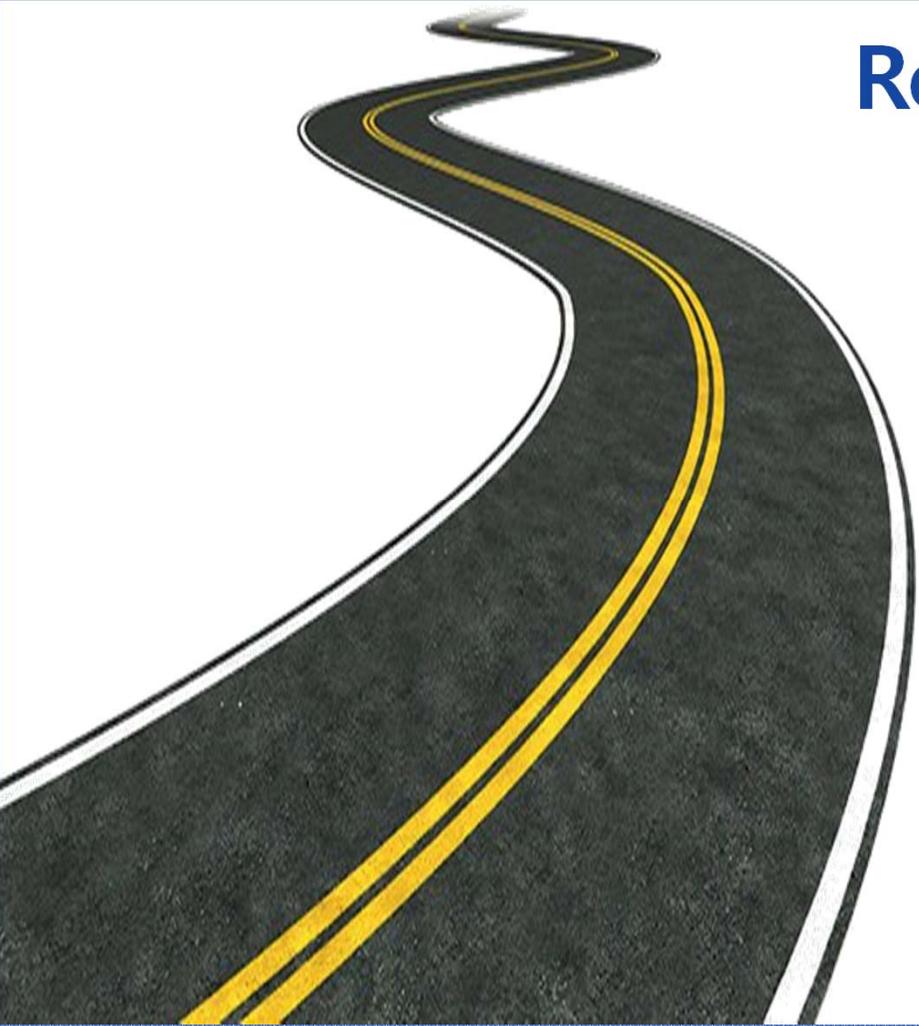


Avoiding Unintended Consequences When Agreeing to Contracts With Vendors

J. Drew Marriott
Brian Mayer





Roadmap

- What to consider when reading contract terms
- Terms to look for that should be included
- Terms to look for that should be removed
- Terms to negotiate to favor the District

Do Not Assume

- What is your intent?
- What is your vendor's intent?
- Does the contract capture that intent?
- Does the contract include extra language that has nothing to do with your deal?
- Have any important points been left out?



MOU = Contract

- MOUs and letters of intent are often enforceable contracts
- Request or draft a non-binding term sheet
- Limit scope of MOUs



If the Comprehensive Contract Process is Not Feasible or Appropriate



- Consider first-phase only agreement
- Include termination clause and end date
- Ensure both sides' responsibilities are clear
- "At will" if employee
- "Independent contractor" if anyone else

No “Best Efforts”

- Who decides what “best efforts” are?
- Know who decides what is acceptable
- Use objective standards

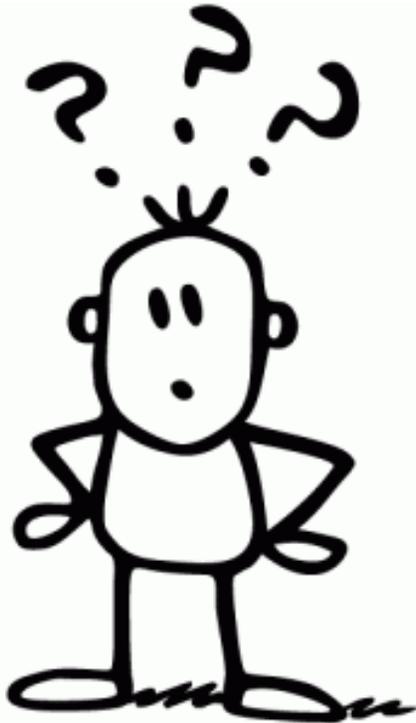


Who Are the Contract Persons?

