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Consulting Contracts for Non-Profits **(“The Good, the Bad and the Ugly”)**

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A. INTRODUCTION

Many non-profit organizations need assistance in their formation, organization, outreach, funding and strategic planning activities. Often, the best way to obtain that assistance is to retain an expert, a/k/a “Consultant”.

The term “Consultant” is not well-defined or well-understood. In many circumstances, the Consultant does not require formal licensing or certification to hold himself or herself out as an “expert” in a particular field. As a consequence, Consultants come in a wide variety of sizes, shapes and styles -- and so do the forms of contracts (“Consulting Agreements”) -- that are provided to their proposed non-profit organization clients.

While all of the terms and provisions of a written contract -- and any agreement with a consultant should be reduced to writing -- are important, the following focuses on certain key terms in these contracts that warrant careful attention and clear understanding.

B. KEY CONTRACT TERMS

In negotiating the terms and conditions of a Consulting Agreement, there should be a clear understanding of: (i) the price or cost of services; (ii) the scope of work to be performed; (iii) who will perform the services; (iv) timelines for performance; (v) the product to be delivered, including the quality of the product; and (vi) termination rights and remedies.

1. Price of Services. Consulting Agreements can be priced on an hourly basis, a fixed-fee basis, a not-to-exceed price basis or a reimbursement of costs-plus basis. Which basis is right for your organization will depend on the services provided and the personnel providing them.

Certainty of cost, however, is an important ingredient in any such arrangement. At a minimum, the non-profit organization needs to be sure that the cost of the services provided will not exceed budgeted amounts.

The best way to do that is to obtain: (i) clear cost estimates for each portion of the services; (ii) a specific fixed fee (or an hourly charge with a not-to-exceed maximum amount); and (iii) a limitation on reimbursable expenses, such as mileage, lodging, telephone, printing and copy charges (or an agreement for pre-approval of expenses beyond a certain threshold amount). A Consultant's normal overhead expenses should not be a reimbursable cost.

The following are examples of both appropriate and inappropriately-drafted cost provisions of a Consulting Agreement:

- **Good**: "... services to be provided at the times and within the estimated dollar amounts set forth herein, not to exceed \$xxxx.xx."
- **Bad**: "... pay Consultant on an hourly basis for all hours billed and worked."
- **Ugly**: "... pay Consultant in accordance with its usual schedule of fees and charges."

2. Scope of Work. Depending on the services provided, the scope of work is often rather subjective in nature (e.g., "coordinate and facilitate focus groups"; "assist the board in mobilizing volunteers"; or "assemble information and prepare a report").

If specific tasks cannot be clearly quantified in the Consulting Agreement, the non-profit organization should obtain a clear understanding of what will be done (or not done) by, for example, referencing examples of previous consulting services performed for others or appending a detailed narrative of the services to the Consulting Agreement.

- **Good**: "... timely perform all of the services as authorized and described on Exhibit A."
- **Bad**: "... perform various consultation services as determined by the Consultant."
- **Ugly**: "... perform the role of facilitator or strategic planner."

3. Personnel Performing Services. Before engaging a Consultant, non-profit organizations should perform their own "due diligence" on the background and abilities of the Consultant and the quality of the Consultant's work. Reputation within the non-profit community is often a key factor in selecting a particular Consultant.

Once the Consultant is selected, however, the non-profit organization should ensure that he or she will personally perform the services, rather than having the services subcontracted out or performed by less qualified individuals within the Consultant's company.

The best way to ensure use of the proper personnel is to identify them in the Agreement and prohibit subcontracting or substituting personnel without the non-profit organization's prior written approval.

- **Good:** "... services will be performed only by the individuals identified on Exhibit A without the prior written approval of Client."
- **Bad:** "... Consultant may identify and retain or engage additional personnel or professionals ..."
- **Ugly:** "... services will be performed by up to two members of Consultant's staff."

4. Time for Performance. For planning purposes, non-profit organizations need to know when the services will be performed, when the project (or each phase of the project) will be completed, and when the final report or other written work product will be delivered. Many Consulting Agreements contain a timeline with target dates for completion. To meet expectations, it is important to hold the Consultant to dates and to closely monitor progress to avoid "falling behind" in the schedule.

The timeline should be more than vague time references, e.g. "during first quarter of 2006". If time is "of the essence", the Consulting Agreement should say so.

- **Good:** "... services will be performed and work products delivered at the times set forth in the attached Schedule. Time is of the essence for the performance of the services."
- **Bad:** "... services to be performed over the next three to six months."
- **Ugly:** "... services to be performed in accordance with the attached Schedule, but subject to changes based on the availability of professionals or other needed personnel."

