

Contracts and RFPs: A Roadmap for Review

WASBO Spring Conference

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Presenters:

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Contracting 101

Topics Covered Today:

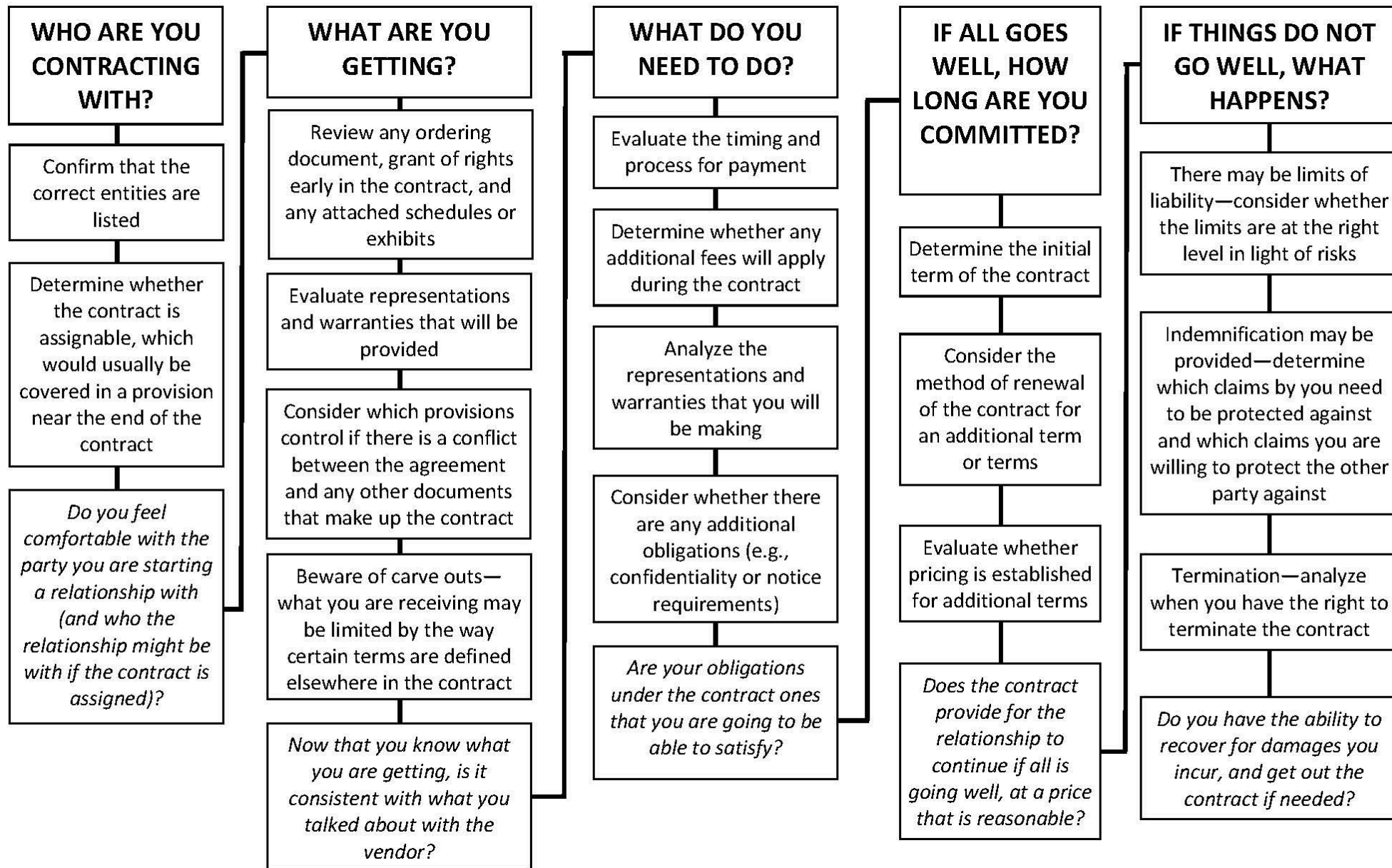
- The One Big Question
- Five Step Roadmap to Contractual Success
- Top 10 List of Risky Provisions
- Impact of the Pandemic
- Liability Waivers
- Utilizing an RFP process

The background features several sets of concentric, curved lines in shades of gray, some solid and some dashed, creating a sense of motion and depth. A blue speech bubble shape is positioned on the left side of the slide.

The One Big Question

- **How does your school district handle its vendor contracts?**

Five Step Roadmap to Contractual Success



Step 1:
Who Are You
Contracting With?

Confirm that the correct entities are listed

Determine whether the contract is assignable—usually covered in a provision near the end of the contract

Do you feel comfortable with the party you are starting a relationship with (and who the relationship might be with if the contract is signed)?

Step 2: What Are You Getting?

