WELCOME
Coffee Talk
Health Industry Seminar Series
The Anatomy of a Contract: A Risk Management Perspective

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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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