But... It’s Our Standard Contract” – Sign This, Not That

Presented By:
Christopher M. Fallon
Overview

• Contract Basics
• Bidding and Awarding of Contracts
• Important Provisions
• Practical Tips
When Do Districts Need Contracts?

- When district will pay money or take on an obligation
  - Payments without valid contract could be impermissible gift of public funds (California Constitution, Article XVI, §6)
- Board must approve/ratify contracts
- No oral contracts
Contract Basics

• What is a contract?
  • Written or spoken agreement
    o Does not need to be called a “contract” or an “agreement”
    o Intended to be enforceable
    o Remember – no “oral” public contracts

• Formation
  • Offer
  • Acceptance
  • Consideration

• Preparing the contract
Contracts are “Strictly for Suckers”
The Power to Contract

• Comply with applicable authority
  ▪ Statute, Case Law

• The Education Code gives the governing board very broad authority to enter into contracts

• The governing board may delegate the authority to others
  ▪ Education Code § 17605
Bidding and Awarding of Contracts

• Contracts for:
  ▪ Equipment, materials, or supplies
  ▪ Services, except construction services
  ▪ Repairs, incl. maintenance

• Amount – Over $50,000

• Competitive bidding required
  ▪ Bid limit – $99,100 in 2022

• Unless an exception

Public Contract Code § 20111
• Some Exceptions to Bidding
  ▪ Informal bids below bid limit
  ▪ Special services
  ▪ Professional services
  ▪ Energy services contracts
  ▪ Piggyback
  ▪ Emergency repairs
  ▪ Textbooks and educational materials
  ▪ Futility
Basic Provisions of Written Contracts

- Preamble / recitals
- Names of the parties
- Performance obligations of the parties
- The payment terms
- The duration of the contract
- Process for termination of the contract
- Indemnification
- Insurance
- Dispute resolution provisions
- COVID-19 and miscellaneous provisions
Clear Identification of the Parties

• Identify each party correctly
  ▪ Use a preamble or introductory paragraph
    o “This Agreement for Catering Services (“Agreement”) is entered into between the XYZ School District and the Best Catering Company in America, a California corporation”
  ▪ Use CA Secretary of State website as a reference
Performance Obligations

• Contract should clearly set forth the parties’ responsibilities

• Date, time, and place of performance
  ▪ Be specific!
    ○ BAD: “x will deliver widgets to y”
    ○ BETTER: “X will deliver [#] widgets to Y at y’s place of business at [xxx] by [date]”
Payment Provisions

• Amount of total payment
• When payments due
  ▪ Total lump sum?
  ▪ Periodic payments?
• Late or missed payments?
• “Additional” services
Duration of the Contract

• Spell out the term
  ▪ Ex: July 1, 2021, to June 30, 2022

• Problems with automatic renewals
  ▪ Shifting notice responsibility to other party

• Contract term limits
  ▪ Services/equipment contract
    o Term cannot exceed five years (Ed. Code § 17596)
  ▪ Materials/supplies contract
    o Term cannot exceed three years (Ed. Code § 17596)
Termination Provisions

• Termination for convenience (preferred)
  ▪ How much notice is required?

• Termination for cause (middle ground)
  ▪ What is cause?
  ▪ Any notice required?

• Termination for breach or default (least preferred)
  ▪ What is breach or default?
  ▪ Ability to cure?
What is indemnity?

“A contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.”

Civ. Code § 2772
Indemnity

• One of the most important provisions in every contract
• A party agrees to assume the liability of the other
• Do not rely on “boilerplate” language
• Critically evaluate the risks at issue and tailor to type of contract (purchasing, services, etc.)
• COVID-19 considerations
• Vendors will often ask that districts indemnify them
  ▪ For what? Indemnity is NOT Appropriate:
    ○ When district’s only obligation is “to pay”
    ○ Merely for the sake of mutuality
    ○ Take away: No need to agree to mutual indemnification!

• The indemnity provision must survive the expiration of the contract
Indemnity Scenario

District hires vendor to provide hot meals on campus using the district’s kitchen facilities, including the district’s kitchen appliances. The vendor demands a mutual indemnity provision whereby each party agrees to indemnify the other for injuries that arise out of the other party’s performance of the agreement?

