



KNUTSON, FLYNN & DEANS
1155 Centre Pointe Drive, Suite 10
Mendota Heights, MN 55120
(651) 222-2811

Is it O.K. to Sign?

The School Administrator's Guide to Reviewing Service Contracts Between School Districts and Third-Party Service Providers

by

Peter A. Martin

pmartin@kfdmn.com

With increasing frequency, school districts are hiring outside third parties (either individuals or companies) to consult on a particular project or matter, perform a particular task, or provide expert advice for a limited period of time. As a result, school administrators are being called upon to review, negotiate and manage a wide array of service contracts.

Contract documents establish enforceable obligations, provide valuable rights, create financial and legal exposure, and are often important tools in making a school district run smoothly. However, on many occasions, the initial version of the contract provided by a vendor contains numerous terms that are more advantageous to the vendor and not the school district. Some contract provisions place undue burdens on the school district, are illegal under Minnesota law, or are so poorly written that the parties' obligations are unclear. Are the terms of the contract documents fair and reasonable? How do you know when a contract is o.k. to sign?

It is important for school administrators to recognize the pitfalls that may be present in a vendor's proposed agreement. This outline will serve as a ready reference to help school district personnel identify potential problem areas in service contracts.

I. GENERAL CONTRACT PRINCIPLES

What is a Contract?

In its most basic form, a "contract" is a promise, or set of promises, to which the law attaches a legal obligation. Both in popular and legal usage, a promise is an assurance, in whatever form of expression given, that a thing will or will not be done. *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 117 N.W.2d 213 (1962). It is often defined as "an agreement between two or more parties for the doing or the not doing of some particular thing." *Sharpe v. Rogers*, 10 Minn. 207 (Gil. 168) (1865).

Why Have a Written Contract?

Generally speaking, a contract may be in either oral or written form. In contracting with school districts and other government bodies, however, state law may require a written contract in certain situations (such as contracts that are subject to bidding rules). But not every school district contract is subject to such requirements. *See Krohnberg v. Pass*, 187 Minn. 73, 244 N.W. 329 (1932) (services of professionals and independent contractors are not subject to bid or quotation requirements).

Apart from statutes which require a written contract, there are several key reasons that having a written agreement is preferable to an oral contract.

(1). To Prevent Disputes. Having a good, clean written contract can prevent disputes between the parties. It defines their expectations about all elements of the transaction. It assigns consequences for departures from expectations or failure to abide by its terms. The process of negotiation, drafting, and review that leads to a document satisfactory to both parties should ferret out areas of potential difficulty in the relationship and give both parties confidence that they know what they are getting into when the contract is ultimately signed.

(2). To Create a Cost Management Tool. A good contract aids in managing expected costs. It also provides a control on costs resulting from contingencies, and it allocates risks of the unexpected between the parties.

(3). To Comply with Legal Requirements and for Use in Litigation. Some contracts must be in writing to be enforceable in the courts. These include contracts for the sale of goods with a value of \$500 or more, contracts that, by their terms, will not be completely performed within a year, leases for more than one year, real estate contracts, special promises to answer for the debt, default, or doings of another and promises or undertakings to pay a debt which has been discharged by bankruptcy or insolvency proceedings. This law is known as the "Statute of Frauds." *See* Minn. Stat. §§ 513.01; 336.2-201.

Even if the law does not explicitly require one, a written contract will be the best way to show what the agreement of the parties was if one party is attempting to enforce the contract. A written contract helps exclude other extraneous evidence, such as what representations were made during negotiations.

II. COMMENTS ON CUSTOMARY CONTRACT PROVISIONS

Description of the Parties

School district contracts should be in the name of the correct legal entity. For school districts, the name is typically prefaced by "Independent School District No" or "Special School District No...." Generic references to the school district (such as "ABC Area Schools") or references to a specific school in the school district (i.e. "Lincoln High School") should not be used.

Recitals or "Whereas" Clauses

These statements customarily appear on the first page of the contract. It is recommended that contracts include "Whereas" clauses because they set the stage for the transaction and are useful for establishing the general intent of the parties in entering into the contractual obligations. They may aid in the interpretation of the contract in litigation or for other reasons.

Date, Term

A contract usually states its effective date, which may be as of the date of last signature on the contract, or "as of" a prior date if retroactive effect is mutually desired and appropriate. The term of the contract should be specified, including options for extension, if any. It is recommended that the term (especially the initial term) of the contract not be lengthy. Automatic contract extensions should be avoided.

A failure to state the duration of a contract may be construed to create a term of "reasonable" duration or an indefinite term. If the contract is to be terminable at will by either party, it should so state, including applicable notice provisions.

Performance of Contractual Obligations

The obligations of the parties with respect to performance should be set forth in explicit detail. If the contract is for a specific set of services, the services to be provided must be well-defined.

Time for performance should be specified. If time is "of the essence" -meaning that it is critical to acceptable performance-the contract should so specify. Timing of performance may be linked to penalties or right of termination.

