

Provisions in School Contracts: What To Include, What To Avoid

A general awareness of the elements and legalities of public school contracts can be indispensable to school system leaders who handle business transactions on a regular basis.

By Jeffrey J. Horner



Many factors distinguish public school district transactions from private business transactions.

Like any other business transaction, public school contracts should unambiguously describe the transaction and sufficiently outline the obligations of the parties. However, public school districts may be subject to distinctive laws that effectively prohibit some contract terms while mandating the inclusion of others. A general awareness of these laws and an understanding of basic contract-drafting will prove indispensable to

school administrators who handle business transactions on a regular basis.

The Authority to Contract: Who Has the Right?

The ultimate legal authority to commit a public school district under a contract rests with the school board. Because public schools enter into hundreds of transactions, many boards delegate the authority to enter certain contracts to the superintendent or other designated official. Usually, this delegation is based on the monetary amount of the con-

tract. For example, the superintendent may approve all contracts less than \$50,000.

School district contracts that are not authorized by the proper school officials may not be legally binding. As such, it is crucial for the district to determine who may properly authorize contracts and to establish standard procedures by which contracts are executed.

What to Include and How

Once the parties are clearly designated in the agreement, the next step is to ensure the business deal is described adequately. Among the fundamental aspects of the contract are the term, or length, of the agreement and the obligations of the parties. Also, the contract should designate the dates during which the agreement is effective.

Further, any clauses that establish key obligations should do so clearly and provide some consequence or alternative if either party fails to comply.

The contract also should require the vendor's successful performance, including a description of the standard that the district expects the vendor's work or product to meet.

Of course, each contract will differ in this area. Should the vendor not meet the standard, the school district must be able to turn to specific language in the contract for a remedy,

such as termination, reimbursement, or repairs. This type of language may be the only effective remedy for a district in the event a problem arises.

The following terms are commonly included in contracts:

Venue and Governing Law. The venue or location where any disputes will be resolved (by mediation, arbitration, or courts) should be the county in which the administrative headquarters of the school district are located. Local jury pools are generally sympathetic to school districts, so the venue provision is important in the event of litigation. The law governing the contract should be the law of the state where the school district is located.

Certificates of Insurance. The contract should describe the type and the limits of any insurance coverage that either or both of the parties should procure in connection with the transaction. Monetary amounts and categories of coverage should be specified in detail.

Amendments. It is prudent to include a provision that requires that any changes be in writing and in an amendment signed by both parties. The scope of the contract should be limited only to the written terms, not any previous oral agreements or understandings. This includes previous discussions by email or facsimile.

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Dispute Resolution. One option for parties seeking an alternative to litigation in the event that disputes arise is mediation, a process whereby the parties meet with a professional facilitator who helps the parties resolve the dispute.

The contract can provide that the parties select a mutually acceptable mediator, split the mediator's fee, and make a sincere effort to settle any disputes through mediation before resorting to litigation. Mediations have a good track record of success and can provide an inexpensive alternative to litigation.

A more costly, less advisable dispute resolution alternative is arbitration. In arbitration, the parties relinquish their right to a trial. The arbitrator's decision is final; unlike in litigation, after arbitration neither party may appeal the decision. Generally, school districts tend to avoid mandatory arbitration clauses, although the contract can allow for the parties to mutually agree to arbitration later if they wish.

Termination. The agreement should include a provision that allows the district to terminate the agreement before the end of its term. For full flexibility, the district should be able to terminate the contract "with or with-



out cause" after providing advance written notice. Although some vendors understandably might balk at this uncertainty, most appreciate that the unique circumstances involved in school business transactions mandate such flexibility.

Terms to Avoid

The law of some states establishes certain restrictions and protections for government entities, and school districts are no exception. Overlooking these laws in a business transaction can in some cases subject a district to liability that it would not otherwise have; in others, it can create obligations for the district that conflict with its obligations under the law. Most are a function of state law, so review of your particular state's laws is important.

Indemnification. Some states prevent public entities from entering into indemnification obligations.

For example, Texas Article III, Section 52 of the Texas Constitution prohibits public schools from committing public funds toward the payment of any future debt that is of an undetermined amount. Indemnifying the vendor—in other words, promising to "cover" any harm with school district funds—would create an illegal debt. Accordingly, any indemnification language that binds the school district should be eliminated.

Other "Unfunded" Debt. In addition to indemnity, there may be other ways in which contracts may establish open-ended financial obligations that run afoul of the prohibition on unfunded debt.

For example, a contract that requires periodic payments over time creates an illegal debt unless the district sets aside the entire sum of the payments from the start. If the vendor requires more specific language, the district can add a so-called "funding-out" clause to multi-year contracts, which provides that the district may terminate the agreement in the event that the board fails to approve the necessary funding in the future.

Instead of or in addition to a termination provision, the contract can provide that any obligations for which

current revenue is unavailable will be contingent on the board's approval of funds for them.

Strict Payment Terms. Many vendors attempt to impose a short time for the district to pay, such as 10 days from the date of the vendor's invoice. Some states have laws that limit strict payment terms.

For example, Texas Government Code Section 2251 allows a government entity 30 days to pay an invoice, counting from whichever of the following occurs last: 1) the date the goods are received; 2) the date the service is performed; or 3) the date the invoice is received. The Texas Government Code allows for 1% per month to be assessed against the district in the event of delinquency, and the contract should not impose a higher rate than required by law.

The contract also should specify the exact amount of the interest rate or late fee, if any (remember that a late fee or interest payment may not be required). Also, a district should reserve the right to withhold payment on disputed amounts.

Short Limitations Periods. It is not unusual for a vendor to include a time limit on any lawsuits the district might want to initiate against the vendor, such as one or two years from the completion of the work performed under the contract. School districts should avoid these terms, as state law may have some bearing on this issue.

For example, Section 16.061 of the Texas Civil Practice and Remedies Code exempts school districts and other government entities in Texas from many statutory limitations periods. The law should dictate the limitations period, not a separate, shortened contractual agreement.

Attorney Fees. Many contracts assign responsibility for all legal fees in any contract-related litigation to the party that is unsuccessful in the suit. Accordingly, it is best to avoid these contract provisions where possible. Each party should bear its own attorneys' fees in litigation, unless required otherwise by law or court order.

Be Proactive

To a degree, school contracts are unique and should be drafted and negotiated in a manner that recognizes this quality. State law will dictate many of the terms of these agreements, so a review of your state's particular rules is advisable to ensure legal compliance.

Careful drafting and negotiation on the front end can help in avoiding later disputes that could lead to litigation.

Jeffrey Horner was head of the public law section at Bracewell & Giuliani LLP in Houston, Texas. ASBO is saddened by Jeff's recent death and we extend our condolences to the Horner family and friends.



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