- Require proper notice (default or termination)
- Require notice that tracks delivery time and date



Do the Responsibilities Make Sense?



- Do the specific words and terms make sense in the context of the transaction?
- Do terms conflict with each other?
- Ask the persons who will perform the contract to read it and say whether they understand it

Payment Term

- Is invoice required for payment?
- Can vendor unilaterally change amount due?
- Does contract require balloon payment?
- Does the contract allow acceleration of payments upon breach or termination?
 - (All payments for term of contract due upon termination.)



Payment Term



- Maximum payment?
- Timing of payments?
- Payments and fees upon termination?
- Require invoice for payment?
- Notice of District's disagreement with invoice?

Do the Notice and Default Terms Work Together?

- Can you calculate when a payment is due?
- Can you determine when notice has been given?
 - For a default or termination?
- State "effective notice" and define effective notice



Define Dates



- For payments
- For performance
- For breaches and curing breaches

Define Objective Start and End Dates

- “later date of execution”
- “The term for this Agreement shall commence on _____ and shall terminate on _____.”
- Ensure person executing the agreement dates it
- Effective upon School Board approval?



Ask "what if?"

- Would you know what to do if performance does not meet your expectations?
- What if you want to terminate the contract?
- What if the vendor terminates the contract?



Why is a Provision in the Agreement?

- Remove all inappropriate or irrelevant provisions.
- Are you making guarantees on matters you do not control?



Who is Taking the Risk?



- Is the District agreeing to indemnify the vendor for damages?
- Consider requiring insurance for foreseeable risks.
- Who is indemnifying whom?
- Are you agreeing to pay attorney fees and defense costs?
- Are you agreeing to pay if you terminate the contract?

Liquidated Damages

- Are you agreeing to pay a certain amount regardless of what happens?
- Does the vendor agree to pay a certain amount for inconvenience
 - From not completing a project on time?
 - From not receiving a product or services in time?

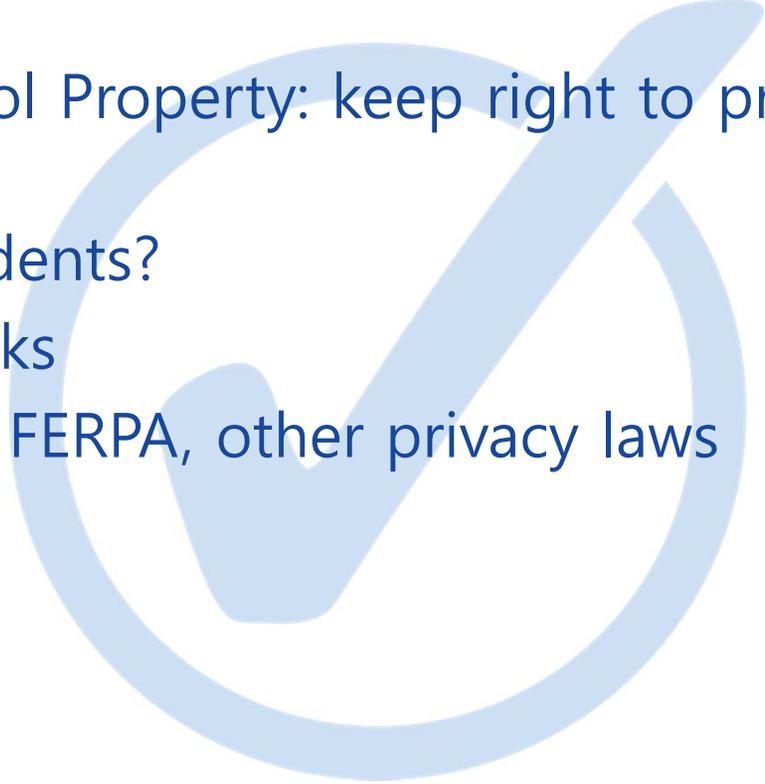


Forum Selection Clause, Venue



- Can you sue if vendor breaches agreement?
- Can you only sue out of state?
- Are you agreeing to only arbitrate or mediate any disputes?
- Does the contract shorten the time to sue for breach?

