

Contracting With Outside Organizations – Handout Suggestions

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These suggestions contain general information only, and are not intended to be complete or precise, or to provide specific legal advice or direction. Organizations should consult with informed legal counsel, regarding matters specific to their business or operation, and aware of the laws in their jurisdiction.

Layers of the Onion - Value of Thoughtful Contracting:

- Examine purpose/goals of the contracting relationship: Reasonable? Aligns with mission? Realistic?
- Undertake reasonable effort to screen: diligent inquiry; documentation
- Craft informed, simple and clear written contract that matches roll-out
- Inform participants[/parents] of contracting relationship; in addition, provide (them with) good information exchange on activities, responsibilities and liabilities (including use of participant agreement)
- Coordinate with contractor/preserve the independent relationship
- Train and prepare attending staff on contract, role with contractors, 'culture' and other relevant issues
- Understand insurance 'picture' going in (in conjunction with written contract)

Taking these steps, works to:

- Focus on running a quality program/alignment with mission – thoughtfully consider issues/risks
- Competent and responsible contractor (consistent with Organization's pre-screen)
- More effectively manage risks; manage/minimize risk of loss to participants and to program
- If incident occurs, informed and efficient emergency and other response
- Organization's effective efforts, perhaps result in positive resolution and no lawsuit
- If lawsuit is filed, organization is better prepared with defenses and tools to minimize loss
- Appropriate insurance in place to cover any loss

(Some) Ramifications of Poorly thought out Contracting Relationship:

- Contracted activity/program isn't considered in light of Organization's mission
- No or little effort to screen contractor
- No contract or "un-informed" contract
- No disclosure to participants[/parents] about contracting relationship or details of program, no signing of participant agreement
- No staff preparation before trip, in regard to roles/coordination/contracting relationship
- No evaluation of insurance coverage

This scenario can lead to:

- Poor quality programming not aligned with mission
- Surprises on program, regarding contractor's expertise, qualifications
- Poor rapport or confusion in roles/responsibilities between attending staff and contracted guides
- Increased risk of injury or other loss to participant and to organization
- Frustration and anger by student/families who were not informed about contracting relationship or details of program
- Increased legal exposure for actions of independent contractor, or, independent liability
- Gaps in insurance coverage.

Thoughts on Screening Contractors

Reasonable (“diligent”) Inquiry: Even though, generally, an organization should have no liability for the acts of its independent contractors, there are exceptions (see the slide presentation). One of those is that an organization has a duty to exercise reasonable care to select a competent contractor (and resulting liability for “negligent selection” of a contractor if found to have breached the duty). The endeavor is to determine if you have a contractor competent to conduct the services (fulfilling the duty is important for both practical and legal reasons (see p. 1)). Conducting reasonable screening/vetting is in an effort to have a reasonable basis for determining competency. What is ‘reasonable’? This is an objective standard (what would an organization in the same or similar circumstances do to determine competency). What is “reasonable” in any given case can be measured (in court litigation, typically via the testimony of an expert) by, e.g.: practices engaged in by other programs in the industry, applicable accreditation standards or practices, any state laws or regulations, direction from published case law.

The following is an example (not exclusive) of some potential areas of inquiry when screening contractors.

Company Business and Contact Information – relevant details

Company Operations

- Required/voluntary licensing or accreditation – associated details, compliance, revocation, etc.
- Permits (company or guide) required or other – associated details, compliance, revocation, etc.
- Liability Insurance – carrier, types and amounts; ability to add additional insured endorsement
- Internal policies or operational standards – including risk management plan, emergency response plan, etc.
- Internal or External reviews – details

Staff

- Staff hiring and selection criteria (required certifications, licenses, amount/type of experience, etc.)
- Background or sexual offender registry check
- Staff to participant ratios
- Staff hired as employees or independent contractors; use of volunteers
- Details (timing, substance) of staff training
- Workers’ Compensation coverage

Equipment (slightly different for Animals)

- Description of equipment (including safety equipment) used
- Equipment use, inspection, maintenance, repair, storage and retirement (and assoc. documentation)
- Equipment policies in accordance with manufacturer’s recommendations?
- Students instructed on proper use – describe
- Communication devices: use, reliability, etc.

