

## COMMUNITY ASSOCIATION CONTRACTS

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Condominium and homeowner associations enter into contracts all the time. Examples include contracts for management, painting, roofing, grounds and landscape maintenance, pool maintenance, cable television, street paving, trash pick-up, and security to name just a few. This Article is designed to provide condominium and homeowner associations with a checklist of safety tips to consider before entering into a contract to (a) minimize the likelihood of a contractual dispute and (b) insure that if a dispute arises, the potential legal exposure of the association will be as limited as possible. Please be advised that this checklist is not exhaustive as contracts differ and may require specialized provisions on a case-by-case basis. Additionally, this Article is not meant to take the place of having all association contracts reviewed by legal counsel.

1. Investigate the Contractor's Background. There are contractors and there are contractors. Make sure that the one your association enters into a contract with is a good one. An association should only enter into a contract with a contractor that the association is familiar with or whose background the association has checked. In this regard, the association should ask the contractor for a list of references. If possible, the association should also go to see some other work that the contractor had done to satisfy itself that the contractor can do a good job for you. Finally, the association should call the Better Business Bureau, or similar agency, to see if anyone has ever complained about the contractor's work before.

2. Get the Support of the Membership on Large Contractors, Especially Those Involving Additions, Alterations and/or Improvements. In most cases, the board of directors of the association will have the legal authority to enter into contracts on behalf of the association. However, the documents may limit or even restrict the power of the board of directors to enter into contracts for "additions, alterations or improvements." As a result, the board of directors may be required to obtain the approval of the membership for certain types of contracts. Even if not required by the documents, as a practical consideration, the board, in some instances, may want to seek the support of the membership prior to entering into large contracts, especially those involving additions, alterations or improvements, to insure that the membership supports the expenditure. Owners always like to know how their money is being spent, especially when large amounts are involved. Consulting the membership in advance is the best way to prevent the board from guessing wrong and whether certain expenditures are necessary at a particular time and in the best interests of the unit owners as a whole.

3. Have a Written Contract. Most of people enter into contracts without ever giving much thought to the idea that a serious dispute or disagreement might arise. As a result, the contract is often an afterthought and not paid much attention. In the event of a disagreement, however, the terms of the contract are what a court will look at to determine the respective rights and liabilities of the parties. Having the terms of the contract set down in writing and made as specific as possible will protect the association from the unwitting contractor who does not understand what he is agreeing to or from the unscrupulous contractor who understands the agreement but then tries to change it.

4. Clearly State the Names of the Parties Entering into the Contract. Clearly stating the proper legal names of the parties entering into a contract can avoid problems of an innocent party being inadvertently drawn into a contractual dispute. For example, the contracts an association enters into should be written using the proper legal name of the association to insure that the directors, officers and others associated with the association are shielded from legal liability by not being able to be sued as individuals. If the president of the association is signing a contract on behalf of the association, the contract should state that the individual is signing as an officer of the association rather than as an individual. Similarly, if a management company is entering into a contract on behalf of the association, the contract should clearly state that the manager is entering into the contract as "the agent for" the association.

5. Try to Specify Minimum Levels of Performance as Much as Possible. The contract should specify as much as possible the work to be performed, the time period in which the work is to be done, and a minimum performance level. For example, compare the following two ways of drafting a standard provision often seen in a landscape contract.

(a) Contractor shall edge all lawns as needed; and

(b) Contractor shall edge all lawns as needed, but shall edge the lawns at least once a week during the months of May through September, and at least once every two weeks from October through April. All edged areas shall be of a neat and attractive appearance comparable to the edged areas of other condominiums in the area.

The second provision is obviously superior to the first because it removes some of the ambiguity from the term "as needed" by quantifying a standard of at least once a week during the growing season, and twice a month during the non-growing season, as well as defining a standard of quality for the edging work to be performed.