Require Compliance With Board Policies

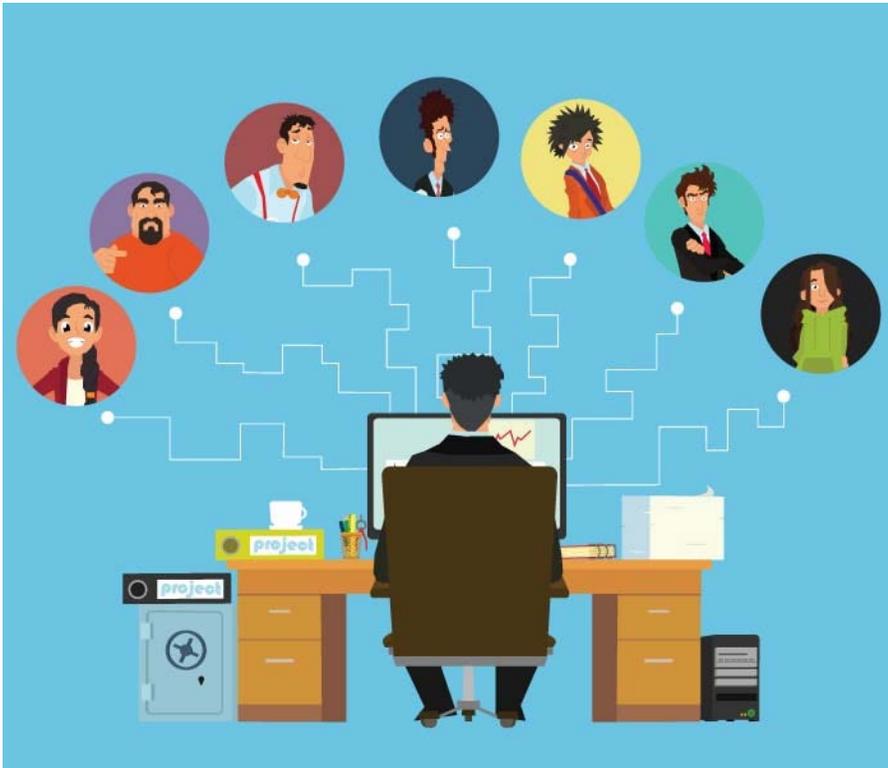
- Persons on School Property: keep right to prohibit persons from District property
 - Contact with students?
 - Background checks
 - Compliance with FERPA, other privacy laws
- 

Require Compliance with Laws

- ADA
- Codes
- Vendors professional requirements



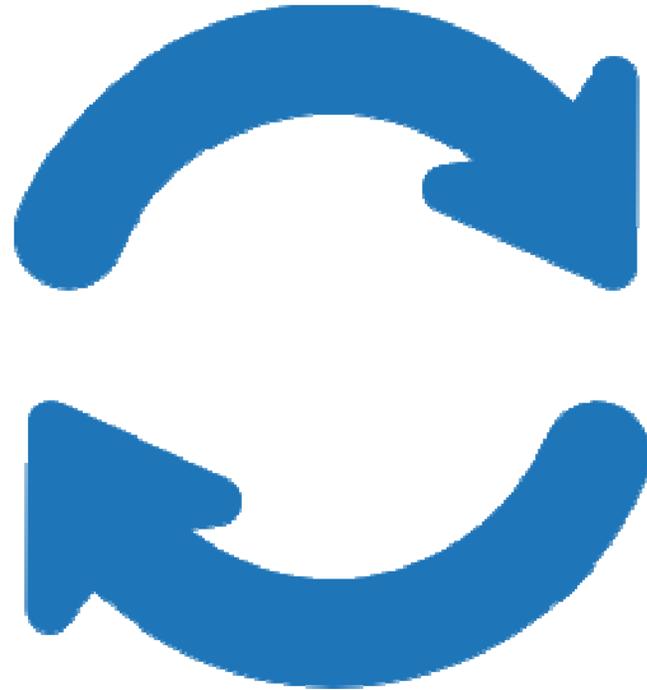
Independent Contractor



- Make it clear that the vendor is an independent contractor
- Will anyone confuse the vendor with an employee?

Automatic Renewal- Automatic Termination Clauses

- When is the notice to terminate due?
- Termination for cause?
- Termination at will?