Review any ordering document, grant of rights early in the contract, and any attached schedules or exhibits

Evaluate representations and warranties they will be providing

Consider which provisions control if there is a conflict between the contract and any other documents that make up the contract

Beware of carve outs—what you are receiving may be limited by the way certain terms are defined elsewhere in the contract

Now that you know what you are getting, is it consistent with what you talked about with the vendor?

Step 3: What Do You Need To Do?

Evaluate the timing and process for payment

Determine whether any additional fees will apply during the contract

Analyze the representations and warranties that you will be making

Consider whether there are any additional obligations (e.g., confidentiality or notice requirements)

Are your obligations under the contract ones that you are going to be able to satisfy?

Step 4:
If All Goes Well,
How Long Are You
Committed?

Determine the initial term of the contract

Consider the method of renewal of the contract for an additional term or terms

Evaluate whether pricing is established for additional terms

Does the contract provide for the relationship to continue if all is going well, at a price that is reasonable?

Step 5: If Things Do Not Go Well, What Happens?

There may be limits of liability—consider whether the limits are at the right level in light of risk

Indemnification may be provided—determine which claims by you need to be protected against and which claims you are willing to protect the other party against

Termination—analyze when you have the right to terminate the contract

Do you have the ability to recover for damages you incur, and get out of the contract if needed?

Top 10 List of Risky Provisions

10. Finance Charges and Costs of Collection
9. Assignment
8. Exclusivity
7. Representations & Warranties
6. Term
5. Broad Obligations for You
4. Additional Fees
3. Insurance
2. Indemnification
1. Limitation on Liability

Top 10 List of Risky Provisions

1. Limitation on Liability

In the event of any discontinuation of the services provided hereunder, neither Party nor their officers, directors, employees, providers, subcontractors, and agents shall be liable to the other Party for any indirect, special, incidental, consequential, punitive or any other damages, including but not limited to any lost revenue, profits, data or commissions of any kind, whether or not foreseeable, which are claimed to have arisen therefrom (whether or not Party was advised of the possibility of such loss or damage), under any theory of contract, negligence, strict liability or other legal or equitable theory. In no event shall the aggregate liability of Vendor under this Agreement exceed the total amount of fees it has received from Client under this Agreement during the most recent twelve month period.

Top 10 List of Risky Provisions

2. Indemnification

Vendor, on behalf of itself, its contractors and agents (“Vendor Parties”), and subject to the limitations under Section 7.2 agrees to defend, indemnify and hold harmless Client, their directors, officers, employees, agents, subsidiaries, and affiliates, from and against claims, arising out of or with respect to (i) negligence/malpractice by any Vendor Parties (ii) any willful misconduct or bad faith on behalf of any Vendor employee, (iii) Vendor's management of site safety, and (iv) Vendor's regulatory compliance.

Client, on behalf of itself, its contractors and agents (“Client Parties”), and subject to the limitations under Section 7.2 agrees to defend, indemnify and hold harmless Vendor, its directors, officers, employees, agents, subsidiaries, and affiliates, from and against claims, arising out of or with respect to (i) negligence/malpractice by any Client Parties (ii) any willful misconduct or bad faith on behalf of any Client employee, and (iii) Client's regulatory compliance.

Top 10 List of Risky Provisions

3. Insurance

Vendor agrees to maintain, during the term of this Agreement, at its sole cost and expense, comprehensive general liability insurance in the amount of \$3,000,000 per occurrence for bodily injury and for property damage. If requested by Client, Vendor hereby agrees to provide Client with a Certificate of Insurance evidencing the minimum levels of insurance set forth above. Vendor agrees that it will maintain workers' compensation insurance for Vendor employees in an amount not less than the statutory requirements. Vendor agrees to maintain, during the term of this Agreement, at its sole cost and expense, comprehensive professional liability (malpractice) insurance.

Top 10 List of Risky Provisions

4. Additional Fees

Travel Charges- Costs incurred for travel and transportation (airfare, car rental, mileage, etc.), travel time (half-rate), meals and lodging.

Section 3.2 Additional Fees

- **Travel Charges** may apply to locations more than 100 miles from Vendor office when utilizing Vendor employees and subcontractors. **Travel Charges** will be invoiced as they are incurred by Vendor (charges may include mileage, hotel, airfare, meals, car rental, etc.).

Top 10 List of Risky Provisions

5. Board Obligations for You

Article V. Responsibilities of District

District shall be responsible for providing in accordance with the terms and conditions of this Agreement and reasonable business practices, the following services:

- Provide Vendor with all required data to properly populate system database
- Incorrect, incomplete, improperly formatted, and/or late data will require additional processing time and is subject to additional consulting fees.
- Active wellness program support and promotion including correspondence with Vendor about matters that might directly or indirectly affect the success of the wellness program.
- Sufficient private onsite (or near site) space at District and support for Vendor personnel and participants while conducting wellness program services.

