NONPROFIT ADVISOR

For DAV Departments and Chapters

Volume 4, No. 3 **WATCH OUT, THE BOILERPLATE IS HOT!** **Summer 2012**

All charities have a responsibility to safeguard the assets with which they are entrusted. This general principle is specifically included in the DAV National Bylaws and made applicable to departments and chapters. (The National Organization is already subject to a variety of internal and external controls on management of its assets).

One of the great, and unavoidable, risks to department and chapter assets is related to the contracts in which those entities are involved. The types of agreements are almost too numerous to mention, but may frequently include contracts for events (like conventions), for product purchases (like automobiles or supplies of any kind) and for services (like repairs to chapter facilities or the provision of professional services).

In most cases, the vendor of the services presents a contract for signature. Unfortunately, in most cases, the signer does not read the entire agreement, but simply checks the "price paragraph" and affixes his or her John or Jane Hancock on the dotted line. Big mistake! In contracts, as in life itself, the devil is in the details. And the most dangerous details in a contract are often the "legalese" of boilerplate sections. These sections never come into play unless the contract goes sour. By then, it is too late to change those sections. When reviewing a contract prior to signature, department and chapter officials should read the entire document from start to finish (No-Doz will help) and make sure that amidst all the boilerplate, your organization does not overlook the following points:

PAYMENT LEVERAGE

It is important that the purchaser retain some "clout" during the performance of the contract, especially an extended contract for services. For that reason, it is desirable that a significant amount of the payment obligation be deferred until all services have been completed, and to the reasonable satisfaction of the purchaser. Few people would pay a craftsman upfront the full fee for a house-painting job. Instead, "progress payments" seem to make the most sense, and to be the fairest. The same principle applies in many other contexts.

PAYMENT DISPUTES

Very few contracts presented by vendors ever have a "dispute" clause. The reason? It's simple! Vendors want purchasers to pay, not to argue. At best, a contract should always contain a clause that states, in essence, that the purchaser has an obligation to make payment of amounts when due **unless those amounts are the subject of a good-faith dispute.** Otherwise, the purchaser may be in the awkward position of having to make payment and then litigating with the vendor to recover damages.

MUTUALITY

The mutuality issue may be the most important "ticking time bomb" in boilerplate provisions in contracts. "Mutuality" refers to obligations or conditions that should apply to BOTH parties (vendor and purchaser). In many vendor contracts, this mutuality is neglected. Here are a few areas to watch:

Indemnification

"Indemnification" refers to one party's obligation to protect the other party in the event of litigation with a third party that happens to arise out of the contract. Most boilerplate states that the purchaser will indemnify the vendor, but not vice-versa. The vice-versa is very important. Hold out for it!

Termination

Many contract forms state that the vendor may terminate the contract if the purchaser fails to pay. While that is fair, the contract should also state that the purchaser may terminate the contract if the vendor fails to perform.

Cancellation Penalties

A contract will often provide that if the purchaser cancels the contract, a substantial penalty will attach. This is very typical in contracts for events, where, for example, a hotel has committed many rooms and facilities well in advance. Such penalties are actually very fair. But what happens – as it sometimes does – if the hotel cancels its obligation at the last minute? Often, the purchaser will receive only a refund of deposit and then be faced with the near-impossible task of finding alternate accommodations at the last minute and at a higher price. For that reason, any cancellation penalties should be identical for both sides.

GET A LAWYER?

Certainly, one does not need a lawyer to review each and every contract. Normal purchase orders are contracts, and can usually be signed routinely and without fear of hidden terms and conditions. Similarly, so-called "adhesion contracts" (contracts whose terms cannot be negotiated) should certainly be reviewed, but normally would not require the assistance of a lawyer. Such adhesion contracts typically involve large companies that provide pre-printed form contracts. Common examples would be automobile rental contracts, mortgage-related contracts and financial services agreements.

That said, it certainly might be prudent to seek legal assistance in the review of a contract that commits a significant share of the department or chapter assets, and where performance issues are likely to arise during the course of the agreement. It is important to remember that contractual terms only become important when things go south. Somehow, though, it seems that things frequently go south.

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