


Walter|Haverfield LLP
ATTORNEYS AT LAW

Contracts Have Consequences: The Nuts and Bolts of Vendor Contracts and Common Pitfalls




2016 Capital Conference
November 14, 2016
Mark S. Fusco
Peter T. Zawadski

Walter|Haverfield LLP
ATTORNEYS AT LAW

Introduction


- Results if good practices are followed when administering contracts:
 - Meet the district’s administrative and operational needs.
 - Ensure that district is getting what it wants and when it needs it.
 - Maximize value.
 - Realize cost savings.



Walter|Haverfield LLP
ATTORNEYS AT LAW

Contract Basics

- Corporate powers of the board of education:
 - The board of education of each school district shall be a body politic and corporate, and, as such, **capable of suing and being sued, contracting and being contracted with**, acquiring, holding, possessing, and disposing of real and personal property . . .
- Legally enforceable promises when you have:
 - Offer
 - Acceptance
 - Consideration



Walter|Haverfield
ATTORNEYS AT LAW

Contract Requirements
for School Districts

- Board approval for each contract is necessary
 - No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board - R.C. 3313.33(B).
 - Applicable blanket authorization?
 - Authorization from annual appropriation resolution pursuant to R.C. 3313.18?
- Proper certification:
 - R.C. 5705.41
 - R.C. 5705.412

Walter|Haverfield
ATTORNEYS AT LAW


Qualifying Contract
Under R.C. 5705.412

- A “qualifying contract” is:
 - an agreement for the expenditure of money under which the aggregate payments from the funds included in the district’s five-year forecast will exceed the lesser of:
 - \$500,000; or
 - 1% of the total revenue to be credited in the current fiscal year to the district’s general fund
- Requires certification from the treasurer, board president, superintendent (or appropriate designee)

Walter|Haverfield
ATTORNEYS AT LAW

Penalty Under
Under R.C. 5705.412

- Any officer, employee, or person who knowingly spends or authorizes the expenditure of public money, or the execution of a contract contrary to R.C. 5705.412, or knowingly issues a certificate containing false statements, is jointly or severally liable for the money personally and on his or her bond in an amount not exceeding \$20,000, but no person is liable for good faith mistakes based on reasonable grounds.



Walter|Haverfield LLP
ATTORNEYS AT LAW

Additional Notes on Certification

- 412 certification is not required prior to the board's approval of the contract.
- If a purchase order is accompanied by the R.C. 5705.41 treasurer's certificate, then no additional 412 certification is required.
- Any contract made without certification is void and no payment may be issued.
- Contracts must be in writing

Walter|Haverfield LLP
ATTORNEYS AT LAW

Always Review Board Policies


- Special requirements may pertain to contracts.
- May need to obtain written quotes, offers or bids, even when competitive bidding is not required.
- The dollar threshold for competitive bidding may be less than the state minimum of \$25,000.



Walter|Haverfield LLP
ATTORNEYS AT LAW

Contracts Breed Litigation

- Sources of problems:
 - Unclear or confusing terms.
 - A party tries to change provisions in the middle of the contract's term.
 - Competitive bidding requirements apply.
 - Conflicts of interest.
 - Employee Turnover.



Walter|Haverfield LLP
ATTORNEYS AT LAW

Unclear or Confusing Terms

- Approach:
 - Seek legal counsel.
 - Draft a written, mutually agreed-upon amendment.
 - Draft a memorandum of understanding.

Walter|Haverfield LLP
ATTORNEYS AT LAW


Party Tries to Change Provisions

- To be enforceable, there must be evidence of the modification:
 - Change order?
 - Amendment?
 - Memorandum of understanding?
- If not, intervene and call legal counsel.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Competitive Bidding

- Required before entering into contracts to build, repair, enlarge, improve, or demolish any school building where the cost exceeds \$25,000.
- Reward and execution must take place within 60 days after opening the bids.
- Exceptions may apply.



Walter|Haverfield
ATTORNEYS AT LAW

Exceptions to Competitive Bidding

- Acquisition of computer hardware or software for instructional purposes
- Acquisition of education materials used in teaching
- Purchases made under contracts with the Ohio Department of Administrative Services
- Purchases made under contracts of regional planning commissions or councils of government
- Acquisition of existing school buildings, as the statute applies only to projects that “build, repair, enlarge, [or] improve” a school building

Walter|Haverfield
ATTORNEYS AT LAW

- Purchases made from or under contracts of other political subdivisions
- Purchase of surplus commodities of the federal government; and
- If determined by at least a two-thirds vote of all board members, items available only from a single source and energy conservation measures undertaken pursuant to R.C. 3313.372
- Capital improvements in certain exigent circumstances.



Walter|Haverfield
ATTORNEYS AT LAW

No Unresolved Findings Allowed

- Verify there is no unresolved finding of recovery.
 - This requirement applies if previous year’s contract exceeded \$50,000 in the aggregate, but this contract is less than \$2,500.
 - Use the auditor of state’s website or conduct independent verification.
 - “State funds” includes contribution payments to school districts but does not include federal funds or funds that the state receives from other sources.

Walter|Haverfield
ATTORNEYS AT LAW




Avoid Conflicts of Interest

- No member of the board shall have, directly or indirectly, any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which the person is a member -- R.C. 3313.33.
- Unless all of the following apply:
 - Member is employed by a political subdivision, or agency of the state that is contracting with the board;
 - Member does not participate in discussion; and
 - Member files affidavit of employment status.