6. Determine Whether the Worker Should be Hired as an Employee or an Independent Contractor. The threshold question that must always be asked when a job needs to get done is whether the worker should be hired as an employee of the Association or manager or as an independent contractor. Having the worker be an independent contractor rather than an employee can be beneficial for two reasons. First, an employer is usually responsible in tort (civil wrongs) for the actions of an employee taken within the scope of his employment (under the legal theory of respondeat superior). This is not the case with an independent contractor. Second, there are certain administrative costs of hiring a worker as an employee in that arrangements must be made for withholding various amounts in federal and state taxes, social security, and unemployment compensation, obtaining workmen's compensation insurance and insuring compliance with minimum wage, minimum age, wage and hour and a host of other federal regulations. This again is not the case with an independent contractor.

It is important to note that whether a person is considered by a court to be an employee or an independent contractor will not depend on the label that the employer attaches to the worker but more to the nature of the work relationship between the employer and worker. Among the factors which a court will look at in determining whether a worker is an employee or an independent contractor are:

a. The manner in which the employee is paid. employees tend to get paid more by the hour while independent contractors tend to get paid more by the job.

b. Whether the worker uses his own tools or tools supplied by the employer. The worker usually does not supply his own tools in an employer-employee relationship.

c. The manner and degree to which the worker is supervised (employees are usually more closely supervised).

For the purposes of this Article, it is assumed that the worker is hired as an independent contractor.

7. Require an Indemnification Provision. The contractor should agree to indemnify or hold harmless the Association from all damages and claims that are caused by the contractor or contractor's employees. An example of how an indemnification provision works is as follows. Let's say that a unit owner gets sick because the swimming pool is not clean and brings an action against the Association for damages. If the pool cleaning is being performed by a contractor who has indemnified the Association, the contractor would pay for all the costs of defending the claim against the Association and any judgment obtained against the Association in a court of law.

8. Be Wary of Having to Indemnify the Contractor. Associations should be particularly wary of provisions requiring them to indemnify the contractor. This type of provision often appears in cable television contracts where the owner or manager is required to indemnify the cable company for any damage which is done to the cable television equipment which it places on the property. Since a cable television company is in a position to protect itself through insurance against damage to its equipment, these provisions generally should be deleted from cable television agreements.

9. Require That the Contractor Maintain Adequate Liability Insurance. The contractor should be required by the terms of the contract to have liability insurance to cover claims against both persons and property. Liability insurance is critical as a companion to any indemnification provision in that liability insurance is typically the source of funds to fulfill any obligation created under an indemnification provision. The contractor should be required by the terms of the contract to furnish the owner or manager with a Certificate of Insurance evidencing proper insurance coverage prior to the commencement of work. Additionally, the contract should require that the liability insurance policy be kept current during the entire term of the contract.

10. Require that the Contractor Carry Workmen's Compensation Insurance. In addition to liability insurance, the contractor should also be required by the terms of the contract to

carry workmen's compensation insurance. When a contractor has obtained workmen's compensation insurance for his employees, it is often the best evidence that the person performing work for the contractor is in fact the contractor's employee and not the employee of the association.

11. Include a Good Termination Provision in the Contract. Termination provisions are particularly important in an on-going service contract such as for security or landscaping. A good termination provision will allow either party to terminate the contract without cause upon no later than thirty days written notice. In other words, the party terminating the contract does not need to state its reasons for ending the contract. Being able to terminate without cause usually does not affect either party's ability to terminate for cause. For example, under the law in some jurisdictions, if one party fails to perform its obligations under the contract, it relieves the other party from performing its side of the bargain unless it continues to accept benefits under the contract with knowledge of the breach. In other jurisdictions, however, if one party fails to perform, the other party must show that it was capable of an willing to perform its side of the bargain. Check with your attorney as to the law in your jurisdiction.

12. Clearly State the Starting and Completion Date for Work to be Performed Under the Contract. Clearly stating when the work is expected to be started and be completed is particularly important in contracts involving the performance of a specific task (roofing, landscaping, painting, etc.) If the work needs to be performed within a specified time frames, the contract should specify that "time is of the essence" and if possible, state the reason why the particular time frame needs to be followed. For example, if roofing work needs to be performed before the spring rains, it can only help to state that in the contract. Additionally, if the time frame for the work to be completed is of particular importance, a provision can be added to the contract requiring the contractor to pay liquidated damages for each day that work under the contract is delayed.

