



HOA Concerns in Contracting with Vendors

Understanding how to Protect the Interests of the HOA and its Members



Introduction

Every Homeowners Association (HOA) will at some point hire a vendor to perform certain tasks on behalf of the HOA, or to furnish services to the HOA and its members. In doing so, a HOA may be exposed to liability brought about by vendor actions and/or the terms of the vendor contracts. Because such liability may substantially impact the financial interests of the HOA and its members, HOA Boards of Directors and community managers must understand how to properly protect the HOA when hiring a vendor. This resource addresses three issues that are key to doing so: (1) the necessity for hiring properly licensed, bonded and insured vendors, (2) the employment status of a vendor as an "independent contractor" or an "employee" of the HOA, and (3) the importance of having proposed vendor contracts reviewed by legal counsel prior to execution.

Licensed, Bonded and Insured Vendors

In California, anyone who contracts to perform work that is valued at \$500 or more for materials and labor must hold a current, valid license from the [Contractors State License Board \(CSLB\)](#) in the specialty for which he or she is contracting. Because unlicensed vendors rarely have bonding or workers' compensation insurance, they can pose a severe financial risk to the HOA in the event of property damage or injury. A HOA that hires an unlicensed or uninsured vendor also subjects itself to potential liability for unpaid wage or worker's compensation claims brought by the

"...they can pose a severe financial risk to the HOA..."

vendor's employees. Accordingly, as fiduciaries, the HOA's Board of Directors must be diligent in ensuring that a potential vendor is properly licensed, bonded and insured. HOAs and community managers should therefore always check the online [CSLB verification page](#) to verify the vendor is licensed for the type of work to be performed, that no action has been taken against the vendor's license, and that the vendor is properly bonded.

"...always check the online CSLB verification page..."



Employment Status: "Independent Contractor" or "Employee"

The "independent contractor" versus the "employee" status of a vendor significantly impacts the HOA's obligations and liabilities in hiring the vendor. In addition to avoiding such issues as paying payroll taxes, workers' compensation insurance and IRS reporting requirements, when a vendor is deemed to be the HOA's "independent contractor," the HOA better shields itself from potential liability for damage caused by the vendor's negligence during the course of the vendor's work. This is because the HOA is deemed to have control over only the result of the vendor's work, not "the means by which such result is accomplished." [Ca. Labor Code § 3353](#). HOAs should thus include provisions in their vendor contracts explicitly designating the vendor as an independent contractor of the HOA. So long as the HOA retains only "a broad general power of supervision and control as to the results of the work to

"...the HOA better shields itself from potential liability..."

insure satisfactory performance of the independent contract ...including the right to inspect, the right to stop the work, the right to make suggestions or recommendations about the details of the work, and the right to prescribe alterations or deviations in the work," the employment status of the vendor as an independent contractor of the HOA will not be jeopardized. [McDonald v. Shell Oil Co. \(1955\)](#). If, however, the HOA does such things as train the vendor, establish the vendor's working hours, or provide the vendor with tools and equipment, the HOA risks a shift in the employment status of the vendor to an employee of the HOA. Additional factors used to evaluate a vendor's employment status can be found in [I.R.S. Publication 1179](#).



Written Vendor Contracts Reviewed by Legal Counsel

A written vendor contract, reviewed by legal counsel, is a necessity in every circumstance regardless of the size and scope of the service/job for which the HOA is contracting. This may seem like a “no-brainer” to some HOAs and community managers—especially to those that have been badly burned by vendors in the past. However, we are constantly surprised on how the smallest jobs can turn into the largest problems where HOAs short-cut the process by not having a written vendor contract, or by executing a vendor contract without first having it reviewed by the HOA's legal counsel. In general, a written vendor contract is paramount to establishing:

- (1) the scope of the work to be performed by the vendor,
- (2) the timeline with which the work must be performed,
- (3) the price to be paid for the work,
- (4) how the contract may be terminated and by whom,
- (5) the methods of payment,
- (6) how breaches of the contract will be addressed,
- (7) any warranties concerning the work to be performed,
- (8) the employment status of the vendor, and
- (9) indemnification of the HOA for any damages brought about by the vendor during the course of work.

Situations where HOAs suffer financial loss by not having vendor contracts reviewed by legal counsel are often the result of exculpatory clauses contained in the vendor contracts (e.g. indemnification and/or “hold harmless” provisions) as well as the enforcement of exclusivity, term renewal, and arbitration provisions. Legal review of vendor contracts also ensures that the HOA's governing documents grant the Board of Directors the authority to enter into the desired contract and to bind the HOA to its terms.

Summary

Despite how simple the process may seem to select and hire a vendor, HOA Boards and community managers should recognize the HOA's potential exposure to liability should a problem arise. Appropriate steps must be taken to ensure that the interests of the HOA and its members are protected. At a minimum, these steps include (1) verification that vendors are properly licensed/bonded/insured, (2) obtaining written vendor contracts, and (3) ensuring that such contracts are reviewed by the HOA's legal counsel prior to execution.

This resource is available for download from our website's library, located at <http://www.tinnellylaw.com/library.html>

The Tinnelly Law Group was established in 1989 to provide quality, cost-efficient legal representation to California Community Associations. The firm's success is evidenced by its continual growth, its reputation for quality service, and its recognition by the Community Association Industry as one of California's most experienced general counsel firms.

TINNELLY LAW GROUP

Your Community. Your Counsel.™

www.tinnellylaw.com



Published
JUL 2012