Transportation

- Description of means of transport used (make, model, year) – own or lease
- Insurance and licensing for vehicle/plane/other and operator

- maintenance and inspection – details
- Seatbelts or other safety equipment
- Operator experience and training required; background checked – details

Participants

- Student orientation and appropriate details
- Supervised/unsupervised times – description
- Student instruction, sequencing and appropriate details

Emergency Response

- Emergency response plan – describe or attach. Associated staff training on it
- Plan for student separation from program in event of behavioral issues or other
- Staff understanding re: definitive care (location, directions); ability to respond in remote locations
- Pre-coordination/compliance with public authorities (land managers, SAR, etc.) re: emergency response plans

Serious Incident History

X yr. history for serious incidents, seeking appropriate details (fatality or serious injury, whether or not hospitalization involved; how matters resolved, etc.)

Premises/Site/Route selection (if company uses premises or selects a site (either land or water) for the activity):

- For onsite programming (buildings, facilities, grounds) – inspection and maintenance
- Premises/site/route selection process (for various activities)
- Opportunity for guide or leader to evaluate conditions/hazards that may affect the location or nature of the activity (and allow for change, cancellation, etc.)

Follow up reports from Organization attending staff. Documenting appropriate areas vis a vis their actual experience with, and observation of the contractor, post program. This can be the basis for “retro-vetting” (building a record of your organization’s repeated internal vetting).

Written Contract

- **Legal Issues:**
- **Preliminary: factors affecting preliminary enforceability:**

Mutual Assent or Agreement – “meeting of the minds” (no coercion, duress or fraud)

Legal Consideration (bargained for exchange)

Legal Competency

Contract ‘purpose’ not prohibited by law

- **Other:** substantive law related to enforceability of other contract provisions (indemnity, defense, release, etc.)

- **Potential issues affecting contract:** U.S. organization hiring foreign (outside U.S.) contractors for in-country programming; arrangements with U.S. public entities
- **Important considerations:**
 - Who is drafting the contract? (you may not be in the driver's seat)
 - Issues with negotiating the contract
 - The contracting parties should be able to read and understand the contract – keep it simple and clear!
 - Healthy and accurate **information exchange**
 - The contract should reflect what is *actually* going to happen on the ground
 - Preserving the independent relationship
 - Outline details, including relative responsibilities and liabilities of each party
 - The contract should be informed by any applicable standards or laws
 - Reviewed by experienced legal counsel and by insurance representative
 - Discussed with/input from attending staff
- **General elements:** (these are not exclusive, and vary with the nature of relationship – whether outside contractor, mutual services, facilities use/rental or other arrangement):
 - Title
 - Parties
 - Introductory paragraph (outlining the general arrangement)
 - Consideration
 - Defining terms
 - Brief description of arrangement
 - Beginning and ending point
 - Description of facilities offered or used
 - Sections addressing each party's respective responsibilities/services provided
e.g., activities, staffing, supervision, equipment use, premises use, orientation, medical screening/healthcare, emergency response, transportation, property damage or loss, compliance with laws or regulations, other, catch all?
 - Payment (including terms of deposit, cancellation, refund, etc.)
 - Facility rules (facilities use arrangement)
 - Independent contractor relationship intended (via sufficient description)
 - Workers' Compensation
 - Liability Insurance and additional insured – one or both?
 - Obligation to indemnify and defend/release of liability – one way or 'cross?'
 - Participant(/parent) agreements?
 - Term
 - Other important provisions (applicable law, venue, amendments, dispute resolution (e.g. mediation, binding arbitration), etc.)
 - Date, Signatures