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CONTRACTING WITH VENDORS

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Community associations routinely enter into contracts for services. The value of the contract may range from very few dollars to a significant portion of the association's annual budget. The term of the contract may be brief or quite lengthy. Regardless of the contract's value or its term, it makes good business sense for the community association to establish contracting guidelines which take into consideration all steps in the contracting process, contract requirements and contract administration.

I. The Contracting Process

A. The Parties.

1. The Board of Directors - The association's board of directors is generally the entity empowered by statute and the governing documents to negotiate and enter into contracts on behalf of the association.
2. The Managing Agent - Although the board is the decision maker, the managing agent plays an essential and central role in the contracting process.
3. Legal Counsel - The role of association legal counsel varies depending on the contract.
4. Contractor - The vendor or contractor should be a legally constituted entity (or a sole proprietorship) whose qualifications have been confirmed by checking references. The community association should be careful to "know" its vendor or service provider, making certain that the vendor or service provider is properly licensed or certified, if appropriate, and formed under the laws of its "home" jurisdiction and authorized to transact business in the jurisdiction in which the community association is situated.

B. Restrictions.

Initial consideration should be given to the community association's governing documents for the proper source of authority to enter into the contract and any limitations or prerequisites for such contracts.

1. Monetary Restrictions. - The governing documents for community associations often specify a limitation on the amount of contracts that may be entered into by the association, or the board of directors acting unilaterally, without a vote of the members.
2. Execution. - The governing documents will generally establish limitations on who is authorized to execute contracts on behalf of the association. Some governing documents require more than one signature based upon the amount of the contract. Execution by the managing agent is not advisable, unless general authority to execute contracts is a management contract term or is defined by board resolution.

C. Work Requirements.

The association, with the guidance of the managing agent, must define clearly work requirements. (Often times, work requirements are developed with the assistance of an engineer or other professional, who prepares “specifications.” On more complex projects, this is advisable.) A succinct and comprehensive definition of these requirements is essential to identifying qualified contractors and developing an appropriate contract document.

1. Description of Work. Develop a description of work to be performed.
2. Contractor Qualifications. Determine the contractor or person best qualified to perform the work is properly authorized to conduct business in Virginia and whether a special license or certification is required.
3. Calendar. Prepare a calendar for commencement and completion of work to be performed.
4. Work Standard. Identify the standard for work to be performed.
5. Special Requirements. Make a list of special concerns or requirements unique to the work or the community.

D. Bidding the contract.

There is no statutory requirement and generally, no governing document requirement, that contracts are “bid.” Seeking proposals for contracts is not ill-advised. However, associations often become tangled in the process and lose sight of the goal: good work for a reasonable cost.

1. Request for proposals.
 - a. Clearly articulate work requirements, including performance standards and time frames.

- b. Establish criteria for selection of the contractor.
- c. Present expectations for contract provisions.

2. Analysis of Proposals.

- a. Comparative analysis is helpful.
- b. Consider contractor references, experience, prior work performed and financial resources.
- c. Determine contractor's ability to perform.
- d. Conduct independent license and registration inquiries.
- e. Contract should be commercially reasonable.

II. Essential Contract Provisions

A host of issues should be considered by a community association board of directors and community association management when entering into contracts for services. There are a number of contract provisions which can be classified as essential to every contract, however.

A. Price.

- 1. Total Due. - The contract must specify the total sum due for the work performed. Often this sum is set forth as a "fixed fee" or as a figure not to be exceeded.
- 2. When and How Payment will be Made. - The contract should specify the terms under which payments will be made by the association to the contractor or vendor.
 - a. Payment schedule.
 - b. Date final payment is due.
 - c. Conditions under which interim or final payment will be made.
- 3. Automatic Renewal Terms.
 - a. Not preferred and in fact, not advisable.
 - b. Clearly stated.
 - c. Price adjusted according to the Consumer Price Index, or some other established standard or formula.
- 4. Charges for Non-Contract or Incidental Work.

B. Term of Agreement.

1. Time Period. - The contract should state a start and complete date, or a specified time period (e.g. 60 days).
2. Automatic Renewal Dates. - Not advisable, but if the contract provides for automatic renewal, the trigger points should be set out clearly.

C. Contractor is an Independent Contractor.

The contract should provide that the vendor is an independent contractor, not an employee of the association. In addition, the contract should provide that the contractor or vendor is responsible to screen employees, supervise their work and obtain and pay for all required employee insurance including worker's compensation insurance.

D. Guarantees and Warranties.

The contract should provide that the vendor warrants the work or services performed under the contract. The "warranty" should be clearly stated and will vary depending upon the work provided. In addition, the contract should provide that any manufacturer's warranties will be assigned by the vendor to the association.

1. By Whom. - The contract should clearly state who is providing warranties or guarantees. Generally speaking, products are warranted or guaranteed by the manufacturer. Work is warranted or guaranteed by the contractor.
 - a. Manufacturer.
 - b. Contractor.
2. Of What. - The contract should specify what work and what product is being warranted or guaranteed.
 - a. Material.
 - b. Workmanship.
3. Standards.
 - a. Define.
 - b. Make as objective as possible.
4. How Long. - The contract terms should establish the warranty period during which the product or work is covered.

