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Twinsburg City School District

TIPS FOR NEGOTIATING BUSINESS CONTRACTS

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MIND THE DETAILS

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ONE-SIDED CONTRACTS—BE WARY

INEVITABLY, STANDARD VENDOR CONTRACTS ARE UNFAIR OR SKEWED TO FAVOR THE VENDOR.

DON'T ACCEPT "STANDARD" VENDOR CONTRACTS UNTIL YOU WEIGH THE RISK AND POTENTIAL COSTS.

INSTEAD, TREAT THEM AS A ONE-SIDED FIRST OFFER AND GO FROM THERE – **THEY ARE ALWAYS NEGOTIABLE!**

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THE ART OF THE CONTRACT

- A major portion of a school district's operating budget is spent on outside goods and services.
- Good contract management skills in the acquisition of equipment, materials, and services is critical to achieve fiscal responsibility, lower operating costs and improve productivity.
- The contracting process requires diligence, savvy, and an eye for detail.
- It is important to develop solid and effective strategies and standards for securing vendor contracts.
- Researching, defining and collecting information about your company's business requirements and about each of your prospective vendors

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SOME PRACTICAL PRE-CONTRACT ADVICE

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BE PREPARED WITH SOME PRACTICAL PRE-CONTRACT PREPARATION ADVICE

- Understand and clearly define the scope of the work and expectations.
- Research prospective vendors. Secure and check references; consult with colleagues.
- Understand the market and comparison shop. Quote multiple vendors.
- Consult purchasing consortium opportunities.
- Develop effective evaluation criteria.
- Don't be afraid to listen and ask the tough questions.
- Allow yourself sufficient time to undertake a thorough process.
- Ask for help when you need it.
- Know your district's purchasing policies and requirements
- Don't settle and be prepared to go elsewhere

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10 TIPS FOR NEGOTIATING VENDOR CONTRACTS

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1. IDENTIFY THE PROPER PARTIES

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BOARD OF EDUCATION AS NAMED PARTY

- The contract should specifically name the "board of education" as the contracting authority.
- Contracts that fail to be approved or ratified by the board are VOID.
- Vendor should also be identified by full legal business name and address.

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2. NAIL DOWN THE MONEY

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NAIL DOWN EVERYTHING RELATED TO MONEY

- Contract-related disputes almost always come down to money, so it's especially important to get this right.
- Know the total contract costs.
- Understand the district's exposure to potential hidden or extra costs associated with additional services not covered by the contract.
- Early termination fees?
- Late fees?
- Escalation/inflation clauses?
  - Can you get out of the contract if cost escalates excessively
- Inflation clauses in relation time for renewal

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3. HOLD HARMLESS AND INDEMNITY PROVISIONS

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OPEN-ENDED INDEMNIFICATION CLAUSES ARE PROHIBITED

- **HOLD HARMLESS** When you agree to hold someone harmless you agree to not hold him or her responsible for liability that may arise out of the transaction.
- **INDEMNIFICATION** When you indemnify someone, you are agreeing to protect him or her from liability or loss that may arise out of the transaction.
- Ohio Attorney General has twice determined that opened ended indemnification and hold harmless clauses are VOID and unenforceable.
- An indemnification clause must have a maximum dollar amount for which the school district can be held accountable.
- The vendor should protect (defend and indemnify) the school if a third party sues the school.

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4. CONFIDENTIALITY & SUNSHINE LAW PROVISIONS

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PROTECT CONFIDENTIAL INFORMATION

- Require vendor to protect nonpublic personal or protected health information in a commercially reasonable manner consistent with applicable federal and Ohio laws.
- Require parties to follow FERPA.
- Absent a statutory exemption, a "public entity cannot enter into enforceable promises of confidentiality regarding public records.
  - Infrastructure Record exceptions
  - Security Records
  - Trade Secrets

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5. INCLUDE BENCHMARKS TO DETERMINE QUALITY OF SERVICE & ACCOUNTABILITY

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THINK THROUGH THE "WHAT IF'S"

- Before you sign a multi-year vendor contract, think through all of the potential challenges that could arise such as: late shipments, poor quality products, changes in offerings or unsatisfactory service.
- Establish goals or benchmarks that you expect your vendor or distributor to achieve for the District.
- Incorporate milestones by which to gauge progress
- Ensure both parties are aligned on what is considered success and gives the District an out if the other party is not holding up their end of the deal.

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6. TERMINATION CLAUSES

EVERY BUSINESS DEAL SHOULD HAVE A PRE-DETERMINED WAY TO END THE AGREEMENT.

THINK WORST CASE SCENARIO.

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PREPARE AN EXIT STRATEGY
A GOOD CONTRACT MAKES CLEAR WHEN THE CONTRACT WILL TERMINATE.

