

Chapter 11 - Contract Review



Creating Community

ABC'S OF HOA LAW IN NEW MEXICO

A Guide to New Mexico Community Association Law

Contract Review

Most associations enter into several contracts each year. However, very often associations do not realize the pitfalls that exist in the contracts that they sign until someone is hurt by the actions of the contractor, the contractor fails to perform, or the association attempts to terminate the contract.

As part of its fiduciary duties to its members, the board needs to carefully evaluate each contract of the association. The following are some issues that the association should review when considering contracts:

1. What is required to terminate the contract?

One of the first things that an association should evaluate is what it takes to terminate the contract. Usually, the association would not be entering into a contract if it believed it would need to terminate the contract in the future. However, problems often arise whereby the association would want to be able to get out of the contract, such as when the contractor or vendor is not performing as promised. Accordingly, the association should consider the following questions:

- (A) Does the contract require a lengthy termination notice (such as 90 days, or termination only allowed at the end of each year)?
- (B) Does the contract violate any provisions in the association's governing documents?
- (C) Is there a penalty for terminating the contract?

2. Who is responsible if someone is hurt by the actions or negligence of the vendor or contractor?

Some contracts require the association to be liable for the actions or negligence of the vendor or contractor. The language of the contract may state that the association shall “indemnify and hold harmless” the contractor for its actions. Therefore, the association should ask who is responsible for the actions or negligence of the vendor, contractor, or persons hired by the vendor or contractor.

3. Are there requirements for resolving conflicts between the parties?

Many contracts have provisions requiring mandatory arbitration of any conflicts. The association should be aware of such provisions and the requirements of the provisions.

4. Are there hidden costs that are not specifically set forth in the contract?

Does the contract reference possible other costs (such as copies, postage, faxes, extra time spent, etc.)? If so, are the amounts given for these costs? If not, the association should determine what are all of the hidden costs before entering into the contract.

5. Is the time of completion of the contract a concern to the association? Does the contract address this issue?

If the time for completion is a concern to the Association, it should be specifically addressed in the contract. For example, is this the type of contract where liquidated damages may be an appropriate remedy if the contract is not completed by a certain date?

6. Does the contract clearly set forth the requirements of the parties?

It is much easier to enforce a contract where the terms are black and white, versus some oral representation. Make sure that all of the terms that are of concern to the association are properly addressed in the contract.

7. Does the contract require any board members to be held personally liable for payments due to the contractor?

Some contracts have actually been known to contain this provision. Obviously, no board member wants to be personally liable for contracts of the association. Therefore, please review your contracts carefully to see if such a requirement exists.

8. Is the association protected if the contractor fails to fully perform the requirements of the contract?

Has the association kept a certain amount of funds owed to the contractor as retention to make sure that the project is properly completed? Additionally, has the association only paid the contractor for the work actually performed, rather than paying money up front for work that has not been performed? Has the association hired an expert to make sure that there will be sufficient funds remaining to finish the project after the association has paid the contractor for the work already performed?

9. Is the association entitled to recover its attorney's fees and costs if it hires an attorney to enforce the terms of the contract?

Although no association ever wants to be in litigation, the association should protect itself so that, if it is required to hire an attorney to enforce the terms of the contract, it will be able to recover its legal fees and costs for such action.

The association should keep all of the above issues in mind the next time that it is entering into a contract, and may wish to consider hiring an expert to review the contract before the association enters into it to help prevent future headaches and costs to the association.