13. Require that the Contractor Provide a Checklist of Work Performed. The terms of the contract should specify, where appropriate, the work that the contractor is going to perform during each week or month of the contract, and require that the contractor furnish the association with a checklist of the work actually performed. This is particularly important in grounds maintenance contracts and in swimming pool maintenance contracts. In grounds maintenance contracts, it is often difficult to chart when the contractor should be performing a certain task such as fertilizing or spraying and whether he has in fact performed these jobs. The use of a required checklist gives the association a greater ability to oversee the work that is being performed. In swimming pool maintenance contracts, the checklist becomes important to the Association in the event that a swimmer is injured in or around the pool. This checklist may be the only evidence that the Association has to prove that it carried out its maintenance responsibility for the pool in a reasonable manner.

14. Avoid Payments in Advance of the Work. The contract should specify that the contractor will only be paid after the work has been completed by the contractor and inspected and approved by the Association. Payments in advance of performance should avoided. Additionally, where the contractor's profit on the contract is on the front end, the contract should require that a certain percentage of the value of the contract be withheld until all work has been performed under

the contract. This type of provision serves as an inducement for the contractor to complete all work under the contract.

15. Make Sure to Obtain a Proper Lien Waiver From the Contractor. The contract should specifically provide that upon or prior to final payment, the contractor shall furnish the Association an affidavit and lien waiver stating that the contractor and all laborers and material men supplying goods and services used in the project have been paid, and relinquishing all lien rights against the Association. This is generally known as a lien waiver. The failure of an owner or manager to obtain a lien waiver gives a laborer or a supplier of materials who has not been paid the right to pursue a claim for payment directly against the real property where the work was performed.

16. Get Warranties in Writing. Any warranty or guarantee provided by the contractor should be expressly stated in the contract. Most contractors performing non-service related tasks such as re-roofing or re-painting should be willing to guarantee their work in some way. Guarantees should be against defects in both labor and materials.

17. Consider the Need for a Performance Bond with a Large Contract. With large contracts, it may be important for the Association to obtain a performance bond from the contractor. This type of bond insures that funds will be available to complete a job if for some reason the contractor is unable to do so. Since a performance bond is expensive to obtain, and significantly increases the cost of a contract, most Associations usually do not request one except with a large contract.

18. Require Fidelity Bond for Workers Handling Money. Any person handling funds of the association should be required to purchase a fidelity bond to cover any loss to the association in the event that the person handling the funds misappropriates or absconds with the owner's money.

19. Follow the Contract When a Problem Develops. When a problem develops with the contract, there is sometimes a tendency to take quick action without considering the obligations that the contract might impose upon the parties. Rash moves are obviously to be avoided. The contract should be carefully consulted to insure that any dispute resolution procedures are strictly adhered to.

20. All of the Above Provisions Necessary When the Association Hires Twelve Year Old Johnny to Mow the Lawn. Unfortunately, the provisions listed above are for the most part important to consider even when the association is entering into a contract with little Johnny to mow the lawn. It is one thing for a homeowner in a non-association setting to hire the neighbor next door to mow the lawn. It is quite another for an incorporated condominium or homeowners association to do the same thing. An association, unlike an individual homeowner, is much more likely to be closely scrutinized for compliance with all of the Department of Labor, regulations affecting the employment of minors (including regulations concerning the age at which teenagers can operate power mowing equipment). Moreover, if a minor is injured in the performance of his or her job, the likelihood that a lawsuit will be brought is probably greater when an incorporated condominium or homeowner association is the defendant rather than an individual homeowner.

21. Include a Non-Assignment Provision. After all the work that goes into selecting a contractor, why would you want him/her to be able to turn around after the contract has been executed and assign his/her rights and responsibilities under that contract, without your approval, to another contractor? The bottom line; you would not. To protect yourself and the association and to insure that you get what you contracted for from the individual or company that you contracted with, make sure that the contract has a non-assignment provision.