain name should not be exposed to a future dispute should the relationship between the parties deteriorates. If your organization would like support in reclaiming or clarifying the ownership of the existing work performed, please contact PBPO for additional support.

4. When Seeking Professional Assistance, Set Clear Expectations

Even for most frugal nonprofit organizations, there are certain types of agreements that are too important (critical to the continued operation) or too complex to be handled internally with confidence. As with any purchase of products or services, it is always a good idea to explore the available options and inquire whether or not a special rate exists for nonprofit organizations. Once a nonprofit organization selects a firm, it should establish clear expectations with respect to billing, hourly rate, personnel, and other similar issues so that there is no surprise at the conclusion of the engagement. For example, even in cases where the nonprofit organization is aware of the hourly rate, the overall hours spent and amount invoiced may come as a surprise if expectations are not clearly defined from the start. A nonprofit organization can set such expectation in a formal Outside Counsel Policy (samples can be made available by PBPO) in the case of repeat interaction or a simple letter of engagement where the nonprofit organization sets a threshold amount, above which must be pre-approved prior to incurring such fees. Alternatively, depending on the nature of the assistance being requested, it may be appropriate to define a set maximum fee that will be charged for the overall project.

5. Who Signs the Agreement?

A typical nonprofit organization contains both employees and volunteers. To the extent that an employee engages in activities on behalf of the nonprofit organization, he or she will be treated as an "agent". Under such agency relationship, courts will likely find that there was an actual or apparent authority to bind the nonprofit organization to the terms of an agreement regardless of whether or not the employee had proper authority to do so.

As a general rule, volunteers of the organization should be absolutely prohibited from entering into any agreement on behalf of an organization. Similarly, employees who do not have the authority

provided from the board of the nonprofit organization should be prohibited from entering into any agreement. Once the nonprofit organization defines which limited group of employees can sign agreements, it should be communicated to both employees and volunteers prominently so as to minimize the instance of unauthorized contract formation. For nonprofit organizations that experience high turnover rates among its employees or have a history of abuse of authority by a rogue employee, requiring more than one signatory (e.g. requiring two officers to sign) for every contract may also serve as a helpful policy to curtail instances of unauthorized contract formation.

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