

VENABLE[®]_{LLP}

Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips and Common Pitfalls

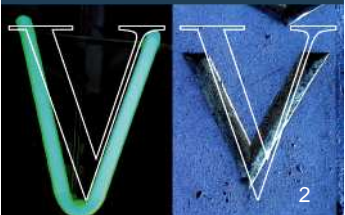
Association of Corporate Counsel
Nonprofit Organizations Committee
Legal Quick Hit
June 12, 2012

Jeffrey S. Tenenbaum, Esq.
George E. Constantine III, Esq.
Audra J. Heagney, Esq.



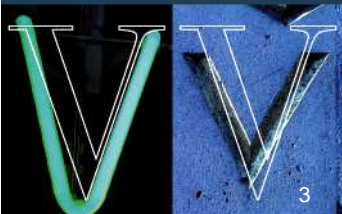
Identify Risks

- What are the obligations of each party?
- What risks are created by the contract?
 - Tax and Tax Exemption
 - Antitrust
 - Regulatory



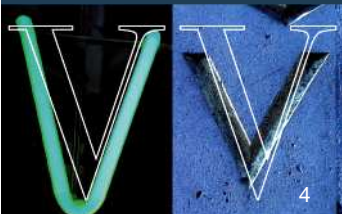
Contract Drafting and Negotiation – A Few Tips

- Your negotiation posture will determine your ability to address the points we will discuss today.
 - Maximize position by leading with your own contract draft
 - Know which contract points are central for your organization
 - Consider markets
 - Educate the non-lawyers on staff
 - Consider RFPs
 - Key provisions
 - Signature from contractor



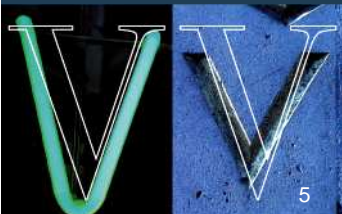
Key Contract Provisions

- Payment and Ownership:
 - Budget and Scope Control
 - Ownership
- Risk Allocation:
 - Damages
 - Indemnification
 - Insurance
- Managing Disputes
- Term and Termination



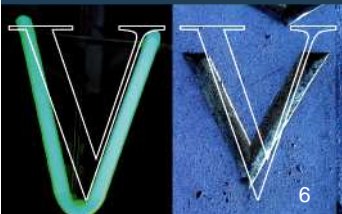
Key Contract Provisions: Payment and Ownership –Scope

- Define “scope” – carefully define what the organization is obligated to do or what you are paying for
 - Particularly important in “soft” contracts – research, writing
- Define material terms, obligations, and defaults
- Avoid disclaimers of warranties



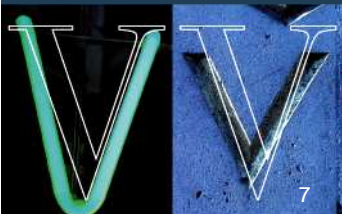
Key Contract Provisions: Payment and Ownership – Payment Terms

- Clear payment terms
 - Fixed price vs. time-and-materials
 - Payment obligations upon termination
- Withhold final payment until all items are delivered – always need an incentive to perform
- Renegotiating prices/payments
 - Consider renegotiation triggers
- Beware of third parties receiving funds due to you



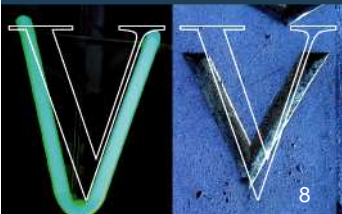
Key Contract Provisions: Payment and Ownership – Intellectual Property

- Association name, trademarks, logo, mailing list, copyrighted information
- Association trade secrets and confidential information
- Who owns what is being created?
- What if a contractor provides something that is owned by a third party?