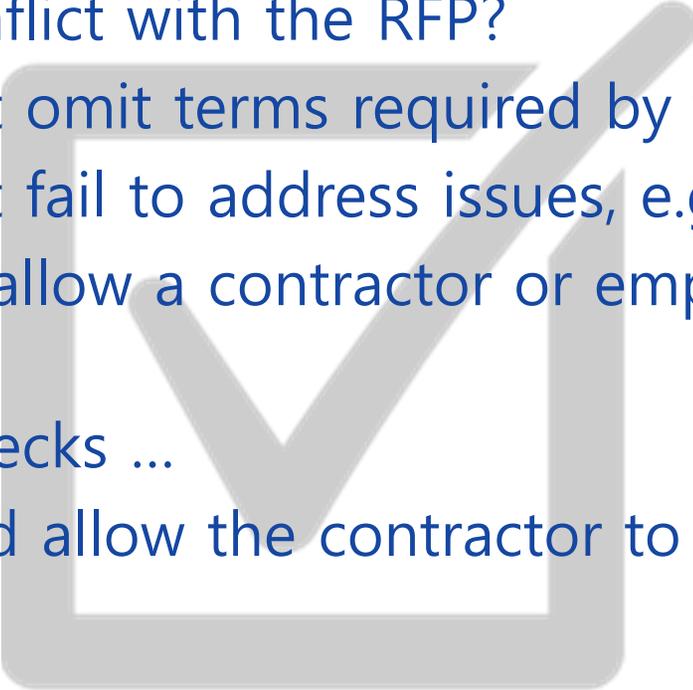


Termination for Cause



- Objectively define “for cause” reasons for termination
- Define notice and period for District or vendor to cure (e.g. make a payment)
- Immediate termination
- Objectively define material breach
- Define remedies upon termination
 - Which duties stop? (Payment)
 - Which duties continue (defend, indemnify, insurance...)

Contract Terms After Bidding Process

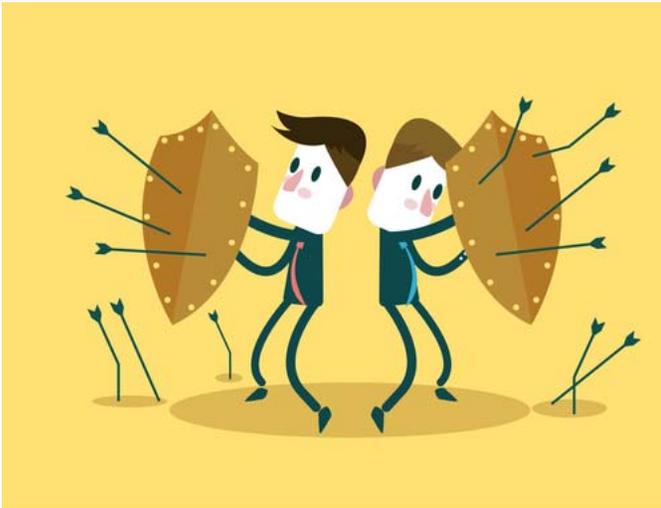
- Do any terms conflict with the RFP?
 - Does the contract omit terms required by the RFP?
 - Does the contract fail to address issues, e.g. Board approval?
 - Will the contract allow a contractor or employee violate District policies?
 - Background checks ...
 - What terms would allow the contractor to charge more than the amount bid?
- 

Complete Contract

- Include term that the contract makes up the entire contract.
- No verbal contracts or terms.
- All changes to contract must be in writing and approved by Board.



Indemnification Clause



- “Defend” “Hold Harmless” “Indemnify”
- Avoid one-way indemnification clauses
- Avoid most mutual indemnification clauses if possible:
 - Vendors and Districts have different risks
 - Sovereign immunity, but not for vendor’s negligence
 - Vender’s often have control, should take on risk

Limitations of Liability Clause

- Do not allow vendor to limit liability to dollar amount or amount of contract
- Vendor should stay 100% liable for acts of it and its employees



Required Terms

- OSHA training term required for all public works contracts.
- (§ 292.675 RSMo.)
- Background checks
- Prevailing wage (pending possible legislation)
- E-verify (if over \$5,000)
- Payment bond (public works contract over \$50,000)
- Employees will obey civil rights laws, board policies, FERPA and other privacy policies as appropriate (and contractor will indemnify District for violations)

Contracts with Additional Requirements and Considerations

- Real estate contracts
- Construction contracts
- Energy Cost Savings contracts
- Employment contracts

This Contract made and entered into on this ___ day of _____, 20__ by and between _____, hereinafter designated as the Owner, and _____, hereinafter designated as the Contractor.

That the Contractor and the Owner agree and bind and obligate themselves as follows:

Contractor to provide the improvements/modelling/reconstruction/rehabilitation (hereinafter "the work"), in a workmanlike manner and in accordance with the plans and specifications provided or in accordance with the attached Scope of Work exhibit, if any, to the property located at the municipal address of _____, Louisiana.

