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

- 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

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