Walter|Haverfield
ATTORNEYS AT LAW

Conflicts of Interest (cont'd)

- Other Unlawful Interests:
 - Nepotism
 - Steering contracts to one's self or business.
- Legal issues, including criminal penalties, may result
 - County Corruption Scandal

Walter|Haverfield
ATTORNEYS AT LAW


Employee Turnover

- Resolve potential miscommunication:
 - Anticipate issues.
 - Disclose controlling contract to your successor.
 - Communicate the terms of the contract.
 - Share any change orders, modifications, or new understandings since the start of the contract.
 - If you are the successor, read the substantive terms.
- May have unknowingly changed the terms of the contract or exposed the district to liability.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Contract Analysis


- Define the contract BEFORE agreeing to it:
 - Determine your needs
 - Obtain proposals
 - Select a vendor
 - Consider:
 - Purchase price;
 - Reputation;
 - Quality;
 - School district's needs;
 - Past relationships with vendor; and/or
 - Total long-term cost.
- Negotiate



Walter|Haverfield LLP
ATTORNEYS AT LAW

Draft the Contract

- Ask the basic questions:
 - Who?
 - What?
 - Where?
 - Why?
 - How?
 - When?
- Be patient and anticipate issues.
- Protect the district's interests at all times.
- Avoid Pitfalls



Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #1

Confusing Identity of the Parties

- Be precise about the identity of both parties.
- The board of education should be one party.
- Precisely identify the vendor by legal name.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #2

Improper Indemnification Clauses

- Do not commit to indemnify other entities.
- But, have the vendors indemnify the board.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #3

Unfair Venue Provisions

- Venue is where the lawsuit occurs.
- Identify the county and state of the school district as the venue.
 - Not Franklin or Hamilton County
 - Not New York, California, Texas, Delaware, etc.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #4

Unfair Governing Law Provisions

- What law do you want to be under?
- Make sure that the governing law is Ohio law, not that of another state, or foreign country.
 - No California Law, Canadian Law, or the Laws of Mexico deciding your dispute.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #5

Certification of Insurance Provision

- Specify the type of insurance required.
- Be sure your district is a named insured.
- Verify the insurance coverage.
- Verify any payment and performance bonds.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #6

No Termination Provision

- Give yourself the ability to terminate a contract for any cause, or no cause, with a certain number of days written notice.
- Simple as: “XYZ District reserves the right to terminate this contract with, or without cause, upon provision of thirty (30) days written notice.”

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #7

Scope of Agreement

- Limit the agreement and obligations to what is in writing in the document.
- Include a provision stating that the written document is the entire agreement between both parties, and supersedes any previous written or oral agreements.
- Future amendments to the agreement should be in the form of a “written amendment.”

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #8

Unclear Length of Agreement

- Always state a specific contract term, subject to possible early termination.
- Contract could be deemed perpetual, if you are silent on its length.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #9

Unclear Length of Time to Pay

- State that the district is on a particular payment basis after receipt, not issuance of invoice.
- Negotiate a discount for early full payment.
- Specify particular dates or times.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #10

Unfavorable Renewal Terms

- Avoid automatic renewals.
- Alternatively, consider annual renewal options requiring written consent.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #11
Early Cancellation Penalties

- No benefit.
- Refuse whenever possible.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #12
Vague Substitution Provisions

- Indefinite provisions are dangerous.
 - E.g. “Or similar materials” may be used
- Specify costs, responsibilities, additional approvals, etc.
- Provide an option to refuse.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #13
Incomplete Disclosure of All Costs



- Hidden costs and fees are always dangerous.
- Make sure all charges are included, such as:
 - Delivery
 - Setup/Installation
 - Maintenance
 - Repairs
 - Training and travel
 - Annual fees

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #14

Collateral Damage Provisions

- Do not waive rights to be made whole.
- Insist on a provision that will hold the vendor responsible for damage.



Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #15

Partnership Provisions


- Avoid!
- “Partnership” = additional duties, obligations, and responsibilities.
- Joint ventures and partnerships with private entities are prohibited.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #16

Dispute Resolution Provisions

- Consult legal counsel.
- Generally, avoid automatic mediation and binding arbitration.
 - However, it may be advantageous at times.
- At least include language that the parties will agree on a mediator/arbitrator and that both parties will share equally in the costs.



Walter|Haverfield LLP
ATTORNEYS AT LAW

Pitfall #17


Attorneys' Fees & Costs Provisions

- Call legal counsel if in doubt.
- Don't obligate the district to pay.
- Consider a provision that each party will bear its own costs.
- More risky is a provision that the prevailing party in a lawsuit will recover all legal costs from the losing party.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Personal Guarantee

- Include a provision on obtaining a personal guarantee from the owner if there is a default.
- Goal is to offset the higher costs of a potential substitute.
- Collecting from an LLC is challenging.



Walter|Haverfield LLP
ATTORNEYS AT LAW

Criminal Background Checks

- Will the vendor have direct contact with students?
 - If so, ensure the contractor is responsible for obtaining and paying for criminal background checks.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Additional Provisions

- Vendor must follow board policy, Ohio, and federal law whenever applicable.
- Protect student records and require vendor follows FERPA.
- Include an Equal Employment Opportunity provision.

Walter|Haverfield LLP
ATTORNEYS AT LAW

Contract Enforcement


- Breach of contract claim
- Alternative approaches to recovery:
 - Promissory estoppel
 - Implied contract / Unjust enrichment / Quantum meruit / Quasi-contract
 - School districts are not typically liable under these alternative theories.

Walter|Haverfield LLP
ATTORNEYS AT LAW

EXAMPLES

Walter|Haverfield LLP
ATTORNEYS AT LAW

QUESTIONS?



Mark S. Fusco
mfusco@walterhav.com
Peter T. Zawadski
pzawadski@walterhav.com