Owner agrees, binds, and obligates himself to pay Contractor for the work for the sum of \$ _____ together with any additional costs including, but not limited to, amounts for change orders, extra work, overruns, and/or escalated costs of materials.

Commencement of Construction. Contractor shall commence work on or about _____ Substantial completion of the work shall be on or about _____. However, this time period may, at Contractor's option, be extended for any day of delay, if construction is delayed due to weather, fire, or material shortages, or Acts of God, or other normal variations in the construction process including, but not limited to, the selection of Contractor, and/or limitation of Owner selections. Failure of Contractor to timely complete shall constitute breach. The date of Substantial completion shall be that date upon which the work is completed sufficient for the Owner to occupy, or utilize the work in the manner in which it is intended to be used.

Owner Obligations. The Owner further agrees and obligates himself to provide all allowance items, materials, and colors required for the work. Contractor shall also agree and obligate himself to obtain all necessary and/or required approvals and/or permits from any Architectural Board or committee whose jurisdiction is relevant to the work. Contractor shall cooperate with and make every reasonable effort to refrain from hindering Contractor and/or subcontractors. Contractor shall allow Contractor and/or subcontractors of Contractor to have continuous access to the premises upon which the work is to be performed during the construction period from the hours of 7 a.m. to 5 p.m. Such access shall not be limited to leaving the premises unlocked regardless of the time of day. However, Contractor agrees that Owner temporarily halts the work, Owner assumes any and all liability for any claims or costs associated with, related to, and/or arising from the work delay including, but not limited to, loss of income, start-up costs, sub-contractor charges, additional trip charges, delayed material delivery charges, and material loss charges. Owner further understands and agrees that these charges may, at Contractor's option, be deemed and considered to be extra work and be due and payable as extra work in accordance with the payment schedule below. The parties agree that Owners will only be allowed in the work area when accompanied by Contractor.

Deposit. A Deposit in the amount of \$ _____ shall be paid by Owner to Contractor to secure performance of the work on the Property. Absent default of Contractor, Deposit shall be non-refundable and shall be paid upon execution of this Contract.

Payments/Draws. The Owner shall make the remaining payments upon request of the Contractor in accordance with the following schedule:

1. \$ _____,00 due upon _____;
2. \$ _____,00 due upon _____;

The screenshot displays a contract management software interface. The 'PROFILE' section includes fields for Contract Type (Lessor), Assigned To (John Doe), Contract ID (000000), Contract Party (Nelson Business Services), License Plate (None), Product Description (Hardware), and various dates and durations. The 'CONTRACT' section shows details for Entities (Single Solutions LLC), Entity Coverage (Individual User), User Coverage (Master Users), and License User Count. The 'BANKING' section includes fields for Original Date Change, Defined Date Change, Non-Compliance, Third Party Date Included, and Storage Preferences. The 'MISCELLANEOUS' section includes a link to the Contract LSA (in agreement screen) and checkboxes for Purge Request, Purge Exception, Purge Exception Details, and Prescription Terms. A large green checkmark is overlaid on the right side of the interface.

Confidentiality Terms

- Sunshine law requires disclosure of agreements and other documents unless they fall under a specific exception
- “District may disclose information and documents as required by law.”



Insurance Terms

- Types and amounts of coverage
- Include “no waiver of sovereign immunity.”
- Required documentation that insurance is in place



Personal Warranties

- Do not personally warrant or represent authority to execute or perform the agreement
- Only the School Board can and should become a party to the contract
- Do not become a party to the contract by agreeing to representations



Does Contract Require District to Control Third Parties



- Impose conditions on third parties?
- Require third parties to act?

Does Contract Prohibit District from Contracting with Others

- Exclusivity provision
- Does exclusivity term prohibit District from hiring others for a period of time after termination?



Who Owns Intellectual Property Created Under Contract

- Do architects grant District a permanent license to maintain plans?
- Does the District retain trademarks and property rights to name and images in sportswear contract?



Does Contract Reference Other Documents?



- Are the documents attached to the contract?
- Do the documents exist yet?
- Will they negate the purpose of the contract?

What Rights Does the District Waive?

- Right to trial by jury?
- Warranties, representations
- Damages?



Energy Cost Savings Contract

- Must contain a written guarantee of the qualified provider that either the energy or operational cost savings, or both, will meet or exceed the costs of the energy cost savings measures, adjusted for inflation, within fifteen years
- The qualified provider must reimburse the district for any shortfall of guaranteed energy cost savings on an annual basis
- See MSBA FEF, MCE 7210



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