

Negotiating Security Contracts

Developed by:
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Webinar Outline

- **Webinar will address these key elements and issues within security contracts:**

- 1. Business & Financial**

- 2. Operational**

- 3. Liability**

BUSINESS & FINANCIAL ISSUES

- **Key issues relating to the RFP and selection process**
- **Financial Issues (billing, salaries, benefits, etc.)**
- **Elements of Non-Solicitation & Non-Compete Provisions**

RFP

- Be thorough & detailed
- Set Standards & Expectations
- Separate “Wheat from the Chaff” (Those who can perform will submit, those who cannot perform will not waste your time).
- Examples:
 1. Licensing Requirements
 2. Previous Experience
 3. Personnel Standards
 4. Training Standards
 5. Insurance Requirements
 6. Scope & Type of Services
 7. Supervision & Inspection Standards
 8. Security & Crime Reporting Procedures
 9. Salary & Benefit Requirements (including OT, vacation, court, etc.)
 10. Key Contractual Provisions (Indemnification, Non-Solicitation, etc.)
 11. RFP Submittal Requirements
 12. Evaluation Criteria & Scoring

Financials

- Get more than “*Billing Rate*”
- Need hourly rates for officers/supervisors
- Need market index salaries for location/region
- Need hourly rates for other line EE’s (future position?)
- Get line item details for officers:

Provision

Medical/Dental

Vacation/holidays

Training

O.T.

Uniforms

Court time

Other benefits

Detail

Prorated % for ER, EE & Company

Eligibility & amount per year

Amount, type and \$ value

When, what purposes, procedures, & costs

Standards, care, replacement, etc

Define who goes, types of cases, minimum # hours, documentary evidence

Personal days, bereavement, sick days, etc

Non-Solicitation

- Both **during and subsequent** to the employment relationship, the Employee (or Security Company) warrants and agrees that any and all **confidential information** regarding the Company and its clients shall not be used, disclosed or disseminated in any manner.
- Employee (or Security Company) acknowledges that this provision specifically includes any information regarding **current or former clients** of the Company plus **any potential client** being solicited by the Company.
- In particular, the Employee (or Security Company) shall not share, disseminate, disclose **or cause to be** shared, disseminated or disclosed any information concerning Company personnel, pricing, products, policies, strategies or its clients to anyone or any other business, entity or association without the **expressed prior written consent** of the Company.
- Said Employee (or Security Company) further **warrants and affirms** that he/she shall not use, disclose or disseminate any of the above mentioned information for his/her own purposes or interests, including, but not limited to: any business or financial enterprise, project, contract, or employment with any person, firm, entity or association in **direct or indirect competition** with the Company.

Non-Compete

For good consideration and as an inducement for (Company) to employ (Employee), the Employee hereby agrees **not to directly or indirectly compete** with the business of the Company and its successors and assigns during the period of employment and for a **period of** _____ years following termination of employment and notwithstanding the cause or reason for termination.

The term "not compete" as used herein shall mean that the Employee shall not own, manage, operate, consult or be employed in a business substantially similar to, or competitive with, the current business of the Company or such other business activity in which the Company may substantially engage during the term of employment.

The Employee acknowledges that the Company shall or may in reliance of this agreement provide Employee access to trade secrets, customers and other confidential data and good will. Employee agrees to retain said **information as confidential** and not to use said information on his or her own behalf or disclose same to any third party.

This non-compete agreement shall extend only for a **radius of** _____ miles from the present location of the Company and shall be in full force and effect for _____ years, commencing with the date of employment termination.

This agreement shall be binding upon and inure to the benefit of the parties, their successors, assigns, and personal representatives.

Non-Compete Principles

- **Reasonableness Rule:** Non-compete clauses must be *reasonable*. Balance an employer's interest in its information and resources with the right of an employee to work someplace else. Non-compete clauses must be narrowly tailored to protect the employer's business interests. If the clause unduly restricts the employee from other opportunities, it'll usually be struck down.
- **Independent value:** Some states require the employee to receive *consideration* in order to validate the non-compete. Employee must receive something from the employer for agreeing to the clause (common example is an employee agreeing to the clause in exchange for employment).
- **Duration:** Courts typically require non-compete provisions to be *limited in time*. Usually a time period of one to two years will be considered valid. Anything over that may be struck down by the court. Courts tend to be more lenient if the provision is between businesses. Equal parties can typically negotiate any desired time frame.
- **Distance:** Courts will also assess the *geographic limits* of the contract. Non-compete clauses shouldn't restrict employees from working in other geographic areas that won't affect the former employer.
- **Blue Pencil Rule:** Courts have the authority to *modify* a non-competitive contract if it's too limiting. It can then enforce the modified contract. However, some states prohibit this rule. Courts in these states must hold that a non-competitive contract is either valid or invalid.

OPERATIONAL ISSUES

- Education/Training requirements for security officers
- Level of performance in the provision of security and security-related services
- Keeping current with changes in threats; deploying officers who can handle the complexity of threats faced
- Observe & Report vs. Order Maintenance:
During emergencies or to protect themselves or others from imminent injury or death.

Performance Standards

- Know your performance markers (same as security firm?):
 1. On-Time
 2. Post Coverage
 3. Uniforms
 4. Training
 5. Turn-over
 6. Other Specific “Hot buttons” (crime, misconduct, attitude, etc.)
- Tie Performance Standards to \$ (“Skin in the game”)
- Reward/Penalty: If firm won’t codify, then red flags!
 - 100% Attendance- bonus/benefit
 - 3rd absence- deduct \$
- Codify contract performance standards + \$

Post Orders

- What do security personnel do?
- Functional Team Approach (who touches security?)
 - Maintenance, operations, logistics, property management, etc.
- Design Job & Post Orders (specific tasks, amendment protocol, notification & acceptance)
- Adherence to Post Orders (How?)
 1. Proper Supervision
 2. Inspection/Audit
 3. Talk to Guards/Officers
 4. Observations by Client (YOU)
- Problem Language: “Protect” “prevent crime” “ensure safety of customers/employees/visitors”
- When post orders change (and they will), make sure you know about it!