5. Delivery of Warranty Certificates. - The contract should require that the contractor deliver all warranty certificates provided by manufacturers, and to the extent necessary, all warranties and guarantees should be assigned to the association.

E. Indemnification and Hold Harmless Provisions.

The contract should provide that the vendor indemnifies and holds harmless the association and past and future directors, officers, employees, agents, members and guests against any claims brought against the association due to the acts of or failure to act by the contractor or vendor. The indemnification should include recovery of costs and attorneys fees. Conversely, language which provides that the association indemnifies the vendor should be stricken, if possible. If not possible to strike the language, the indemnification by the association should be limited to the association's negligence.

1. Of the Contractor.
2. Of the Association.
3. Against Contract Claims.
4. Against Tort Claims.
5. Attorneys' Fees.
6. Indemnification should survive the contract term.

F. Insurance.

The contract should require that the vendor insure the Association, its members and guests or include the Association as an additional named insured under the vendor's general liability insurance. The vendor should be required to demonstrate the appropriate insurance coverage is in place by providing a certificate of insurance to the Association. The contract should also provide that insurance may not be canceled without reasonable advance written notice to the Association.

1. Liability.
 - a. Persons.
 - b. Property.
2. Fidelity Bonds.
3. Association as an Additional Insured.
4. Workers' Compensation.
5. Certificate of Insurance.
6. Employer's Liability.

G. Termination.

The cancellation provisions of the contract should be consistent with the provisions of the community association governing documents, generally thirty days with cause and sixty days without cause.

1. With Cause.
2. Without Cause .

III. Contract Requirements.

A. Standard Form Agreements.

Although standard form agreements or addenda can be a helpful tool, Associations should be careful to include all necessary contract terms - particularly those specific to the transaction. In addition to the essential provisions for all service contracts, contracts entered into by a community association should contain provisions addressing the following issues:

1. Subcontracting. - The contract should provide that the vendor may not subcontract the work or services without the prior written consent of the Association.
2. Assignment. - The contract should provide that it is not assignable without the consent of the Association.
3. Permits and Licenses. - The contract should provide that the vendor is responsible for obtaining an necessary permits or licenses and satisfying any governmental requirements prerequisite to providing service under the contract.
4. Utilities. - The contract should provide that the vendor is responsible when appropriate, for contacting and coordinating with the utility companies in advance o work to be performed.
5. Inspection. - The contract should provide that vendor has inspected and is familiar with the property and warranties that he is capable of performing the wok required by the Contract.
6. Discrimination. - The contract should provide that the vendor does not and will not discriminate in violation of Federal, state or local law.
7. Mechanic's Liens. - The contract should provide that the vendor will provide waivers any mechanic's lien rights as payments are made. The contract should further provide that the vendor will obtain lien waivers from suppliers and subcontractors as a condition of payment.

8. Notices. - The contract should provide that any notices under the contract must be provided in writing to persons designated in the contract.
9. Damages. - As appropriate, the contract should provide for recovery of actual damages. Contract terms concerning damages should be carefully considered and coordinated with cancellation provisions in order to address the consequences of contract cancellation.
10. Attorney's Fees. - The contract should provide that attorney's fees and costs are to be awarded to the community association in the event of a dispute.
11. Applicable Law and Forum. - The law of the jurisdiction in which the community association is located should apply.

B. Other Considerations.

1. Contractor and AIA Standard Form Contracts. Associations may be inclined to accept standard forms presented by the contractor. Be wary because these agreements are often written entirely from the contractor's perspective and so not contain provisions important to protecting an association. Special care is appropriate when working with an AIA standard form. At a minimum, the association should attach an addendum addressing issues pertinent to the association.
2. Execution. The governing documents may contain specific requirements concerning who must sign the contract.
3. Retainage. An association may consider "retainage" - i.e., retaining a portion of the contract fee, as a way to assure acceptable performance.

IV. Contract Administration.

Sometimes overlooked, but equally important is proper administration of work under the contract. Contract administration is generally the responsibility of the management agent, but the board is ultimately responsible to monitor work performed under the contract.

A. Record Keeping

1. Written Agreement. - The individual responsible for maintaining association records must retain a complete original, executed copy of the contract in the association records together with any contract addenda or amendments. Duplicate originals should be prepared so that all parties to the agreement have a copy in their files.

2. Contract Changes. - All contract changes should be made in accordance with the contract terms, but written addend or amendments are recommended.

3. Work Log. - Progress in work performed under a contract may be advisable, particularly if the contract term is lengthy.

B. Work Inspection.

Work performed under the contract should be reviewed carefully and timely to assure acceptable performance.

C. Payments.

Again, contract terms control payment schedules, but scheduled payments should be timely made, but only after proper documentation and releases.

D. Completion.

When work under the contract is complete, thorough inspection is recommended prior to payment. Again, contract terms control.

V. Questions and Discussion.