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The Anatomy of a Contract: A Risk Management Perspective

December 5, 2018

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Agenda

- A. What is a Contract?
- B. Review of Key Contract Terms
- C. Duty to Act Honestly
- D. Contract Risk Management

What is a Contract?

- A contract is a legally recognized agreement between two or more persons or entities, giving rise to obligations that may be enforced in the courts
- Consider whether document is intended to be binding
 - MOU/LOI vs. Agreement

What is a Contract?

- Contracts are used to document agreements and arrangements in all areas of an organization's operations
- For example, contracts can be used to:
 - Establish agreements to purchase services and products
 - Engage in collaborations, affiliations or joint ventures with other parties
 - Lease and license space
 - Engage employees and contractors
- Contracts may be templated for certain uses but will always be situationally unique

Key Contract Terms

- Certain key contract terms are consistent across many forms of agreement
 - Parties
 - Recitals
 - Definitions
 - Terms of Agreement
 - Consideration
 - Term and Termination
 - Representations, Warranties and Covenants
 - Indemnities and Insurance
 - Dispute Resolution
 - General Provisions
 - Signatures

Key Contract Terms

Parties

- Who are you contracting with?
- Can they legally contract with you?

Key Contract Terms

Recitals

- May explain the purpose of the contract
- May provide background information through recitations of mutual understanding of fact
- Some courts have held that recitals are conclusive evidence of the facts they state
- Recitals are part of the contract so only include facts that you are absolutely certain are correct

Key Contract Terms

Definitions

- Alphabetic listing of terminology to be used in the contract
- Important for clarity and a meeting of the minds

Key Contract Terms

Terms of Agreement

- Promises made by each of the parties
- States and makes explicit the obligations of each of the parties under the Agreement
- Clear and specific description with detail often contained in schedules to be attached

Key Contract Terms

Consideration

- Each party to a contract must give some consideration to the other party
- Consideration means the cause, motive, price or impelling influence which induces a contracting party to enter into a contract
- It can be anything of value to the other party

Key Contract Terms

Term and Termination

- States the duration of the contract and options for renewal
- Provides for exit mechanisms (i.e. circumstances allowing for voluntary and automatic termination of the contractual relationship)
- Address how matters will be dealt with upon termination (e.g. payments, assets, information)

Key Contract Terms

Representations, Warranties and Covenants

- A Representation is:
 - a factual statement in regard to some past or existing fact, circumstance or state of facts pertinent to the contract
- A Warranty is:
 - a promise by one party which provides assurance to the other party of the existence of fact upon which the other party may rely
- A Covenant is:
 - a promise that something is either done or shall be done or shall not be done

Key Contract Terms

Indemnities and Insurance

- Indemnity is:

- an obligation to make another party whole for third party claims resulting from the first party's negligence, breach of contract or statutory violation
- “hold harmless” means the other party will take over the defence

- Insurance is:

- evidence that a party will have the financial means to satisfy its indemnity obligations

Key Contract Terms

Confidentiality and Privacy

- Of each other's information
- Of patient information
- In compliance with regulatory requirements

Key Contract Terms

Dispute Resolution

- Problem solving during the relationship is an important consideration
- Provides a mechanism for dealing with disputes between the parties before they go to court
- May involve discussion, mediation, arbitration

Key Contract Terms

General Provisions

- Assignment
- Amendment
- Force Majeure
- Governing Law
- Independent Contractor
- Counterparts
- Entire Agreement
- No Waiver
- Severability

It's not just boiler plate!

Key Contract Terms

Signatures

- Contracts must be executed by authorized signing officers in order to be valid
- Check your By-laws to determine how many signing officers are required and who has the authority to sign

Duty to Act Honestly

- Supreme Court of Canada decision in *Bhasin v Hrynew*
- Parties to a contract must perform their duties in “good faith”
- “Good faith” defined by the Supreme Court of Canada as honest and reasonable
- Applies to charities and not-for-profit corporations, regardless of the types of contracts they enter into

Duty to Act Honestly

- Principle should not be interpreted to mean that parties have an obligation to disclose all information to each other
- Distinction from fiduciary duty—good faith performance does not engage duties of loyalty to other party or a duty to put other party's interests first
- Duty means that parties cannot actively mislead or deceive each other in respect of specific contract terms

Contract Risk Management

- Contract will govern the legal and operational relationship on a go-forward basis
- Standardizing contracts will increase efficiency and reduce risk

Contract Risk Management

- Competitive procurement may be required under the BPS, funding agreements and internal policies
- Controlling the form of contract will increase your bargaining strength on key terms
- BPS requires and it is bargaining power to attach the contract or key terms as a schedule to the RFP
- When engaged in competitive procurement important to give attention to contracting terms early in the process

Contract Risk Management

- Internal contract management practices are also important:
 - Contract management office/teams
 - Bookmark key dates
 - Review, document, enforce

Summary

- Determine when you intend to have a binding commitment
- Ensure parties have the legal ability to contract
- Understand implications of contract terms
- Use contract as risk management tool
- Increase your bargaining strength and organizational efficiency by advancing your form of contract/contract terms



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