Legal Aspects of Philanthropic Giving – Points to Consider

First and foremost, this document is not intended to bypass the need for legal counsel. Instead, it was written to raise awareness of the myriad legal issues associated with philanthropic giving. Under all circumstances, before making any decision regarding your giving plans, we recommend that you consult with a lawyer who specializes in philanthropic law.

Philanthropy entails many legal issues that must be taken into account. It is recommended that funders have a comprehensive contractual agreement with a grantee (as compared to a letter of intent, for example), particularly when significant sums are involved. If your giving is via the nonprofit (Amuta) platform, you should know that nonprofits in Israel must verify that their funds are being used in accordance with their goals. Thus, it is essential to protect yourself with a contractual agreement that outlines the goals and conditions for awarding any grant/contribution, formalizes the relationship in a clear and orderly manner for both sides, and defines all expectations, boundaries and important issues you wish to emphasize.

Just as every donor is distinct from another, every type of philanthropic giving has different characteristics, so that no single contract format can cover all their needs. Indeed, every philanthropic relationship has unique considerations that need to be addressed, formalized and documented in an orderly fashion.

The contractual agreement between funder and grantee outlines all the issues and conditions related to their relationship, and specifies the allocation of responsibilities between them. As such, we recommend that such contracts include and/or address the following:

1. A detailed verbal description of the project to be carried out using the granted funds, including dates and measurable milestones for progress.
2. A detailed budget reflecting the cost of the project, additional funding sources aside from the funder, the budget line items, and projected expenses during the contract/funding period.

Regarding the budget – if there are additional funding sources for the project that are not yet committed, it is a good idea to clarify what will transpire if the promised funds are not delivered.

- For example – if not enough funds are raised to complete the entire project, will the granted funds be reimbursed to the funder or will the project be modified to the new budget?
- Does the funder need to agree upon how the project is modified?
- Should the funds be reimbursed by default in the event that no agreement can be reached? (It’s important to understand that, if the funds are returned, according to paragraph 46 aleph, this refund may have tax implications.)
• Does the funder agree to a certain level of fluidity between the line items in the approved budget?

3. If a grant is given with matching funds, this must be explicitly noted, with an appropriately defined payment schedule.

4. If there are a number of funders for a single project, it is important to consider whether to use one identical contract, and what kind of collaboration will apply to the funders in this regard.

5. The schedule of grant payments over the year and the conditions for payment (i.e. submission of a written report, reaching a milestone, transfer of funds from a third party or any other point). Different donors allocate their funds in different ways – some immediately disburse the entire amount, while others allocate it in several payments linked to specific goals/milestones from the work plan.

6. A commitment to use the granted funds only for the purposes of the program and the budget appended to the contract.

7. Reporting – including a requirement for narrative and fiscal reporting on the project’s progress is recommended, although there is no substitute for a firsthand look. If a field visit is possible, you can see for yourselves what is being done with your funding dollars. If you do require reporting throughout the progress of the project, the details should be specified in the contract. For grants covering construction projects, a CPA should be engaged to serve as a controller.

8. If the grant period extends over several years, will it be necessary to extend the contract, review progress reports and/or achieve other milestones in order to approve the transition from one grant year to the next?

9. Evaluation and review – how will you define success (measurable goals of the project) and how will you evaluate and review the work? Will you want to include external evaluation and review as part of the budget? It is a good idea to indicate in the contract your right to receive and review relevant documentation from the grantee.

10. Intellectual property such as copyrights, registered trademarks, etc. – in the event that the grant supports research activities or publications, the rights to the use of the outcomes of these activities, including publication rights, should be clarified. On the other hand, the funder should be protected from claims by third parties who illegitimately use their intellectual property (creations).

11. Damages, indemnification insurance. This becomes particularly significant the more the funder or their representative is involved in the project, the more significant the funding is as part of the overall project budget, or when the project involves construction, funding for medical, sports, playground and/or other types of equipment, etc.

12. Use of the funder’s name – Does the funder want their name to be publicized or do they prefer to remain anonymous? If they agree to the use of their name, how will it be presented, in what context, and how frequently? Does every public use need to be approved? If the name is being memorialized and will appear on a structure, how many years will the name remain in place, who will finance the memorialization, who will decide
on the signage and issues related to public relations/advertising? Will you want to establish requirements or limitations in this regard? What will happen if the project/building will need a new strategic funder further along – does the funder have the right of first refusal? Does the grantee have the right to apply a new funder’s name on the building? Furthermore, when funding existing projects, the issue of previous donors who are honored in the context of the project should be addressed.

13. The funder should be protected by legal contract against the possibility of creating any type of employer-employee relations, particularly but not only if a portion of the funding is intended to cover salaries. Furthermore, the funder should confirm that they are protected by the grantee in the event of legal action by an employee against the grantor. In construction projects it is important to confirm that only workers who are legally employed are working on the project.

14. Funder Acknowledgement – funders should articulate their expectations related to acknowledgment, including whether or not they agree to use their name, invitations to events, if and how their logo is used on letters and publications, how they are mentioned in the grantee’s website, media publications, meetings with the target population, etc.

15. If the support is giving mid-project – it is important to clearly specify if the funding covers certain activities retroactively or not.

16. Fundraising costs – Can this cost be covered by the grant? This may constitute a very high percentage of the total grant amount.

17. Can grantees include general and management expenses in their budgets, if at all?

18. Activities such as funding for elections in Israel or money laundering should be carefully avoided, and legal counsel is advised if there is any room for concern.

19. The funder should comply with the rules of proper management and transparency, (this requirement does not preclude the need for stringent due diligence for the entire organization).

20. Will the grant need to be tax deductible? If yes, the contract should address the necessary conditions to fulfill this requirement.

21. In recent years new and different giving instruments have emerged, among them impact investing and social impact bonds. These instruments (whether loans, share acquisition, guarantees, etc.) have specific characteristics and require appropriate contracts.

22. In cases where funding is given for building – all the rules and procedures for construction should be addressed, including for what will happen the day after construction is finished (long-term maintenance, equipment, building insurance, etc.) The greater the funder’s relative portion of the budget, the more important it is to consider hiring a building inspector to represent them and monitor the project’s progress from close up.

Funding for Building

Funding to construct a building entails additional, special considerations. Here, too, it is very important to receive counsel from the appropriate experts. Some points to consider include:
Approval of building plans, specifications, and any changes to them.

Confirmation that the construction complies with regulations, permits, etc. – the chances of receiving building approvals should be checked initially.

Oversight on the construction - The greater the funder’s relative portion of the budget, the more important it is to consider hiring a building inspector to represent them and monitor the project’s progress from close up.

The day after construction is finished – confirm there is a budget for long-term maintenance to ensure that the building is appropriately maintained. Often impressive buildings are erected, but without adequate budgets for maintenance, over time they become a source of deep distress for both sides. Issues of equipment, insurance and the responsibility of those who use the building should also be considered.

If a name is memorialized in the building, how will that name appear, and for how many years? Under what conditions can the name of the building be changed? What impact will any future expansion of the building have on the name? Will the funder have right of first refusal for any future naming? What will happen in the event of a fire/earthquake or evacuation of the building – will the memorialized name be transferred to the replacement building or is the funder obligated to rebuild the building?

Compliance with strict building standards, accessibility for individuals with special needs, safety, and the option to add special building standards, such as green construction, ISO building standards, elevators, special equipment, etc.

Keep in mind that these points are presented for your protection, and to help you keep in mind the many factors that impact and are impacted by your giving. The intention is not to encourage excessive bureaucracy or procedures, but to make your giving simple, focused and professional.

Good luck!