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The Ten Commandments of Contracting

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The area of contracts/contracting is often one that causes a great deal of consternation for the Board of Directors of most community associations. While it is an essential part of the process of running and maintaining a community, it is very often not given the time and attention it deserves by most Boards. Far too often this leads to ineffective, one-sided contracts which leave the Association in a weak position when litigation arises out of a disagreement between the parties. However, this need not be the case if the Board adheres to a simple but thorough list of checkpoints when either drafting or considering contracts from potential vendors. The following ten basic tenets should be considered when drafting or receiving contract:

1. The Work: Obviously the contract must clearly spell out the specific work to be done by the contractor. The larger the dollar value of the contract and the scope of the project, the more detailed the description of the work. This will ensure that both parties, as well as a court of law, will understand precisely what tasks the contractor is required to perform. Instead of referring to earlier correspondence about the work, the contract itself should include a complete detailed description of the work.

2. Compensation: Equally obvious is the need for the contract to state the amount that will be paid for the work performed. This provision should also state when, in what manner, and on what terms the price is to be paid. It might, for example, provide that 25% of the price would be paid when the contract is signed, 25% when the work is half done, and the remaining 50% when the work is completed.

3. Term: The contract should state when the work is to begin and by when it must be completed. Ideally, the contract will also provide for a penalty payment or reduction in cost if completion is delayed beyond the deadline.

4. Standard of Performance: The contract should provide a standard against which the contractor's work can be judged. For example, the contractor may be required to use "best efforts" or to exercise "reasonable care". He or she may be required to create a specific result, such as an appearance "identical to that existing immediately prior to the commencement of work" or a structure "substantially similar in design and appearance to existing structures of the same type in the association."

5. Warranty: A separate provision of every contract should contain an express promise from the contractor that the completed product will function properly for a specified period. Then, if the work proves defective during that period, the contractor's obligation to fix it at no additional cost is clearly understood.

6. Restoration: Every contract for work at an association should contain a clause stating that if the contractor's employees, agents or subcontractors damage any association property during the course of performance of the contract work, the contractor agrees to fully restore the property to its original condition. This clause may also provide that the association is entitled to retain part of the contract price until the restoration is completed, or to deduct any costs the association has to expend in restoring the property on its own.

7. Indemnification: The contract should expressly state that the contractor will indemnify the association for any amount the association has to pay because of a claim made against it as a result of the contractor's work. The provision should be broad, covering any claims of any type by any party arising from the contractor's performance of the work. It may also provide that the contractor expressly agrees to pay the association's legal costs of defending itself from such claims. Most contractors' form contracts will contain an indemnification clause that is the exact opposite of this; it will provide that the association will indemnify the contractor for any claims made against the latter. The association should try to have such a provision deleted before signing the final contract.

8. Notice: The contract should expressly state the names and addresses of the individuals representing both of the parties for purposes of that particular contract. These will be the official addresses to which correspondence related to the contract must be sent.

9. Insurance: The contract should expressly require the contractor to have all necessary insurance, including, at least, liability and workers compensation coverage. The contract should require the contractor to provide to the association certificates as proof of the coverage prior to commencing the work.

10. Termination: This is one of the most important provisions, particularly in long-term service contracts, such as contracts for laundry machines or waste removal. The association should always have a right to terminate the contract. The association should push for a provision allowing it the right to terminate without cause with a specific timeframe for notifying the contractor of the termination. The association should be able to terminate "for cause" as well as "without cause" meaning that the contractor's poor performance is not the only basis by which the association could terminate the contract.

In following these simple, yet specific guidelines, the association can effectively negotiate contracts for

services that not only provide the association with needed services, but protect the legal interests of the parties as well. If you have additional questions concerning any of the issues outlined in this memorandum, please contact any one of our community association attorneys.

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