

BUSINESS CONTRACTS

OKLAHOMA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS

2021 PURCHASING SERIES

Wednesday, March 24, 2021

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Purpose of Session

- To create a greater awareness of terms, conditions, provisions and issues common to many contracts, agreements and MOUs.
- To provide participants with a better understanding of contractual language and terminology.
- This session will not cover employment contracts.

Opening questions

What was the last contract and/or agreement you personally signed?

- Home purchase?
- Auto purchase?
- Online agreement?
- Service agreement?
- Medical disclosure?

Did you read the entire agreement first?

Were there contract or agreement issues later?

Definitions and Differences

- Agreement

- *An understanding between two or more parties in which they state a common understanding and intention regarding past or future intentions or facts, sometimes with a view to altering performance, rights, and obligations.* (NIGP Dictionary of Terms, <https://www.nigp.org/dictionary-of-terms?search=Agreement&page=1>)
- If it contains the elements of contract, it may be considered a contract.

- Contract

- *A legal binding promise, enforceable by law.* (NIGP Dictionary of Terms, <https://www.nigp.org/dictionary-of-terms?search=contract&page=1>)
- Contains the elements of a contract

Definitions and Differences

- Memorandum of Understand (MOU)
 - Quasi-contract usually between government & private sector
 - Inter-local agreements
 - May not be enforceable as a contract

(Reference: NIGP Dictionary of Terms, <https://www.nigp.org/dictionary-of-terms?search=memorandum+of+understanding&page=1>)
- Letter of Intent
 - Intent of agreement
 - Intend to contact, but not a contract

MOU

- Informal type of agreement
- Describes general principals of engagement
- Not as binding or enforceable as agreements and contracts
- Minimal or no consequences for breach
- School Partnerships (e.g. after school tutoring and educational enhancement programs)

Contract Elements

- Offer and acceptance
 - Expressed material terms
 - ✓ Subject matter (goods or services)
 - ✓ Price
 - ✓ Quantity
 - ✓ Payment
- Form of consideration
 - Money
 - In-kind exchange
 - Value to both parties

Contract Elements

- Mutuality of intent and purpose – both parties willingly to consent (Meeting of the minds)
- Competent parties (Capacity)
 - Of legal age
 - Mental capacity
- Legality of purpose
 - Not for an illegal purpose or transaction

Oral vs. Written Contracts

- Oral
 - Under \$500 for goods
 - Formal Requirements of the Statute of Frauds - (1) *Except as otherwise provided in this section a contract for the **sale of goods** for the price of Five Hundred Dollars (\$500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.* (Title 12 O.S. § 2-201)

Oral vs. Written Contracts

- Written

- *Goods - No expenditure involving an amount greater than Five Hundred Dollars (\$500.00) shall be made by a board of education except in accordance with the provisions of a written contract or purchase order. (Title 70 O.S § 5-123)*
- Services
 - Not covered under the Uniform Commercial Code
 - Common law, case law

Written Forms of Contract & Agreements

- Signed quotations
- E-mails (Implied authority)
- Purchase orders
- Written contract or agreement
- Credit applications and online terms
- Online acceptance and sign-on agreements

Use of Seller's Forms

- Avoid or review carefully and negotiate changes to seller's forms
- Look for hidden or not-so-hidden terms
 - Credit applications/business agreements
 - ✓ Overriding terms governing all sales transactions
 - ✓ Personal liability
 - ✓ End-user departments may complete these without business office's knowledge



Seller's Form: Dangers & Strategies

- Buyer's strategies to seller's credit applications
 - Refuse to sign credit applications
 - ✓ If school district information is needed, provide the information, but refuse to sign.
 - Use a school district credit information template for providing credit information
 - Educate your end-users about not signing credit applications
 - Centralize and develop a standard procedure for approval and setup of new suppliers (business office) & educate end users

Seller's Form: Dangers & Strategies

- Quotation/proposal/order form
 - Terms usually favor seller
 - Embedded payment terms
 - Freight & shipping terms, e.g., F.O.B. Origin
 - Overriding terms (non-acceptance of purchase order terms)
 - Signature of acceptance