Top 10 List of Risky Provisions

6. Term

Unless terminated earlier as provided in this Article IX, this Agreement shall have an initial term of thirty six (36) months from the Service Start Date, and thereafter on each anniversary of the Service Start Date (beginning with the first anniversary) the term of this Agreement shall automatically be extended an additional twelve (12) months unless on or before ninety (90) days immediately preceding any such anniversary date, either Party gives notice to the other that the term shall not be extended beyond the expiration date of the then-current term.

Top 10 List of Risky Provisions

7. Representations and Warranties

Each Party hereby warrants and represents to the other Party that (a) it has all requisite power and authority to execute, deliver and perform this Agreement and to consummate the transactions contemplated hereby, and (b) the execution, delivery or performance of this Agreement will not (i) conflict with or violate any provisions of such Party's organization documents or (ii) violate any statute, injunction or decree of any court or of any public governmental or regulatory body, agency or authority applicable to such Party.

Top 10 List of Risky Provisions

8. Exclusivity

During the term of this Agreement and any extensions thereof, Client hereby appoints Vendor, and Vendor hereby agrees to act as, the exclusive vendor of [applicable] programs, subject to all of the terms and conditions of this Agreement. Client shall not enter into any agreements that would provide for services competing with Vendor during the term of this Agreement without prior written approval of Vendor. Nothing in this Agreement shall prohibit Vendor from entering into agreements with others to provide [applicable] programs, or related services.

Top 10 List of Risky Provisions

9. Assignment

Client shall assign this Agreement to its successor in its entirety as part of a corporate reorganization, consolidation, merger or sale of substantially all of its assets. Any other attempted assignment or delegation, which is in conflict with the foregoing, shall be void and of no force and effect unless Client acquires prior written consent from Vendor.

Top 10 List of Risky Provisions

10. Finance Charges and Costs of Collections

Amounts not paid when due will accrue interest at the lesser of one-and-one-half percent (1.5%) per month or the maximum rate permitted by law. Client will pay the reasonable costs of collection of past due amounts incurred by Vendor.

Impact of the Pandemic

- Highlights the need school districts to closely scrutinize vendor contracts.
- Brings to light the necessity of force majeure provisions.
- Emphasizes the need for strategic planning with respect to vendor relationships.
- Highlights the need for legal review.

Exculpatory
Agreements
(Liability Waivers)

- Difficulties in enforcement
 - Is it worth the paper written on?
- If not, why is there such a push to use them?

Elements of Strong Exculpatory Agreements

- Standalone form
- Must be specific as to the release
 - Should not be overly broad and all inclusive
 - What exactly does the release mean—what claims are being released?
- Opportunity to bargain
- Consider differences in different jurisdictions

Purpose of RFP/RFQ

- **An RFP is a written request to prospective vendors to basically:**
 1. **demonstrate they are qualified to perform the work,**
 2. **provide the project delivery method on a common set of conditions, and**
 3. **competitively bid the cost.**
- **The RFP process introduces competitive bidding on costs of the contract and is the best procedure to get the most for the least cost.**

RFP/RFQ Process

- **Competitive bidding requirements do not apply to school districts.**
 - **HOWEVER**, a school district is legally compelled to follow its own policies with respect to procurement.
 - Be sure to review Board policies and procedures to ensure compliance prior to engagement.
- **Use of RFP/RFQ process to find the right vendor**
- **Pay careful attention to the form of the RFP/RFQ**

RFP/RFQ Process

- Identify up front the information needed to properly evaluate a proposal to provide services to your district.
- Build the RFP with an eye toward the end contract.
- Include required contractual language in the RFP.
- Require bidders to note any objection or exception to your required language.
- Advise bidders that promises made in a response will become a part of the contract.

Sample RFP Provisions

- The responses provided in conjunction with this RFP shall be considered representations of a successful bidder and a material inducement for the district to enter into a contract.
- The district's standard contractual terms and conditions are made a part of this RFP and the bidder shall provide any requested modifications to such terms and conditions in conjunction with the bidder's response.

Narrowing the Candidates

- An interview of the candidates does not happen until after the RFP responses come in
- Therefore, it is critical to ask the right questions in the RFP
- The RFP should provide you with enough information to evaluate sales vs. performance

Interview Process Pre- Selection

- Getting to know your vendor – what are the right questions to ask?
 - There is no standard set of questions – you need to get comfortable with what information is important and the questions to ask to solicit that information.
 - Understand the nature of the project/service.
 - What is the vendor's cost estimating process?
 - What happens if the cost is exceeded?
 - What is the vendor's reputation?

What if We Don't Use an RFP Process?

- Your district may not have many (if any) options in selecting a vendor.
- If that is the case, the negotiation process serves as a substitute for the RFP process.
- While you may not have the negotiation leverage associated with a competitive bid process with many bidders, there is mutual interest in a good contractual relationship.



Questions?

Thank you!

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