

HIRING VENDORS AND NEGOTIATING CONTRACTS 101

BY: JEFFREY A. FRENCH, ESQ.
GREEN BRYANT & FRENCH LLP

Hiring vendors and negotiating contracts are a normal part of life for board directors. By necessity, associations must hire countless vendors, and by default, that requires them to screen these vendors and ultimately enter into contracts with them. However, often times this process is somewhat taken for granted and this leads to problems on down the line. Often times, the association-vendor relationship starts out bright and cheery during the hiring and contract negotiation process, but sometimes that relationship sours during the course of performance or at the conclusion of the work. It is at this point, when the relationship starts to sour, that the association's due diligence in hiring the vendor and negotiating the contract becomes much more relevant. This is when the contract is closely scrutinized to see what the relative rights and responsibilities of the parties are. Hopefully, enough work was done at the outset to avoid any surprises such that the association has some options as well as leverage under the contract. What follows are some tips associations can adopt in hiring vendors and ultimately negotiating a contract with the chosen vendor. The goal is to do some level of due diligence during the hiring process, and to then make sure the contract between the association and the vendor is fair to the association and offers protection to the association in the event of a dispute.

As boards are acutely aware, the process of hiring numerous vendors that community associations rely upon is no easy task. However, it is one of the most important tasks that boards of directors are called upon to perform on a regular basis. Therefore, it is important that the board work closely with management to reach out to a qualified pool of prospective vendors. This is where managers can help save boards' time and effort as they often have a good pool of qualified vendors to draw from. Thus, a prudent first step in the vendor hiring process is to call upon the expertise and resources of the community manager in initially assembling a qualified pool of prospective vendors worthy of reviewing.

Once a handful of qualified vendors have been identified from which to hire, the board can then perform its own independent due diligence on these vendors. Some of this due diligence can be done via the Internet by looking at Web sites such as these for the Better Business Bureau, Community Association Institute, California Association of Community Managers, and the California State Contractors Licensing Board. All of these, and many more Web sites, provide good information about licensing, complaints, and other background information. In addition, it is helpful to look at trade affiliations and determine whether vendors are members of pertinent trade organizations such as CAI and CACM. Membership in pertinent trade organizations is often a good indicator that the prospective vendor is familiar with community associations and understands their needs. Further, following up on vendor references can be a great source of information by contacting other boards and managers who have worked with the vendor in the past. Finally, boards should carefully scrutinize the information submitted by prospective vendors and confirm appropriate licensing, insurance, bonding, and other relevant information consistent with industry standards.

Once the vendor is selected, then the “fun” begins in terms of negotiating the contract. Typically, the chosen vendor submits its standard form contract for review and consideration by the association. Not surprising, this “standard” contract generally tilts in favor of the vendor, or completely ignores some contract terms that are very important to the association. Given this, it is critical for associations to take the contract process just as serious as the hiring process. We have seen examples where associations enter into contracts in excess of six figures with little or no thought about the contract terms and with absolutely no outside review by counsel. While this may save some money in the short term, it may also prove to be a huge issue in the long term if a dispute should arise. Simply having counsel briefly review the contract for major issues of concern can eliminate a lot of frustration and exposure should a dispute arise later on.

Some of the key issues to focus on (by no means an exhaustive list) when negotiating and reviewing a contract in conjunction with management and legal counsel are the following:

- Vendor insurance coverage (liability, workers compensation, etc.)
- Have the association be made a named additional insured under the vendor’s applicable insurance policy
- An indemnification provision in favor of the association
- How change orders/extras are to be handled
- Binding arbitration clauses
- Prevailing party clauses that award attorneys’ fees and costs
- Term of the contract
- Termination of the contract upon specified notice, whether for cause or not for cause
- Consistency of the contract with the requirements of the governing documents
- Confirm vendor licensing
- Contract scope
- Fixed price vs. time and materials and timing of payments
- Retentions on construction contracts

At the end of the day, vendor hiring and contract negotiating does not need to be an all-consuming and costly process for the board. The board should utilize the resources that it has at hand to streamline this process by engaging its management team and general counsel in the process. In addition, the board should perform some of its own independent due diligence consistent with what was discussed above. By utilizing all of these resources, the board can ensure that each and every contract it enters into is fair to the association and provides a reasonable degree of protection for the association should a dispute arise later with the vendor. To simply sign contracts willy-nilly without plugging into some sort of due diligence process may “get by” on many contracts, but ultimately such a process (or lack thereof) will backfire when a major contract dispute arises. It is precisely at that point the association wants to feel confident that it has entered into a contract that is equitable and provides protection for the association such that it can negotiate and ultimately litigate with confidence in its legal position.