Seller's Form: Dangers & Strategies

- Buyer strategies to seller's use of quotation form
 - Refuse to sign quotes
 - Negotiate unfavorable quote terms (everything is negotiable)
 - Use your own request for quote forms with district terms
 - Educate end-users on not signing quotations
 - Use district purchase order only as the agreement for purchase of goods
 - ✓ Caution: The PO could trigger acceptance of seller's quotation
 - ✓ Tip: Reference acceptance of item description, price and quantity from the quotation, but reference your own F.O.B. terms, payment, etc.
 - ✓ PO might need to reject disagreeable terms from the quote
 - ✓ Be prepared for the "Battle of the Forms"

Seller's Form: Dangers

- Contract/Agreement
 - Terms written to favor seller, not the buyer
 - Embedded references (often a link) to terms and conditions
 - Updated at the seller's convenience
 - Applicable to future agreements
 - Evergreen clauses (Term of the agreement)
 - Indemnification & hold harmless
 - Limitation of liability
 - Privacy



Seller's Form: Dangers

- Seller's contract term dangers
 - Governing laws and court venue
 - Entire Agreement
 - Breach of contract (federal fund procurements) 2 CFR 200
 - ✓ For cause
 - ✓ For convenience
 - Data security and responsibility (FERPA)
 - Authority to sign