- Include ways to terminate the contract for cause and/or for convenience (without cause).
- Make sure the contract lets you terminate immediately for breach. (Does it have to be a "material" breach?)
- Make sure cure period is short and the contract terminates after the cure period. (Don't agree to a 30-day cure period and then have to give notice again after the cure period and then wait around another 30 days to terminate.)
- Watch for stealth "forever" contracts in which renewals happen automatically unless notice is given within a very narrow window ("between 3 p.m. and 5 p.m. on the day that is thirty-seven days before the end of term").
  - Are there penalties if notice is not timely given?
  - Is renewal on the same terms as the original agreement?

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WATCH FOR AUTOMATIC RENEWAL PROVISIONS

- Watch for stealth forever contracts, in which the renewals happen automatically unless notice is given within a very narrow window ("between 3 p.m. and 5 p.m. on the day that is thirty-seven days before the end of term"),
  - Do you have to give notice if you do not want to renew?
  - Are there penalties if notice is not timely given?
  - Is renewal on the same terms as the original agreement? Are there price increases?
  - Consider adding options to renew on favorable terms.

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Res Judicata

Subject Matter Jurisdiction

affidavit

subpoena

Res Ipsa Loquitur

Motion to Quash

Statute of Limitations

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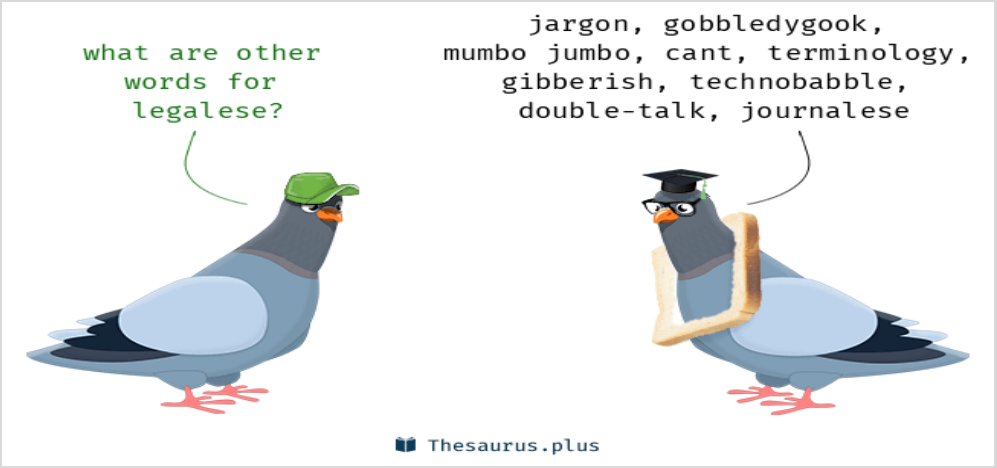
7. USE PLAIN ENGLISH

GET ADVICE ON CLAUSES YOU DON'T UNDERSTAND OR FEEL MAY BE UNFAIR



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8. RESOLUTION OF DISPUTES

NO ONE WANTS TO TALK ABOUT THE BAD STUFF, BUT YOU NEED TO PUT NECESSARY MECHANISMS IN PLACE

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DISPUTES MAY BE RESOLVED BY LITIGATION, MEDIATION, OR ARBITRATION.

- Mediation-binding process where the parties try to resolve their dispute with a mediator's help. Each party pays 1/2 of the mediator's fees, so specify that the mediation will last no more than (X) hours.
- Arbitration is a binding process where the parties tell their stories and the arbitrator makes a ruling. Arbitration can result in a quick decision, but the right to engage in discovery is limited and you may not be able to issue subpoenas or take depositions.
- Determine how you want to deal with resolution of disputes.
- Be careful to specify Ohio courts!
- Be leery of damage limitations and reduced statute of limitations.

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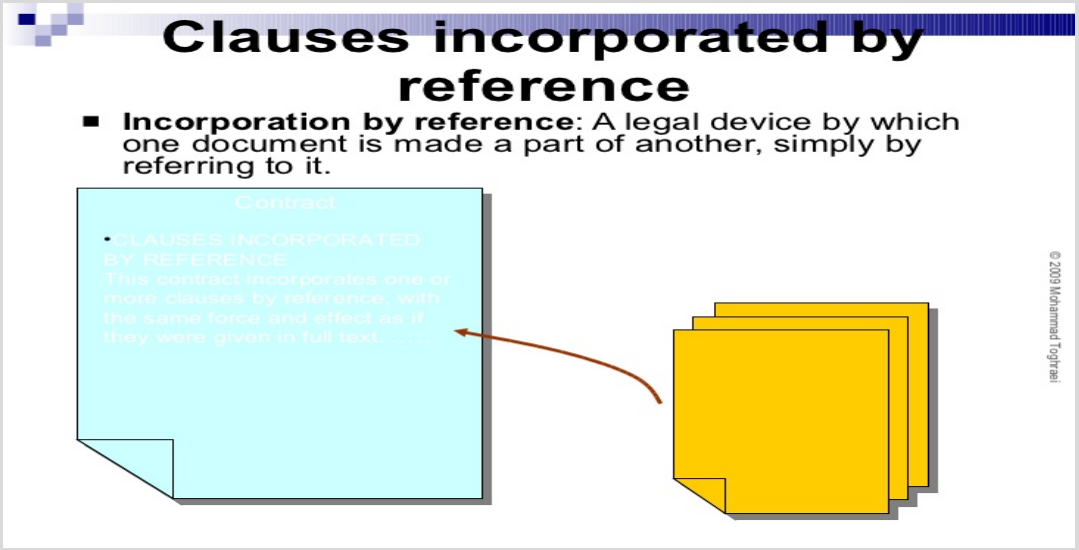
REVIEW ALL DOCUMENTS REFERENCED IN THE CONTRACT