In the context of contracts involving services to students, the contract should make clear that services shall be provided on those days designated as school days in accordance with the school district's calendar (except that services shall not be provided on school days or portions of school days where the school district has closed school due to inclement weather or other circumstances).

Payment: How Much, When, to Whom, and In What Manner?

Payment terms should be clear. Confirm that promises to pay within a certain number of days are realistic. Typically, school districts require at least 30 days from the date the invoice is received to issue payment.

Termination

Rights may be granted to early termination with or without cause, usually upon written notice to the other party. *Both* parties should have equal rights to terminate the contract. One-sided rights to terminate should be viewed with caution.

Employee or Independent Contractor?

The contract should clarify that the vendor is not an employee or agent of the school district, that the vendor's authority is specifically limited to the duties assigned in the contract, that the vendor has no authority to bind or obligate the school district and that the vendor shall be responsible for payment of all taxes and fees arising out of the vendor's activities under the agreement.

Access to Education Records or Other Private Data

If the consultant or service provider will have access to education records, personnel data or other information considered confidential, the contract should specify that the vendor must agree to comply with applicable data privacy provisions in both state and federal law.

Insurance

The agreement should require that the vendor have or acquire adequate general liability, workmen's compensation, and/or professional insurance coverage. The vendor should also be required to include the school district as an additional insured on its policies and have the vendor furnish a certificate of insurance prior to or upon execution of the contract. Be sure that the contract requires that the insurance policies be in effect during the contract term and the school district be notified promptly of any impending cancellation of the insurance coverage.

Indemnification/Hold Harmless Provisions

Indemnification and "hold harmless" clauses should be reviewed by legal counsel. In general, indemnification/hold harmless clauses obligating the school district should be negotiated out wherever possible.

Disclaimers of Warranties

Warranties, both express and implied, regarding the skill, competency, experience, background and education of a vendor may be disclaimed. Typically, the disclaimer conspicuously appears somewhere in the contract. Service contracts that contain such disclaimers should be reviewed by legal counsel.

Arbitration and Other Alternative Dispute Resolution

Arbitration offers a substitute procedure for dispute resolution rather than going to court. Consider carefully the pros and cons of arbitration. The primary advantages are likely to be cost and time savings (although arbitration is not necessarily inexpensive). Disadvantages include the nature of arbitration, as it is not bound by legal precedents and is insulated from judicial review. An arbitration clause may be broad, subjecting any dispute relating to the contract to arbitration, or narrow-subjecting only certain types of claims to arbitration. In general, arbitration clauses are not preferred in third-party service contracts.

"Merger" or "Integration" Clause

This clause states that the written contract document supersedes all prior representations and agreements, the latter being "merged" into the final contract. Make certain that all agreements and representations that are to stay in effect are restated in the body of the final contract (*including any exhibits or attachments to the main contract document*).

Amendments

Require that all amendments be in writing and signed by both parties.

Notices

Make sure the school administrator designated to receive notices is the appropriate person; that correct and complete contact information is clearly provided in the contract; and that the manner of providing notice are clearly set forth.

Governing Law and Forum Selection Clauses

Parties may select the state law that will apply to any interpretation or performance issues concerning the contract. It is recommended that Minnesota law be applicable to the contract. Forum selection clauses in which the school district agrees to submit to the court of a particular state should be avoided.

Signatures - Who Should Sign the Contract?

Authority to contract is vested in the school board. A school board is empowered to employ and discharge necessary employees and may "contract for other services." Minn. Stat. § 123B.02, subd. 14.

A school board may also authorize its superintendent or business manager to lease, purchase, and contract for goods and services within the budget as approved by the board. Minn. Stat. § 123B.52, subd. 2.

III. TIPS FOR REVISING AND FINALIZING CONTRACTS

When In Doubt, Contact Legal Counsel!!

Whether the contract is one page or ten pages, if you are unsure what a contract says or what affect a particular provision may have, contact legal counsel. Asking for advice after a contract is signed is too late! It is preferable that the school attorney get involved early in the negotiation and drafting process.

Makes Changes in Redline and Strikeout Form and Save All Versions of the Contract .

It is easier for decisions to be made about alterations to contract language if all parties can see what the changes look like before they are agreed to. Both Word and WordPerfect have "track changes" functions that allow new inserted language to be in "redline" form and deleted language to be in "strikeout" form. It is also recommended that the entire drafting history of the contract be retained, in case there is a dispute later about the intent of the parties or the meaning of a particular contract provision that was revised during negotiations.

Be cautious of any vendor who revises the contract and refuses to reflect changes in a readily observable fashion.

Work Out Any Differences Before the Vendor Starts Work on the Contract

Anticipate your need for the vendor's services and finalize the contract before such services are needed. School districts should not start performance of a contract in advance of its final approval and execution.

It is O.K. to Say "No"

Some people have a hard time saying "no" to a vendor with whom they just spent the last three weeks negotiating a contract. But there is no requirement that the school district enter into the contract. If the contract is not to your liking, *do not sign it!*