**Section Operations**

**5.11** **Contract Negotiations and Approval – San Diego Section**

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| **1. Section, Branch** | San Diego Section |  |
| **2. Section/Branch Size** | Large |  |
| **3. Project Contact** |  | |
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| **4. Project Category** | Section Operations | |
| **5. Project Description** | The San Diego Section hosts an annual awards event, which is typically a semi-formal to formal evening affair. The Chair of the event is the Vice President who oversees a committee of selected section members, usually including the past and current President. Part of the Vice President’s duties as Chair is to select a venue and negotiate a contract for the event with the Catering Sales Manager or Events Manager of the venue. | |
| **6. The Process**  (What you did, When and How) | The contract with the site or catering company is initiated once a location is selected. The venue provides a contract with the terms and items to be provided for the event. All items are negotiable, but a deposit is required to reserve the space. After the first offer is given, bargain for a preferred amount. Venue lawyers tend to write onerous terms which are usually in complete favor of the venue. Review of the contract is necessary to allow the section some recourse in the event something does not go according to plan. As a board we discussed the review of contracts and how the section is responsible for all of its sub-groups (Technical Groups, Institutes, Branch, Younger Member Forum, and Student Chapters). Within our section, the Student Chapters and Younger Member Forum hold seminars, events, and golf tournaments. It was decided that any contract totaling over $5,000.00 shall be reviewed by a board member, and a recommendation must be made to approve the contract for signing after a final review by National’s legal department. When the contract is completed, it must be signed by a member of the board.  When working alongside venues, it is important that every aspect be in writing. Any item in question should not be included in the contract. All items such as detailed schedules, ballrooms, conference rooms, bars, meal selections, hors d’oeuvres, table dimensions, chairs, linens, place settings, audio-visual, electrical drops, etc. must be explicitly outlined. While reviewing contracts, look for these red flag words: “sole," "gross," "waive/waiver," "release," "limit/limitation," "indemnify," and "hold harmless".  Important sections in contracts are “Insurance”, “Termination”, “Liability/Indemnification”, and “Force Majeure”. Terms are defined in an attached section. The following is an example of an unfair paragraph (from a SeaWorld Contract Abbr. SEA):  *“G.* ***Force Majeure.*** *Group shall bear the risk of matters beyond the control of the SEA which causes a failure or refusal to perform, including, without limitation, inclement weather (including threatened inclement weather), acts of God, governmental laws, rules, orders, riot or civil disturbance, strikes of any kind, labor disputes or unrest of any kind, boycotts, picketing, or labor shortage or other similar causes (collectively, “Force Majeure Event”). In the event Group cancels the Event because of a Force Majeure Event, SEA and Group may mutually agree to the following remedies:*   1. *If feasible, SEA may provide indoor facilities for the Event;* 2. *Reschedule the Event for the next available date (pending the availability of the Premises) and apply payments made by Group hereunder to the amount due for the rescheduled event; or* 3. *Terminate this Agreement and refund Group the Deposit less SEA’s actual out-of pocket expenses incurred in arranging the Event, including, but not limited to, labor, printing (programs, schedules, and/or menus), and food service.”*   A more balanced paragraph would read:  *G.* ***Force Majeure.*** *Neither Party shall be liable for failure to perform arising from a cause beyond the parties reasonable control that makes performance impossible, illegal, or inevasible, inclement weather (including threatened inclement weather), acts of God, governmental laws, rules, orders, riot or civil disturbance, strikes of any kind, labor disputes or unrest of any kind, boycotts, picketing, or labor shortage excluding those caused by the parties own employees, or other similar causes (collectively, “Force Majeure Event”). In the event Group cancels the Event because of a Force Majeure Event, SEA and Group may mutually agree to the following remedies:*   1. *If feasible, SEA may provide indoor facilities for the Event;* 2. *Reschedule the Event for the a mutually agreeable future date (pending the availability of the Premises) and apply payments made by Group hereunder to the amount due for the rescheduled event; or* 3. Terminate this Agreement and refund Group the Deposit. (portion removed)   The changes are small (denoted in red), but change the tone and meaning of the paragraph. | |
| **7. Those in Charge** (Committee, Task Committee, Etc.) | Vice President and selected committee. | |
| **8. Time Frame**  (When Started, When Completed) | Scouting a venue for the following year’s event begins after the current event has concluded. The contract and items to be provided are negotiated, and contract terms are agreed upon prior to deposit submittal. Deposit is due eight to nine months in advance. | |
| **9. Success Factors**  (The Parts that Worked Really Well) | Collaborative efforts with Tara Hoke, ASCE National Assistant General Counsel. Contact information: [thoke@asce.org](mailto:thoke@asce.org), Phone (800) 548-2723 x6151 or (703) 295-6151 | |
| **10. Setback Factors**  (The Parts that did Not Work Well) |  | |
| **11. Creativity**  (This is something off the wall that we did) |  | |
| **12. Administration**  (What was most Important?) | Resolving any flagged details early and perform a thorough review of the contract. You must read and understand the full meaning behind the paragraph and its stated intent. If the paragraph does not apply, then strike it in its entirety. | |
| **13. Follow-Up**  (What was most important?) |  | |
| **14. Recommendations**  (What you should ALWAYS do with this project?) |  | |
| **15. Cautions**  (What you should NEVER do with this project?) |  | |
| **16. The Outcome** | A fair agreement and a great event | |
| **17. Ongoing Activity**  (Would you do it again?) |  | |
