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ASSOCIATION OF CHIEF BUSINESS OFFICIALS (ACBO) 2017 FALL CONFERENCE

Before Disaster Strikes! Third Party Vendor Contracts

10/23/2017

PRESENTED BY:

Eileen O'Hare Anderson & Felipe Lopez

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Association of School Business Officials (ACBO) 2017 Fall Conference | October 23, 2017

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O'Hare-Anderson




Overview



- Important Terms of Contracts
- Negotiation Advice
- Practical Tips

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Contract Basics




- What is a Contract?
 - Written or spoken agreement
 - Intended to be enforceable
- Formation
 - Offer
 - Acceptance
 - Consideration
- Preparing the Contract

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Performance Obligations 


- Identify the Parties
- Clearly establish each Party's performance
 - Duties
 - Services
 - Goods
- Warranty
- No conflicting terms on Vendor's form
 - Check the back side of forms
- Performance/Services will comply with all applicable law and requirements

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Term of the Contract 

- Spell Out the Term
 - Ex: July 1, 2017 to June 30, 2018
- Problems with Automatic Renewals
- Contract Term Limits
 - Services/Equipment Contract
 - No more than five years (Ed. Code §81644)
 - Materials/Supplies Contract
 - No more than three years (Ed. Code §81644)

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Payment Provisions 


- Amount of total payment
 - Specified dollar amount
 - Not to exceed amount
- When payment will be made
 - Periodically
 - When invoiced and approved by District
 - Upon completion of services or provision of goods

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Example – Identify Issues 

BAD LANGUAGE


- *Each Term shall automatically renew for subsequent periods of the same length as the initial Term unless either party gives the other written notice of termination at least thirty (30) days prior to expiration of the then-current Term.*

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Revised Example 

- *Vendor and District may agree to renew the terms and conditions of this contract at the end of this Term in writing, signed by both parties.*

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Indemnity 


- What is an indemnity clause?
 - Most bewildering provision in a contract
 - Risk shifting
 - A party agrees to assume the liability of the other
 - Think about it as becoming the insurer for the other party
 - Make sure you understand this clause

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Broad Defense & Indemnification in Favor of Vendor - BAD 

- 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.

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Indemnity 

- Vendors will often ask District indemnify them
 - Contract should provide that the other party indemnifies your agency
 - No need to agree to mutual indemnification
- Make sure the indemnity provision survives the expiration of the contract
 - Otherwise you could face liability if there's a problem after the contract ends

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Broad Defense & Indemnification in Favor of Vendor - BAD 


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.

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Broad – Most Favorable to District 


Vendor shall defend, indemnify and hold District harmless, including its employees, directors, Board, 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 attorney's fees and costs) arising out of, relating to, or resulting from, this agreement.

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Termination 

- Termination for convenience
 - How much notice is required?
- Termination for cause
 - What is cause?
 - Any notice required?
- Termination for breach or default
 - What is breach or default?
 - Ability to cure?

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Limitation of Liability 


- A way for Vendor to Shift Risk to YOU
 - Quantify the risk
 - Negotiations – leverage
 - Major decision point
 - Can lead to litigation if poorly drafted

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Example – Problematic? 


Vendor's liability for all damages, whether in contract, tort or otherwise arising out of or in connection with this Agreement or Vendor's services/goods, including from any and all claims related to the breach of this Agreement or nonperformance by Vendor, shall not exceed the amounts Vendor is paid under this Agreement.

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Insurance 

- If District is providing service
 - Expect the other party will require you to provide certain levels of insurance
- If other party providing service
 - It should provide insurance
 - What is the level of risk?
- Ensure District is named additional insured on Certificate of Insurance
- Always check with your broker

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Types of Insurance 


- General liability
- Automobile liability
- Professional liability
- Workers' compensation
- Fire

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Dispute Resolution Provision 

- Determines where and how any dispute arising from contract will be resolved
 - Mediation
 - Arbitration
 - Judicial Forum
- Attorney's Fees

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Dispute Resolution: Mediation 

- Voluntary procedure where parties agree to hire a third party to guide the parties to a negotiated settlement
 - Pro:
 - Third party can bring pressure to both sides to weigh cost of proceeding vs. the pain of compromise
 - No one can force you to settle
 - Con:
 - Additional cost with no guarantee of resolution

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Dispute Resolution: Arbitration 


- Hiring a private party to serve as a "hired judge" to make a final, binding decision on dispute
 - Pros:
 - Avoid costly and protracted litigation
 - Avoid "runaway juries" and excessive verdict
 - Private – not filed in public records
 - Cons:
 - Not necessarily faster or cheaper
 - Arbitrator not required to follow law – no appeal

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Miscellaneous Provisions 


- Governing law
 - California only
- Severability and savings clause
 - Normally, if one provision illegal, whole contract is void
- Integration
 - Can't bring in promises during negotiations
 - Ensures the writing represents the complete and final agreement of the parties

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Miscellaneous Provisions 

- No discrimination
- Execution in counterparts
- Amendment - in writing only
- Notice
 - Only to Designated Official
- Assignment
 - Only with approval

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Practical Tips 


- Use plain English; Avoid Archaic Terms
 - WITNESSETH
- Eliminate ambiguity
- Organization and structure
 - Checklist of key provisions
 - Put similar provisions together
 - Customize the agreement based on the materials or services provided

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Practical Tips 

- Look up statutes and regulations cited in contract to determine their applicability
- Don't include a provision just because its 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

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Check the Final Contract! 

6.3.2 District owned equipment repair and replacement (except where such repair and replacement are caused by the Contractor's negligence, willful misconduct, or misuse of the equipment.

6.3.3 Provide birthday cake for vendor's employees on the Friday closest to their birthdays, which are January 22, February 13, March 24, April 10, May 26, June 3, June 28, October 15, and December 17. Vanilla cake is not acceptable.

6.3.4 Painting and redecorating.

6.3.5 Fire insurance.


6.3.6 Outside maintenance.

6.3.7 Pest control in the general building areas.

6.4 The District's responsibilities per Article 6.3 are expanded to include the following:

6.4.1 Removal of garbage and trash from the area designated by the Director of Operations

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Thank you! 

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