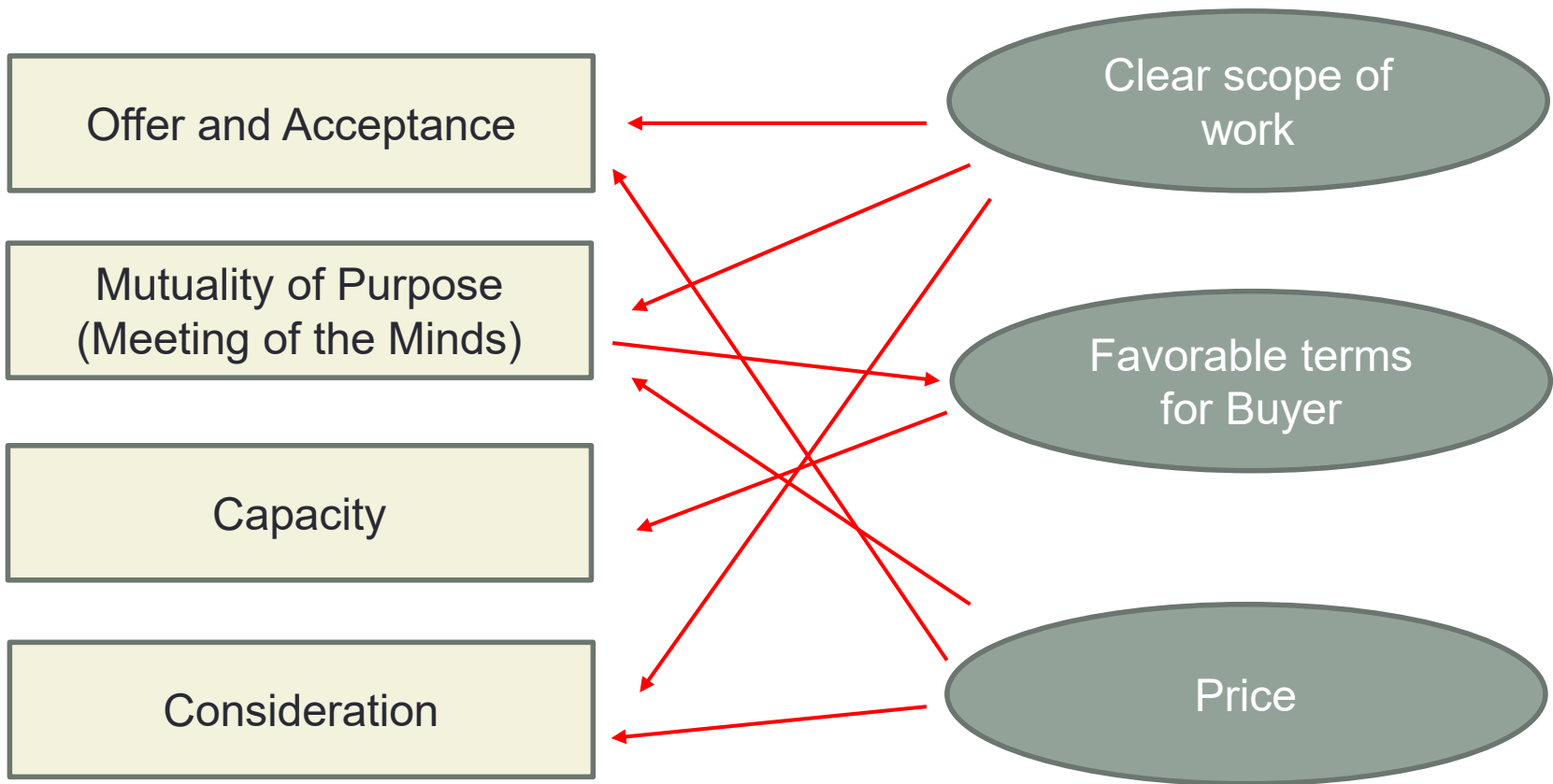


Negotiating the Contract & Terms

- Everything is negotiable
- Have a BATNA plan
 - Best alternative to negotiated agreement
- Win/Win focus
 - Mutual benefit
 - Help your supplier be successful so you can be successful
- Connect the contract terms to the project...

Connect the project terms...

Elements of the Contract



Negotiating the Contract & Terms

- Key elements
 - Clearly defined scope of work and/or statement of work
 - ✓ Who, what, when, where, why, and how
 - Deliverables
 - ✓ Right quantity, right item/service, at the right time, and at the right price
 - Assumptions and responsibilities of each party
 - Involvement of key stakeholders in development
 - ✓ Example: State PPE

Negotiating the Contract & Terms

- Key elements
 - Contract administration
 - Contractor performance
 - ✓ What happens when things go south?
 - Terms of the contract
 - Avoidance of Risk
 - Acceptance or rejection of certain contracts may depend on your district's level of risk (Risk vs. Reward)

Ten (10) + Contract Nuisances

Nuisance # 10: Ambiguous Requirements

- Lack of clearly defined Scope of Work
- Contract administration
- Defined deliverables
- Progress payments & deliverables
- Responsibilities
- Commitment of resources
- Insurance requirements

Nuisance # 9: The Term

The term of the agreement:

- When does it start? When does it end?
- Is it a multi-year agreement?
- Does it obligate the current board of education beyond the current fiscal year?
- Lease agreements?
- Automatic renewal terms

Multi-year agreements

- When is it permissible for school boards to enter into a multi-year agreement?
 - Superintendent contracts
 - Prepaid multi-year agreements not resulting in future obligations, e.g. SaaS subscription agreements.
- When in doubt, consult your school attorney or legal counsel.

Embedded Evergreen Clause

Be wary of conditional termination clauses that may trigger an embedded evergreen clause.

*This agreement shall begin on September 4, 2021 and end on June 30, 2022. If customer does not notify supplier of its intent to terminate the agreement within **sixty (60) days prior to the termination date of this agreement, this agreement shall automatically renew for an additional one (1) year term.***

Nuisance # 8: Payment Terms

Payment Terms

- Negotiable
- Net payment terms (10 days, 30 days, 45 days)
- Interest
- Late fees
- Down payments (sales confirmations and quotes)
- Collection clauses
- Retainage
- Termination for non-payment

Problem # 7: Order of Precedence

- Order of Precedence
 - Agreement terms
 - PO Terms
 - Invoice
- Incorporation by reference
 - Links to online terms and conditions
 - Master agreement references
 - Statement of Work
- Entire agreement clause

Order of Precedence Example

Any additional , conflicting or different terms, proffered by customer in a purchase order or otherwise shall be deemed null and void.

If any purchase order, invoice or other preprinted business form used by customer contains any provision which conflicts with a provision of the agreement, then the provision of the Agreement shall prevail.

Nuisance # 6: Confidentiality Clause

The customer agrees to keep this agreement confidential. No disclosure of this agreement shall be permitted unless the customer has received written permission from supplier to disclose the agreement.