9. INCORPORATED DOCUMENTS & HIDDEN COSTS



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REFERENCES TO OTHER CONTRACTS OR DOCUMENTS

- Be aware of any contract clauses obliging you to accept the terms of a separate policy or other contractual document not available for review at the time of signing the contract. Obtain a copy of the document and review it carefully.
- It's common to see vendors incorporating online documents such as software licenses and minimum equipment requirements into the contract by reference.
  - Find and read the incorporated documents and modify them as necessary — they are just as much a part of the contract as the standard terms and conditions.
  - Look for additional costs in incorporated documents

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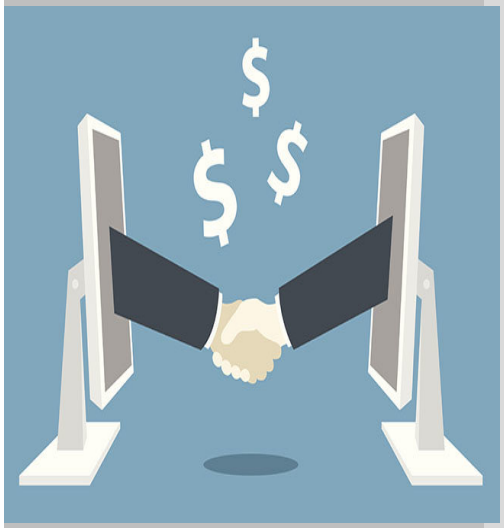

10. TECHNOLOGY CONTRACT CONCERNS

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THE U.S. DEPARTMENT OF EDUCATION'S MODEL TERMS OF SERVICE/PRIVACY POLICY FOR VENDORS REGARDING STUDENT PRIVACY.

1) definition of data – should be broad to ensure as much data as possible is protected;

(2) data de-identification – should protect any PII that may be used for improving services by aggregating data;

(3) marketing/advertising – data should not be used to target students or parents for advertising or marketing;

(4) terms of service/privacy policy modification – users should be notified and consent requested to any modification regarding PII;

(5) data collection – should be limited to only what is necessary to provide these specific services;

(6) data use – should be restricted to only the purposes outlined in the agreement;

(7) data mining – should be prohibited for targeted advertising to students or their parents;

(8) data sharing – acceptable for subcontractors and the like but they should be bound by the same limitations;

(9) data transfer/destruction – provision not required but helps limit the amount of PII available to third parties and prevent improper disclosure;

(10) rights and license to data – maintaining ownership by users allow schools to retain control over PII;

(11) access – FERPA requires parental access to PII; and

(12) security – failure could lead to FERPA violations.

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SOME OTHER TECHNOLOGY CONCERNS

- Access to Data
  - Need to be able to access date in a useable format to the extent it is being stored on vendor devices.
- Exported and reimport concerns
- Software compatibility concerns
- Issues regarding obligations to implement litigation hold
- Stop deletion processes that are set up
- Reliance on vendor for public records request – who's ultimately responsible for storing and responding?
- Cost, ease of management , time frames
- Metadata issues

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RECAP: BEFORE YOU SIGN CAN YOU ANSWER "YES" TO THESE QUESTIONS

1. Are the vendor's obligations clear?
2. Are the school's obligations clear?
3. Are the payment terms clear?
4. Is the length or term clear?
5. Is the insurance adequate? Generally, the school should be named as an additional insured on the vendor's insurance policies.
6. Are termination provisions reasonable?
7. Are there dispute resolution provisions?
8. Is the vendor required to abide by all applicable federal and state laws and regulations?
9. Do you understand the contract in its entirety?

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POST CONTRACT CONSIDERATIONS

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"I AM A PRETTY VERSATILE FOOL WHEN IT COMES TO CONTRACTS, AND BUSINESS AND SUCH THINGS. I HAVE SIGNED A LOT OF CONTRACTS IN MY TIME, AND AT SOMETIME I PROBABLY KNEW WHAT THE CONTRACTS MEANT, BUT SIX MONTHS LATER EVERYTHING HAD GROWN DIM AND I COULD BE *CERTAIN* OF ONLY TWO THINGS, TO WIT: ONE, I DIDN'T SIGN ANY CONTRACT. TWO, THE CONTRACT MEANS THE OPPOSITE OF WHAT IT SAYS."

MARK TWAIN'S NOTEBOOK

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