Agenda

• The Contract’s Purpose
• What is a Contract?
• Negotiating and Drafting
• When is a Contract Formed?
• Standard Clauses
• Types of Contracts
• Contract Management

CONTRACTS: WHAT IS THE PURPOSE?

To establish the agreement that the parties have made and to fix their rights and duties in accordance with that agreement.
WHAT IS A CONTRACT?

Contracts

“A contract is an agreement to do or not to do a certain thing.”

Civil Code section 1549

What is a Contract?

Offer/counter offer
Acceptance/rejection
Consideration
Anatomy of a Contract

Preamble
Recitals
Terms
Signatures
Exhibits

Names of Contracts

• Letter of Intent?
• Memorandum of Understanding?
• Purchase Order?
• Voucher?
• Term Sheet?

CONTRACT DRAFTING: Think Back to the Future

ROADS?
WHERE WE'RE GOING, WE DON'T NEED ROADS.
"When I use a word", Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."

From the California Supreme Court: The English language is imprecise - "a rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained"

In a dispute, the court’s job will be to determine the mutual, objective intent of the parties when they entered into the contract.
Negotiating and Drafting Contracts

Know your Counterparty

- Licenses required/status
- Financial status
- References
- Google/Social media
- Professional networks

“This Memorandum of Agreement is effective August 1, 2005 by and between the Kremen School of Education and Human Development California State University Fresno ("University") and participating school districts of the Central Valley of California: . . .”
IBM may change the terms of this Agreement by giving you three months written notice by regular mail or by sending notification to the email address of the Enterprise Key Contact that you provide on the Master Record. These changes are not retroactive.
Negotiation and Drafting

- Understanding the contract
  - Read the fine print
- Scope of agreement
- Clarity of issues
- Clarity of definitions
- Is this the agreement as you understood it?

4 Point Font

"Any Party’s delay in, or failure of performance under this Agreement will be excused where such delay or failure is caused by an act of nature, fire, acts of war, terrorism, or other catastrophe, work stoppage, direction or effect of an order from a court or a government agency or body, or any other cause beyond a Party’s reasonable control (each such event a "Force Majeure Event"). A Force Majeure Event will not affect the obligation to pay money hereunder."

Delegation of Authority

Ed Code 17604 - Board may delegate by majority vote to District Superintendent (or to “any persons that he or she may designate”). However, no contract made pursuant to this delegation is valid unless “the same shall have been approved or ratified” by the Board by a motion duly passed and adopted.
## Delegation of Authority

- Education Code section 17605 delegation for supplies, equipment and services – governing board may delegate authority to purchase supplies, material and services not in excess of amounts under section 20111 of the Public Contract Code. ($15,000 for public works projects; the dollar amount is updated annually for equipment, materials, supplies and services per section 20111(d)).
  - $88,300 effective January 1, 2017

## WHEN IS A CONTACT FORMED?

### Void Contracts

- No Board Approval
- Super Majority Approval
- Conflict of Interest
  - Gov Code 1090
  - Political Reform Act (FPPC)
  - Common Law
### Void Contracts

- **Ultra Vires**
  - Contrary to law
  - Improper bid award

### Public Policy/Constitutional Issues

- Contract cannot bind future Board’s legislative decision-making
- Contract cannot bind future budgets (exceptions)
- Duration for work, services or equipment not to exceed 5 years; for materials or supplies not to exceed 3 years (Ed Code 17596)
Remedies for Default/Breach

• Time to cure
• Termination for non-performance
• Specific performance
• Proof of breach

Non-delegation of rights, duties, and obligations
Attorneys fee clauses – to use or not to use
Governing Law/Venue
Alternative Dispute Resolution (ADR)
Interpretation
Standard Contract Clauses

• Indemnity/Hold harmless/Defense
• Integration clause
• Binding effect – successors and assignees
• Written modification

Standard Contract Clauses

• Execution by Facsimile or Counterpart
• Severability
• Authority to Sign
• Board Approval/Ratification

Types of Contracts

• Procurement Agreements
• Real Property Agreements
• Construction Contracts
• Professional Services Agreements
• Settlement Agreements
• Employment Contracts
For All Agreements

- Consider the purpose.
- What have the parties agreed?
- Are essential terms included clearly?

For All Agreements

- Hope for the best, plan for the worst

Construction Contracts

- Heavily regulated and litigated area of the law
- Utilize owner-friendly agreements
- Coordination between attorneys and architects in developing contracts
- Tailor contract to construction delivery method
Construction Contracts
- Consider current changes in the law (i.e. prequalification of contractors or new DSA requirements)
- Changes to the project
- Time of completion
- Dispute resolution and claims process

Professional Services Agreements
- Consider applicable selection process
- Utilize owner-friendly forms
- Again, hope for the best, plan for the worst

Procurement Agreements
- Purchase Orders
- Contracts
- Verbal Agreements?
Real Property Agreements

• Property Acquisition Agreements
• Property Sale Agreements
• Leases
• Licenses
• Easements

Real Property Agreements

• Process Considerations
• Third Party Approvals
• Financing
• Representations & Warranties

Contract Management
Monitor the Contract!

- Follow through on terms
- Calendar deadlines

Avoiding Litigation

- “Pay me now or pay me later.”
- Simplify when possible
  - Plain English is allowed!
- Eliminate/limit ambiguity
- Review contract – trust but verify
- Vendor’s contract will favor vendor

Don’t assume attorney got it right

The business decision is yours.