

# NEGOTIATING CONTRACTS FOR GOODS AND SERVICES



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# Today's Roadmap & Objectives

## Agenda

- Drivers of the Deal
- Contract Formation
- Risk Allocation
- Negotiation Strategies



## Objectives

- Identify the drivers and key issues behind your contracts.
- Recognize contract provisions and problematic areas.
- Understand key contract negotiation basics.

*This document is comprised of general information relative to the subject matters discussed herein. It is not intended to give legal advice and does not establish any attorney-client relationship. Entities facing specific issues should seek the assistance of an attorney.*

# Drivers of the Deal

A contract is intended to be the “roadmap” for a business transaction. Building an effective contract requires an understanding of the relationship between the parties, the context of the transaction, the key provisions for the contract, as well as the desired outcome.

**Preliminary issues to consider:**

- **Are we dealing with services or the sale of goods?**
- **Are there any statutory or regulatory provisions that mandate or affect the deal?**
  - Is there a specific form to follow?
  - Are specific provisions mandated or prohibited by law?
- **What are the industry norms for the particular transaction?**
- **Is there a “course of dealing” between the two parties?**
- **What process was used for the transaction?**
  - Were procurement documents (such as an RFP) used?



# Drivers of the Deal – Legal Requirements

## Common Law

- The common law embodied in court decisions remains the primary source of contract law.
- Often used as the “gap filler” when statutory provisions, like the UCC, are silent.

## Statutory Requirements

- Various Federal and State statutes and regulations govern/mandate the form and content of contracts. Examples that School Districts often encounter include:
  - Michigan Revised School Code
  - Federal National School Lunch Program and related federal laws & regulations
  - Uniform Commercial Code (“UCC”)

## Contract Formation – Role of the Statute of Frauds

*The Statute of Frauds (“SOF”) is the exception to the rule that contracts do not need to be in writing to be enforceable.*

- **Purpose is to prevent fraud or the opportunity for fraud.**
- **Applies to only certain types of contracts. A few examples are:**
  - interests in land
  - contracts with performance beyond 1 year
  - sales of goods over \$1,000
  - modifications of contracts without consideration
- **An agreement that is void under the SOF cannot be used for any purpose.**
- ***However, courts can enforce the doctrine of part performance if performance was in reliance on an agreement otherwise subject to the SOF if it would be fraud on performing party.***

# Contract Formation

A contract must include certain elements to be considered valid and enforceable and failure to include the essential elements may run the risk that a court will set aside a potentially advantageous contractual arrangement or complete the terms of the contract with provisions other than those desired by one or more of the parties.

## Four Essential Elements to a Contract

- **Parties competent to contract**
- **Proper subject matter**
- **Mutuality of Agreement (Offer and Acceptance)**
- **Legal Consideration**



# Contract Formation

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To have an effective contract, you should always keep in mind that the purpose of a contract is not to entertain, inform, or convey theories. Rather, the purpose of a contract is to accurately set forth the intent and agreement of the parties to the contract. All contract drafting should keep the “big picture” in mind.

## Keys to an Effective Contract

- **Clarity**
  - Understand the factual basis for the transaction.
  - Understand the legal context of the transaction.
  
- **Proper Form**
  - Not all contracts look alike!
  
- **Proper Structure**
  - Utilize appropriate terms and conditions.

# Contract Basics

Not all contracts will follow exactly the same template or format, but in general, most contracts should contain certain basic provisions.

## The Basic Contract Terms:

- Parties
  - Accuracy of legal names of parties
  - Is the party a valid entity?
- Purpose and Subject Matter (“Recitals”)
- Consideration
  - Invoicing
  - Payment Terms & Disputes
- Representations and Warranties
  - What do they cover?
  - How long do they last?
  - How does the School District enforce?



# Contract Basics

## The Basic Contract Terms (con't):

- Conditions for Performance
- Risk Allocation Provisions – *Where do they intersect?*
  - Insurance
  - Indemnification
  - Limitation of Liability
- Indemnification vs. Limitation of Liability)
- Term and Termination
  - Initial Term and Renewal Term(s)
  - How can the contract be terminated? For Cause? For Convenience?
- Governing Law and Venue
- Boilerplate provisions
- Signatures



## Contract Form

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Many people think or expect that there is a form contract for every type of deal.

**BUT.....THERE ISN'T!**

- “Forms” should be a starting place, not a finish.
- Distinguish from consistent documents in similar circumstances.
- Many contracts include “meaningless boilerplate” language which often compounds interpretation issues.

**Not all language in forms (even the “boilerplate” provisions) should automatically be inserted into each contract, as they may not apply and could even be adverse to the party’s interests.**

# Contract Negotiations – The Method Behind the Madness

## Contract Drafting and Negotiation Basics:

- Understand the parties
- Understand the subject matter
- Understand the purpose for the contract
- Understand the underlying drivers of the contract (was there an RFP etc.)
- Keep drafts non-binding

Negotiations will often focus on these concerns so it is imperative that they be understood and are able to be conveyed to legal counsel.

Even if a form can be found for a particular transaction, it still needs to be carefully reviewed so that the key issues and proper considerations that need to be addressed are completed in the correct manner and context.

# Contract Negotiations – The Method Behind the Madness

## ❑ Preliminary Best Practices for Contract Negotiations

- Use clear, plain and unambiguous language.
- If ambiguous, clarify it. If get push back, may want to rethink transaction.
- Do NOT assume all the “legal stuff” is standard. Make sure you understand it.
- Run down all the “what ifs” for the transaction and particular provisions.
- Anticipate the obvious.
- Use definitions for ease of interpretation and be consistent.
- “Backyard BBQ Test” – How would you explain to your half-drunk neighbor?
- Understand the course of dealings between the parties.
- Boilerplate is not always boilerplate.
- You are responsible for what you sign, even if you do not understand it!

# Contract Negotiations – The Method Behind the Madness

- ❑ **Drafting and Negotiating the Contract**
  - Keep drafts non-binding.
  - Pursue exaggerated interests with caution...may lead to protracted negotiations.
  - Consider confidentiality and non-disclosure agreements.
  
- ❑ **Avoiding the Battle of the Forms**
  - Buyer and Seller's "forms" have competing terms and no signed contract.
  - Common Law - Mirror Image Rule
    - Acceptance must match offer exactly or no contract
  - Common Law – Last Shot Rule
    - If accept by performance, for example, last document will control.

## Contract Negotiations – Rules to Live By

### ❑ Know Your Leverage

- Eating the Elephant vs. Eating the Peanut
- Contractual Right vs. Commercial Relationship

### ❑ Stick to the CRAPP....Really!

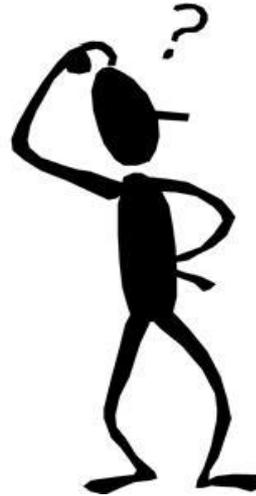
- C = Clear and Concise
- R = Reasonable
- A = Avoid Ambiguity
- P = Practicable
- P = Prophylactic – Anticipate...Think twice draft once



### ❑ Follow The Golden Rule

- Do not ask for something you are not willing to give in return!

## THANK YOU! Any Questions?



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