LEGAL ISSUES

Duty to Protect:

- No duty of care to protect another from the harmful or criminal acts of third persons.
- EXCEPT when that party voluntarily or contractually assumes a duty to protect another from the harmful acts of a third party.
- “Under the voluntary undertaking doctrine of liability, the duty of care to be imposed upon a security provider is limited to the extent of the undertaking.”
- You’ll be held to what’s contained in your contract (RFP, Contract & Post Order Language)

Aidroos v. Vance Uniformed Protection Services, Inc.

386 Ill.App.3d 167, 897 N.E.2d 402 (2008)

- A duty was found if the agreement showed that the security guards were intended to protect the tenants
- But no duty was found if the agreement showed that the guards were intended to protect only property.

Key Principles

- If your security personnel are not trained or equipped to ***protect*** tenants or patrons from violent crime...THEN DO NOT SAY THEY ARE!
- Huge difference between “protection” and the overall goal of a safe environment.

Suggested contract language:

- The presence of the security officers is designed to deter and reduce certain types of conduct and risks.
- However, Security Firm X is not a law enforcement agency. The principal function of its security officers is to maintain a presence, to observe and to report criminal acts (order maintenance, act during emergencies/imminent harm?)
- Security Firm X does not insure or guarantee the personal safety of any person or the security of any property.

Indemnification

(Broad Coverage)

- The SECURITY COMPANY agrees to protect, defend, indemnify, save, and hold the XYZ Company its officers, officials, employees and agents **free and harmless from and against any and all** liabilities, losses, penalties, damages, settlements, environmental liability, costs, charges, professional fees (including attorney's fees) or other expenses or liabilities of every kind, nature and character **arising out of or relating to** any and all claims, liens, demands, obligations, actions, suits, judgments or settlements, proceedings or causes of action of every kind, nature and character (collectively, "Claims") **in connection with or arising directly or indirectly out of the Contract and/or the acts and omissions** of the SECURITY COMPANY, its officers, officials, agents, employees, and subcontractors, including but not limited to, the enforcement of this indemnification provision.
- Without limiting the foregoing, **any and all such Claims**, relating to personal injury, death, damaged property, defects in material or workmanship, actual or alleged infringement of any patent, trademark, copyright or of any other tangible or intangible personal or property right, or any actual or alleged violation of any applicable statute, ordinance, order, rule or regulation, or decree of any court, **shall be included** in the indemnity hereunder. The SECURITY COMPANY further agrees to investigate, handle, respond to, **provide defense for and defend all suits** for any and all Claims, at its sole expense and agrees to bear all other costs and expenses related thereto, even if the Claims are considered groundless, false or fraudulent.
- The XYZ **Company shall have the right**, at its option and at the SECURITY COMPANY's expense, **to participate in the defense of any suit**, without relieving the SECURITY COMPANY of any of its obligations under this indemnity provision. The SECURITY COMPANY **expressly understands and agrees** that the requirements set forth in this indemnity to protect, defend, indemnify, save and hold XYZ Company free and harmless are separate from the SECURITY COMPANY's responsibility to obtain, procure and maintain insurance pursuant to the Contract. Further, the indemnities contained herein shall survive the termination of the Contract.

Indemnification (Limited Coverage)

Security Company shall not be responsible for any theft, damage, destruction, loss of property, personal injury or death except due to Security Company's negligence or willful misconduct, and Security Company would not have any liability arising from the criminal acts of any third parties.”

Liquidated Damages Clause/ Limitation of Liability Clause

The parties agree that the Security Company is the ***not the insurer*** of the Client's risks and liability exposures. The parties further agree that the Security Company ***cannot be expected to prevent the occurrence of crimes*** on the facility, as the conduct of third parties is often unpredictable and unpreventable.

In this regard, the costs of the services provided to the Client are unrelated to the value of or the risks to the Client's property, personnel or visitors, nor are the costs of services related to the protection of the persons or property of third parties located on Client's premises. The ***number*** of Security Company personnel, hours of services, and the nature of the services provided hereunder have been determined and directed by the Client, who shall be solely responsible for the adequacy or inadequacy thereof.

Key Provisions/Principles

- The further acknowledge that it is impractical and extremely difficult to fix the actual damages, if any, which may proximately result from a failure to perform any of the obligations contained herein, because of, among other things:
 - (A). The uncertain amount or value of the Client's property, or the property of others, kept on the premises which may be lost, stolen, destroyed, damaged, or otherwise affected by occurrences which these services are designed to detect or avert;
 - (B) The uncertainty of the response time of any police, medical or fire personnel, or any other responding third party;
 - (C.) The inability to ascertain what portion, if any, of any loss or damage which would have been proximately caused by the Security Company's failure to perform any of the services articulated herein;
 - (D.) The nature of the services performed by the Security Company, and by the decision making of individuals who commit crimes, terrorism, and other forms of misconduct.

Insurance Provision

- Client understands and agrees that if Security Company should be found liable for personal injury or property loss or damage due to or from the Security Company's performance or non-performance of services derived from this agreement, whether based on contract, tort, law, equity or otherwise, and whether or not such damages are caused in whole or in part by Security Company personnel, the parties hereby agree that liability to the Security Company shall be limited to the amount of the insurance coverage as hereinafter presented.
- This provision is intended by the parties to represent the appropriate amount of liquidated damages, and as such, shall not be construed as a penalty.

QUESTIONS



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