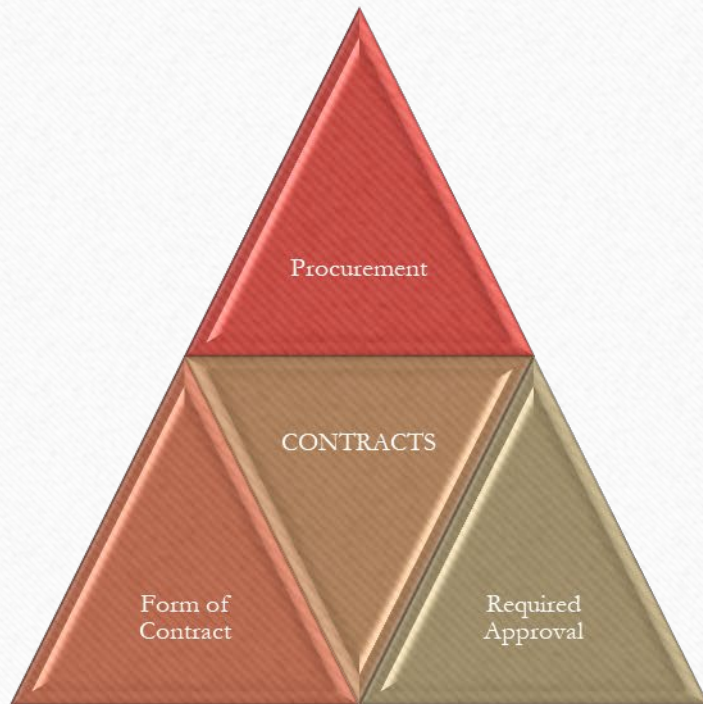


Contract Pitfalls



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Contracts: Three Prong Checklist



For all purchases, ask yourself:

- Is this purchase subject to procurement laws?
- How will I create a binding contractual relationship with the vendor for this purchase, and what is the best type of contract?
- Who must approve this contract?

Today's Focus . . .

How will I create a binding contractual relationship with the vendor for this purchase, and what is the best type of contract?

Facilities Contracts: So much to do, so little time...

- Major construction projects – easier to identify and prepare, review and negotiate the “contract”
- Minor facilities, maintenance and repair contracts typically have less documentation and receive less attention

Why does this matter?

- Some rights and protections do not exist unless stated in a valid, written contract
- Critical rights can be waived or limited by exhibits, fine print, proposal terms
- Certain laws specifically require a written contract signed by the District (i.e. job orders)
- Small dollar contracts can still lead to major risk and damage to the District
- Ignored and omitted terms can leave the District without a satisfactory remedy

These rights must be stated in a contract

- Require vendor to indemnify the District
- Requirement to carry certain insurance
- Right to recover attorney's fees
- Right to assess liquidated damages
- Right to withhold/offset payment for later discovered issues

These rights can be waived/limited by contract terms

- Right to recover consequential damages
- Right to sue or be sued in Texas, using Texas law
- Right to sue without having to first mediate or attend arbitration
- Right to terminate for convenience
- Right to demand warranty repair, replacement, refund
- Right to recover all of your financial losses or damages

What is the “contract?”

- Just an invoice after good/services provided? (Not good)
- A purchase order? (Not good for facilities services or major goods/equipment)
- A PO that incorporates the district’s standard terms and conditions, an RFP or a cooperative? (Better, if for goods. But for facilities services, still not good enough)
- Vendor’s proposal or form of contract signed by the District? (Hmmm, it depends)
- District’s standard “services” contract? (Maybe, but only if it is appropriate for facilities or maintenance related services)

Purchasing Cooperatives

- Myth: If it is a cooperative vendor, I do not need a contract
- Contract #1: District has an Interlocal Contract with cooperative
- Contract #2: Cooperative conducts procurements and awards contracts to vendors that incorporate RFP/CSP terms and conditions
- District selects vendor without having to repeat competitive procurement process, but cooperative is not responsible for the contract between the District and the vendor!

Scope of Services/Work

- Is the scope clearly defined?
- Are deliverables identified, with deadlines/dates?
- Are the standards of care/warranty terms identified?
- Are there specifications that need to be attached or incorporated?

What is missing?

- Does the scope of work trigger requirements for:
 - Prevailing Wages
 - Requirement for Workers Compensation Insurance
 - Requirement for Payment and Performance Bonds
- Do details and specifications need to be incorporated or attached?

Pricing and Compensation

- Does District have enough time to process invoices?
- What type of backup information is required with invoices?
- Are you able to dispute invoices without incurring a penalty or interest?
- Are you able to withhold payment for breach, defective services?

Term and Termination

- Can District terminate/cancel for convenience? Is there a penalty to do so?
- What are the remedies for a breach? (Refund, repair, replacement, damages, attorney's fees)?

Dispute Resolution

- Mediation is non-binding, no obligation to settle
- Arbitration is risky for governmental entities
- Binding arbitration is not subject to appeal (except in rare circumstances)
- Arbitrators need not be lawyers
- Arbitrators may not understand governmental immunity law

Critical Consideration: Insurance

- Does the scope involve “construction services”?
 - If so, Texas law requires all workers to be covered by workers compensation insurance
- Will the vendor have access to any District real or personal property?
 - If so, the vendor should have commercial general liability insurance to cover bodily injury or property damage caused by the vendor

Waiver of Consequential Damages

- Includes loss of use damages, such as the cost for the District to rent substitute facilities or equipment if a defect prevents occupancy
- If consequential damages are waived, rental cost of portable buildings/facilities or rental equipment cannot be recovered from vendor or its insurance company
- Examples: Faulty electrical repair results in fire (need to rent portable classroom and office buildings); defective chiller (need to rent temporary chiller)

Waiver of Consequential Damages

- By law, school districts are immune from paying consequential damages to a vendor (TGC 271.153(b))
- This means a “mutual waiver” only hurts the district and benefits the vendor, the district would never have been liable for them anyway

Indemnity

- Is the vendor requiring the District to indemnify the vendor? Does the vendor have to indemnify the District? What does this even mean?
- Indemnification from third-party claims refers to a contractual obligation where one party (the indemnitor) agrees to protect and compensate another party (the indemnitee) against claims, damages, or losses brought by an external party (the third party)

Indemnity

- What do with a provision that requires the District to indemnify the vendor?
 1. Strike it!
 2. If you can't, insert the phrase "To the extent permitted by law;" or
 3. Ignore it and defend it later.
- Texas governmental entities are immune from indemnity obligations

Indemnity

What if the contract does not require the vendor to indemnify the District?

- The vendor is still liable to the District for breach of contract, but not other types of reimbursements

Example: A faulty electrical repair results in fire. Injured parties sue the school district, and the fire marshal issues a fine to the District. With an indemnity provision, the vendors/vendors insurance company must reimburse the District for all legal costs incurred in dealing with lawsuits and fines.

Choice of Law and Venue

- Require Texas law and District's County for Venue; if not, consult with supervisor/legal
- The law of another state may not recognize governmental immunity the same way as Texas
- Venue of another state/county means a lawsuit must be filed in that state/county

Limitation of Liability

- Limitations of liability caps vendor's **and their insurance company's** damages
- What is the limit? (Examples: amount of contract; \$50,000, limits of insurance)
- Could the worst-case scenario cost District more to repair, replace, correct, recover?
- If liability limited to the amount of insurance coverage, does vendor have enough insurance?

Final Thoughts:

Do not be afraid to ask questions if a provision does not make sense or raises red flags!