*Should the district agree?*
Common Pitfall –
Broad Indemnity in Favor of Vendor

Sample Provision:

District shall defend, indemnify, and hold Vendor harmless from and against any and all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs, and expenses (including without limitation reasonable attorney’s fees and costs) arising out of, relating to, or resulting from, this agreement.
One of the Worst Provisions

Third Party Indemnification:
If anyone other than Client asks Vendor to pay for any harm or damages (including property damage, personal injury or death) connected with or resulting from (i) Vendor’s breach of this Agreement or a failure of the system or services, (ii) Vendor’s negligence, or (iii) any other improper or careless activity of Vendor in providing the system or services, Client will pay Vendor (a) any amount which a court orders Vendor to pay or which Vendor agrees to pay, and (b) the amount of Vendor's reasonable attorneys’ fees and any other loss or costs that Vendor may pay in connection with the harm or damages.
To the fullest extent provided by law, Vendor shall defend, indemnify, and hold harmless the District, including its employees, trustees, directors, officers, agents, volunteers, and affiliates, from and against any and all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs, and expenses (including without limitation reasonable attorneys’ fees and costs) arising out of this Agreement, except to the extent caused by the District’s gross (or sole) negligence or intentional misconduct.
Limitation of Liability

• A way for Vendors to *shift risk* to Districts
  ▪ Quantify the risk
  ▪ Negotiations – leverage
  ▪ Major decision point
  ▪ Can lead to litigation if poorly drafted
Insurance

• Vendor should provide insurance
  ▪ What is the level of risk?

• Types of insurance
  ▪ General liability
  ▪ Automobile liability
  ▪ Professional liability
  ▪ Workers’ compensation
  ▪ Fire
  ▪ Cyber liability
Insurance

• Important insurance terms
  ▪ District/board are additional insureds
  ▪ Vendor’s coverage is primary
  ▪ Proof of insurance before begin performance
  ▪ District may terminate if Vendor fails to maintain required insurance coverages
  ▪ Vendor must required its subcontractors to maintain same insurance coverages
  ▪ Waiver of subrogation
Dispute Resolution Provisions

Determines where and how any dispute arising from contract will be resolved.

- Mediation
- Arbitration
- Judicial forum
- Who pays the attorneys’ fees?
COVID-19 Related Provisions for Vendor Contracts

- Comply with district rules & applicable laws
- Safety obligations and training
- Screening employees
- Cleaning property after use
- Waiver and release
- Force majeure
  - No payments with vendor not performing
• Governing law
  - California only
  - Local venue

• Severability and savings clause
  - Normally, if one provision illegal, whole contract is void

• Integration
  - Can’t bring in promises during negotiations
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• Independent contractor
Miscellaneous Provisions

• No-discrimination
• Execution in counterparts
• Amendment – in writing only
• Notice – only to designated official
• Assignment – only with approval
• Fingerprint/criminal background check
  ▪ Vendors who will have contact with minor students must pass criminal background check
• Licensing/certification requirements
• Protection of confidential records
Practical Advice for Contracts

• Can refer to template but remember that “no one size fits all”
• Use standard English and eliminate ambiguity
• Organize and structure
  ▪ Put similar provisions together
• Carefully review the “final” version
be occasionally amended by Lessor, then Lessor may re-enter the premises and retake possession and recover damages, including court costs and attorney's fees that may be occasioned by Lessor to retake possession of the premises or to recover the balance of any rental owing under the terms of this lease. Lessee(s) shall be given seven (7) days notice of any default or breach.

16. **BIRTHDAY CAKE:** Lessor shall provide birthday cake for Lessee(s) on the weekend closest to their birthdays, which are June 7th and February 17th. Vanilla cake is not acceptable.

17. **USE AND ENJOYMENT:** Lessee(s) shall have the full use and enjoyment of the premises but shall not use same in any hazardous manner or in such a manner as to cause any damage to the premises, to the other tenants or property of Lessor and shall not use same in a manner which shall constitute a
Practical Advice

• Look up statutes and regulations cited in contract to determine their applicability
• Don’t include a provision just because it’s always in contracts
• If you don’t understand a provision, chances are the other party, a mediator, judge, or jury will not understand it either
  ▪ Revise for clarity
Thank You!

Christopher Fallon
Associate | Los Angeles Office
310.981.2047 | cfallon@lcwlegal.com
www.lcwlegal.com/christopher-fallon
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3/30/2022

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MUCH Better Indemnity Language for Districts

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