5. Product Delivery. Many Consulting Agreements provide for the delivery of a final written document, e.g., a "report" or a "strategic plan", at the conclusion of the consulting arrangement. Non-profit organizations should be clear up-front on exactly what is to be delivered and who has rights to it.

The quality of the written product should be measured against industry standards or norms (if there are any). Reviewing examples of previous reports or other work product produced by the Consultant for other non-profit organizations can provide a useful benchmark. Who owns the product, how many copies will be provided, and how the product can be used following delivery are important components of a Consulting Agreement. Confidentiality of the final report may also be important.

Consideration should be given to retaining a portion of the contract price until after the final product is delivered and deemed acceptable to the non-profit organization.

- **Good:** "... the final Document shall meet or exceed all applicable industry standards for similar consulting services. The final Document shall be the sole property of the Client and the Client shall have the right to copyright or otherwise protect its rights in and ownership of the final Document."
- **Bad:** "... the Consultant retains the right to utilize any of the information obtained in the course of providing the services for any purpose, including the provision of similar services for other clients."
- **Ugly:** "... the Consultant shall deliver five (5) bound copies of the final Document to Client."

6. Termination Rights. Most agreements provide for rights to terminate in the case of breach by one of the parties. Some agreements provide for termination simply upon notice for any reason (or no reason). In either case, there should be a clear understanding of the rights of the non-profit organization in the event of such termination, including payment obligations and the ability to receive partially completed work product.

- **Good:** "Neither party may terminate this Agreement except in the event of a breach by the other party. The Client shall not be obligated to pay for any services performed after notice of termination is provided to the Consultant. Upon termination all work product prepared or produced by the Consultant pursuant to this Agreement shall be immediately delivered to the Client."
- **Bad:** "Either party may terminate this Agreement at any time upon thirty (30) days prior written notice. The Client shall be liable to pay the Consultant for all services performed prior to the termination date."
- **Ugly:** "The Consultant may terminate this Agreement at any time upon thirty (30) days prior written notice."

C. BOILERPLATE - - IT'S IMPORTANT TOO!

Included in every written agreement are so-called "boilerplate" provisions, often written in legalese and, just as often, overlooked by non-profit organizations. Such provisions are included because they are legally important in defining the relationship of the parties. But since they do not involve the substantive business purposes of the agreement, the parties (other than their lawyers, if they have engaged lawyers to review contracts) tend to gloss over the "boilerplate".

Boilerplate provisions can be critical, depending on the nature of the parties' relationship and the type of consulting arrangement contemplated. They include (in no particular order of importance):

- **Governing law and venue**
 - Specifies the law that applies to the contract and the place where a lawsuit may be filed
- **Indemnification for third party claims**
 - Provides protection from liability based on Consultant negligence
- **Liability limitations**
 - States any limitations on the parties' respective liability to each other under the contract
- **Disclaimers of warranties or representations**
 - Details what standard or legally implied warranties and representations do not apply to the contract
- **Integration of prior discussions/entire agreement clause**
 - Specifies that only the written terms of the contract are enforceable – and not any earlier agreements
- **Status of Consultant as an “independent contractor”**
 - Clarifies that client organization has no “employer” responsibilities to the Consultant, e.g., payroll taxes
- **Liquidated damages**
 - Sets forth agreed-upon damages if the contract is breached
- **Early termination provisions**
 - Sets standards for canceling the contract before the end of the specified term
- **Conflicts of interest**
 - Defines other matters that the Consultant can or cannot be involved in during the term of the contract
- **Exclusivity**
 - Specifies whether the Consultant is only performing these services for one organization and no one else (or visa versa)
- **Confidentiality**
 - Provides for protection of sensitive, non-public information that the Consultant learns in performing the contract

- **Notice procedures**
 - Specifies the procedures to formally communicate about contract issues, e.g., exercise of early termination rights
- **Third party rights**
 - States whether other persons will benefit from or can enforce the terms of the contract
- **Insurance obligations**
 - Specifies the level of liability and other insurances that the Consultant must carry
- **Assignment rights**
 - Specifies whether either party can assign its rights or obligations under the contract to another – and to whom

D. CONCLUSION

Consulting Agreements are not one-size-fits-all forms. They should be specifically tailored to the needs and expectations of the non-profit organization. If nothing else, they should express a clear understanding of the services provided, the personnel performing the services, the cost of the services, the time schedule, and the quality and delivery of the final work product.

Review of Consulting Agreements by qualified legal counsel is usually helpful and always recommended. Remember, the boilerplate is important too!

This publication is intended to provide general information, and is not a substitute for legal advice. If you have additional questions about this issue, contact Community Legal Resources at 313/962-3171.

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