| **18. Speaker Contact Information**  (person from your Region who would be willing to speak about the Best Practice) |  | |
| Name |  | |
| Address |  | |
| Phone Number |  | |
| Email |  | |
| **19. Additional Comments** | This Best Practice includes definitions of contract terms.  **Terms:**  **Acceptance** - the unconditional agreement to an **offer**. This creates the contract. Before acceptance, any offer can be withdrawn, but once accepted the contract is binding on both sides. Any **conditions** have the effect of a counter offer that must be accepted by the other party.  **Agent** - somebody appointed to act on behalf of another person (known as the principal). The amount of authority to deal that the agent has is subject to agreement between the principal and the agent. However, unless told otherwise, third parties can assume the agent has full powers to deal. Be aware that the principal can be held responsible for the actions of an agent, even if the agent takes an action that exceeds his/her actual authority.  **Arbitration** - using an independent third party to settle disputes without going to court. The third party acting as arbitrator must be agreed by both sides. Contracts often include arbitration clauses nominating an arbitrator in advance.  **Bankruptcy** - the formal recognition that a person cannot pay their debts as they are due. Note this only applies to individuals, companies and partnerships that become insolvent are **wound up**.  **Breach of contract** - failure by one party to a contract to uphold their part of the deal. A breach of contract will make the whole contract void and can lead to damages being awarded against the party which is in breach. Often contracts include a provision allowing a party time to “cure” a breach before the contract may be terminated or other actions taken.  **Conditions** - major terms in a contract. Conditions are the basis of any contract and if one of them fails or is broken, the contract is breached.  **Confidentiality agreement** - an agreement made to protect confidential information if it has to be disclosed to another party. This often happens during negotiations for a larger contract, when the parties may need to divulge information about their operations to each other. In this situation, the confidentiality agreement forms a binding contract not to pass on that information whether or not the actual contract is ever signed. Also known as a non-disclosure agreement.  **Consideration** - in a contract each side must give some consideration to the other. Often referred to as the quid pro quo - see the Latin terms below. Usually this is the price paid by one side and the goods/services supplied by the other. But it can be anything of value to the other party, and can be negative - e.g. someone promising not to exercise a right of access over somebody else's land in return for a payment would be a valid contract, even if there was no intention of ever using the right anyway.  **Damages** - money paid as the normal **remedy** in the law as compensation for an individual or company's loss. If another type of remedy is wanted (such as an **injunction** - see general contract terms below) but cannot be or is not given by the court, then damages will be awarded instead. These may include **direct damages**, which are the ordinary losses caused by a breach, or **indirect/special/consequential damages**, which include less obvious damages such as lost profit, loss of goodwill, etc.  **Disclaimer** – in contracts, a statement that a party is rejecting or refusing responsibility for some condition (e.g., disclaimer of responsibility for ensuring that software does not infringe on another’s proprietary interest). May prevent the other party from seeking a claim for breach of contract if the condition is not met.  **Express terms** - the terms actually stated in the contract (cf. **implied terms**).  **Force Majeure** *[*French, A superior or irresistible power.*] An event that is a result of the elements of nature, as opposed to one caused by human behavior.*  The term *force majeure* is frequently used in contracts to protect the parties in the event that some or all of the contract cannot be performed due to causes that are outside the control of the parties, such as natural disasters, that could not be evaded through the exercise of due care.  **Implied terms** - are terms and clauses that are implied in a contract by law or custom and practice without actually being mentioned by any party. Terms implied by custom and practice can always be overridden by **express terms**. For example, in any purchase of goods, there is an “implied warranty of merchantability” (i.e., that the product is reasonably consistent with the standard for similar goods), but this can be disclaimed by a disclaimer of implied warranties or a statement that the goods are being provided “as-is.”  **Incorporate** - inclusion in, or adoption of, some term or condition as part of the contract. Typically used where a vendor will state that another document (e.g., hotel policies) are incorporated by reference in a contract. This differs from its company law definition where it refers to the legal act of creating a corporation.  **Indemnity** - a promise by one party to reimburse another party for a loss sustained by (or damages assessed to) another party. In a mutual indemnification clause, each party agrees to reimburse the other party for any losses caused by the indemnifying party’s negligence or misconduct. Be wary of contracts that attempt to shift more liability to one party, either by requiring a party to assume liability for third parties’ actions (e.g., vendors, exhibitors, attendees) or by requiring that party to cover the other party’s own negligence.  **Injunction** - a remedy sometimes awarded by the court that stops some action being taken. It can be used to stop another party doing something against the terms of the contract. Injunctions are at the court's discretion and a judge may refuse to give one and award **damages** instead - see the finance contract terms below.  **Insolvency** - the situation where a person or business cannot pay its debts as they fall due (see **bankruptcy**, **liquidation,** and **receivership**).  **Joint and several liabilities** – legal principle explaining that, where two or more parties are responsible together for some act/obligation/debt, each of those parties can be held liable individually for the entire amount. This is true in contracts (e.g., where multiple partners agree to share responsibility for a payment, service, etc., a creditor could recover a whole debt from any one of them individually, leaving that person to recover contributions from the rest of the partners) as well as in **tort** litigation (where the negligence of multiple parties causes injury to another person/entity, the injured person can recover all of their damages from any one of those parties, leaving that party to seek restitution from the other parties for their share of the fault).  **Joint venture** - an agreement between two or more independent businesses in a business enterprise, in which they will share the costs, management, profits or benefits arising from the venture. The exact shares and responsibilities will be set out in a Joint Venture Agreement.  **Jurisdiction** – in contracts between two parties located in different countries or states, a jurisdiction clause should include both a choice of law and a choice of venue; i.e., should identify the country or state whose laws will govern the contract and where any legal action must take place. Important because the laws of different states or countries may vary on an important issue (e.g., some states generally enforce negligence waivers, while others routinely reject them), and because litigation costs may be greatly increased for a party forced to litigate in a distant state/country.  **Liability** - a person or business deemed liable is subject to a legal obligation. A person/business who commits a wrong or breaks a contract or trust is said to be liable or responsible for it.  **Limited liability** - can refer to the benefits of incorporation; i.e., that the personal assets of the owner(s) of a corporation or LLC are generally protected from any debt or liability incurred by the corporation/LLC. Can also apply to a “limitation of liability” clause in a contract, where a party seeks to set a cap on the amount of damages that can be awarded for contract or even tort claims. Often found in vendor contracts, and these are generally very unfavorable to the other party.  **Liquidation** - the formal breaking up of a company or partnership by realizing (selling or transferring to pay a debt) the assets of the business. This usually happens when the business is insolvent, but a solvent business can be liquidated if it no longer wishes to continue trading for whatever reason (see **receivership** in the financial terms below).  **Misrepresentation** - where one party to a contract makes a false statement of fact to the other which that other person relies on. Where there has been a misrepresentation then the party who received the false statement can get **damages** for their loss.  **Negligence** – the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. “Gross” negligence = the intentional failure to perform a duty in reckless disregard of consequences potentially affecting the life or property of another. Gross negligence is an extremely high standard, so beware of contracts where a party wants to limit their liability only to “gross” negligence.  **Offer** - an offer to contract must be made with the intention to create, if accepted, a legal relationship. It must be capable of being accepted (not containing any impossible conditions), must also be complete (not requiring more information to define the offer) and not merely advertising.  **Receivership** - the appointment of a licensed insolvency practitioner to take over the running of a company. A creditor with a secured debt appoints the receiver. The job of the receiver is to recover the debt either by taking the security and selling it or by running the business as a going concern until the debt is paid off (see **liquidation**).  **Remedy/Remedies** - payments or actions ordered by the court as settlement of a dispute. The most common is **damages** (a payment of money). Others include specific performance (of an action required in the contract), **injunction** (see the general contract terms above) and rescission - putting things back to how they were before the contract was signed.  **Tort** – a “civil wrong” whereby one person’s negligence or misconduct causes injury or loss to another person. Can be used to describe most civil litigation that does not relate to a breach of contract (though some litigation may include both a contract claims and a tort claim), such as personal injury, malpractice, defamation, fraud. Though some torts relate to criminal acts, note the difference in type of litigation. A person who commits fraud may be prosecuted by state/federal prosecutors (and receive jail time and/or a fine), and may also be sued in a private civil lawsuit by the victims.  **Trademark** - a name, logo, or other mark that is used in the commercial marketplace to identify the source of a service or product. Trademarks are protected under “common law” (i.e., state courts can assess damages to someone who infringes on another company’s trademark), but significantly greater protection is available to a federally registered trademark. In the U.S., such registration must be granted through the U.S. Patent & Trademark Office.  **Warranties** – a promise that a certain fact is true. In a contract setting, it can be important to require a party to make certain “representations and warranties” regarding its status and to clarify that a breach of warranty is a material breach of the agreement, allowing for termination and damages. For example, if a hotel warrants that it is in compliance with fire and safety codes, and it is later found that this is not the case, the other party may want to relocate the event and make a claim for any additional costs arising from the change of venue.  **Without prejudice** – means that an action taken should not be deemed as a waiver or loss of any other right or privilege. For example, a contract may say that, in the event of a breach by one party, the other party may terminate “without prejudice to any other remedies” (i.e., the terminating party still retains the right to sue for damages, injunctions, etc.). In a litigation setting, courts may dismiss a case “with prejudice” (meaning that a decision has been made on the merits and no subject suit may be filed on the same matter) or “without prejudice” (meaning that the case has been dismissed due to some other irregularity, and the parties have leave to correct that issue and refile the case again).  **-**  This Best Practice includes the following attachment:   * Contract Operations Board Procedure | |