- Confidentiality issues
 - Open records act conflicts
 - Agreement or contract document
 - Information shared between parties
 - Information held by both parties

Nuisance # 5: Limitation of Liability

- In supplier agreements, limitation of liability clauses will almost always favor the seller/contractor
- Protects the supplier from warranty claims, third party claims, copyright infringements, intellectual property claims, and other liability issues including, but not limited to general liability, workers compensation and other claims.
- The contractual transfer of liability to the school district can result in a contingent liability and future obligation
 - Likely contestable in Oklahoma court, but nonetheless problematic for the school district

Nuisance # 4: Indemnification Clause

- Indemnification and hold harmless
 - Who will be the one left unhurt?
 - To indemnify

“To compensate for damage or loss sustained, expense incurred.” “To guard or secure against anticipated loss; give security against (future damage or liability).”

<http://dictionary.reference.com>

Nuisance # 4: Indemnification Example

Lessee agrees to indemnify, defend, and hold harmless the Lessor against any and all claims for injury or death to persons or loss or damage to property, including claims of employees of the Lessee, or any contractor or subcontractors, arising out of the activities conducted by the Lessee, its agents, members or guests.

Bonus Slide: Clause reading tip

Shortcut to reading the long clauses...

Customer agrees to defend, indemnify and hold harmless contractor and its affiliates, officers, directors, employees, successors, and assigned agents from and against any third party claim, demand or action, and all damages, penalties, costs and expenses arising from or out of Customer's infringement or violation of any intellectual property right or rights of a third party.

Customer agrees to defend the contractor from any third party claim arising from Customer's infringement or violation of any intellectual property right or rights of a third party.

(Credit: Leslie S. Marell, Attorney)

Nuisance # 4: Indemnification

Types of Indemnification Clauses

- General liability
- Copyright infringement
- Broadcast
- Royalties (plays and musicals)
- Patent infringement
- Property damage
- Intellectual property infringement

Nuisance #4: Indemnification problems

- Indemnification and hold harmless clauses
 - Create a contingent liability and future obligation for the board of education
 - Negotiate out if possible
 - Consult with your legal counsel on alternate language

Nuisance # 3: Named Agent

- Law of Agency
- Authority to sign the agreement
 - Is the contractor's representative authorized to enter into the agreement on behalf of the contract?
 - Agent statements or certificates (evaluate your risk)
- School board only
- Superintendent
- Encumbrance clerk

Nuisance # 3: Named Agent

- Other problems & strategies
 - Credit applications
 - Quotation and order confirmations
 - Principals signing agreements
 - Educate contractors
 - School board approval

Nuisance # 2: Governing Laws

- Get this one right!
- State of Oklahoma
- Legal venue (court, city, county, state)
- Mediation and binding arbitration

This agreement shall be construed and made in accordance with the laws of the State of Kansas. Any action or proceedings of any kind or nature with respect to, or rising from, this agreement will, if brought by either party referenced herein, be instituted and tried only by the U.S. District Court District of Kansas, Kansas City, Kansas, and both parties do hereby waive any right to cause such action or proceeding to be instituted or tried elsewhere.

Nuisance # 1: Identity Crisis

What's in a name?

- Use the school district's legal name
- Check the contractor's legal name

This agreement is made by and between Acme Elementary School and ABC Supply Company.



It's the name of a building!

Additional Nuisances

- Data ownership and transfer
- Data privacy terms
 - SaaS Agreements
 - Online subscriptions (student access)
 - FERPA protection
 - COPPA protection
 - CIPA compliance
 - Data privacy terms are often referenced as separate documents and have their own limitations of liability, indemnification and other related terms.

Bonus (Time permitting)

Terminating the agreement

- Breach (for cause)
- Not for cause (I just want out!)
- **Force Majeure**
- Damages
- Severability & unenforceability of terms
- Who pays? Attorney fees?

Conclusion

- **Encourage your stakeholders and administrators to read all agreements, sales quotes, proposals, contracts, and MOUs carefully and thoroughly before signing.**
- **When in doubt, seek legal advice.**