Key Contract Provisions: Risk Allocation – Damages and Indemnification

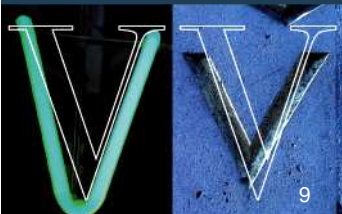
- Increase of proposals to cap damages to the value of the contract
 - Evaluate potential maximum harm and costs to repair in the event of breach
- More suggestions to limit damages to actual damages
- **Indemnification**. Compensation. Making reimbursement to another for a loss already incurred.



Key Contract Provisions: Risk Allocation – Indemnification

AVOID

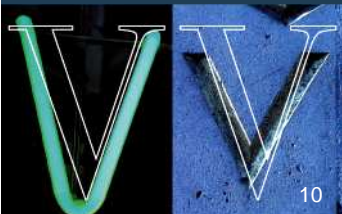
- “Sole,” “Gross” or “As determined by a court” – limits provider’s responsibility
- Coverage for third party’s acts, omissions, negligence, etc.
- No provider indemnification
- Any occurrence related to a meeting



Key Contract Provisions: Risk Allocation – Indemnification (cont'd)

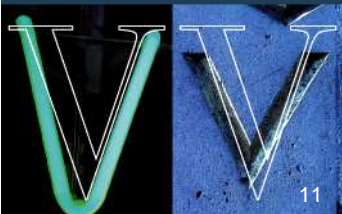
CONSIDER

- Reciprocal/Mutual – each indemnifies the other for its own negligence
- Control – each party is responsible only for what is within its control
- Duty to Defend
 - Choice of counsel (insurance may limit)
- Limit Scope to Insurance Coverage
- Indemnity obligation survives termination of contract



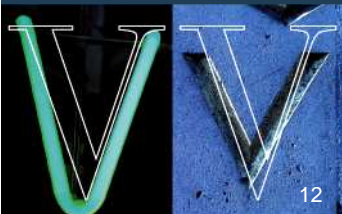
Key Contract Provisions: Insurance

- Secure and maintain coverage
 - Understand scope and coverage
 - Consider event insurance and cancellation insurance
- Coverage types and amounts should correspond to indemnification obligations and potential liability exposure
- Document that providers have insurance coverage
 - Additional Insured
- Reassessments
 - Reconsider risks as activities (and potential liabilities) expand
 - Monitor legal developments affecting kinds and amount of potential liability



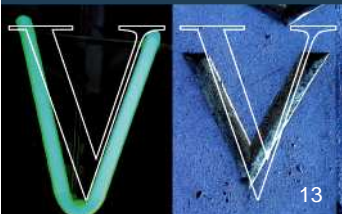
Key Contract Provisions: Dispute Resolution

- Litigation
 - Inclusion of venue and choice of law
 - Attorneys' fees and costs
- Mediation
- Arbitration
 - Inclusion of venue and choice of law
 - Choice of arbitrator(s)
 - Expenses



Key Contract Provisions: Term and Termination

- Avoid long-term deals
- Seek no-fault exit provisions
- Avoid long-term renewals
- Think carefully about “automatic” renewals
- Provide for termination upon breach (watch for long “cure” periods)



Managing the Internal Contracting Process

- Reevaluate the current review process
 - Identify types of lower risk contracts (if any) that can forgo legal review
 - Identify certain dollar thresholds for requiring different levels of contract review
- Use contract templates and guidelines for non-legal staff
- Implement and communicate the revised process
- Seek review and counsel from outside legal, fiscal and other advisors



Questions and Discussion

Venable LLP
575 7th St., NW
Washington, DC 20004
(202) 344-4000

Jeffrey S. Tenenbaum, Esq.
jstenenbaum@venable.com
t 202.344.8138

George E. Constantine III, Esq.
geconstantine@venable.com
t 202.344.4790

Audra J. Heagney, Esq.
ajheagney@venable.com
t 202.344.4281

To View Venable's (Searchable) Index of Articles and PowerPoint Presentations on
Nonprofit Legal Topics,
see www.venable.com/nonprofits/publications,
www.venable.com/nonprofits/recordings and www.venable.com/nonprofits/events

