Public Contracting - You Agreed to What?!
Joseph J. Langel
2019 MASBO Annual Conference
May 9, 2019

Types of contracts
- Software
- Transportation
- Solar
- Construction
- Lease / Lease-Purchase
- Purchase Agreement (land)
- Professional Services
- Joint Powers Agreements
- Energy Efficiency Contracts
- Yearbook/graduation photos

Terms: Indemnification
- Very common in a variety of contracts
- To indemnify means to protect someone else from monetary damage
- School districts are limited by their statutory authority
- Minn. Stat. § 466.07: “shall indemnify officers and employees”
- Nothing about indemnifying anyone else
- Pursuant to a 1964 opinion by Attorney General Walter Mondale, villages cannot exceed their statutory indemnity authority. The same holds true for school districts.
Terms: Indemnification

- But if so many agreements have an indemnity clause...
- Either eliminate them or qualify them
- Often difficult to eliminate
- Mutual clauses
- Other party does not understand limits

Terms: Indemnification

- If cannot get rid of them, preface with “To the extent allowed by law,”
- Imperfect solution
  - Kicks the can down the road
  - Will not address it unless something bad happens. Then may have to fight about the validity of the term.

Terms: waiver and release

- **Waiver**: relinquishing the right to do something - usually the right to seek compensation or bring a claim
  - In the employment context, certain waivers can be rescinded.
- **Release**: Have a right to enforce against another, but you let it go.
  - Often very broad in scope
  - Done in exchange for consideration (money, waiver of a legal right, etc.)
  - Not enforceable without consideration
  - Can have a major impact on the School District - be very careful.
Terms: dispute resolution

- Not all contracts contain a dispute resolution procedure
- Very common in construction contracts, software, and professional agreements, and real estate contracts
- Venue: where the dispute will be resolved
  - Companies with a national customer base (e.g., software vendors) will often choose their home state
  - Can be difficult to change; stay in MN if you can

- Most common procedures: arbitration and litigation
  - If no provision, default to litigation
  - Arbitration: less formal, supposedly faster and less expensive, no appeal
    - "splitting the baby" problem; few legal rulings
  - Litigation: court system, controlled by procedural rules, right of appeal
    - Lengthy, expensive, but can get pure legal rulings
    - Usually choose litigation; can always agree to arbitrate

Terms: limitations period

- The limitations period is the time in which a party may bring a claim arising out of the agreement.
- Typically governed by statute
  - Contracts: 6 years (Minn. Stat. § 541.05, subd. 1)
  - Improvement to real estate: 2/10 rule (Minn. Stat. § 541.051)
- Can change by contract
  - Ask contracts for construction: boilerplate does not match MN law
- Watch for language that changes state law
Terms: limitations on liability

- Negligence vs. Gross Negligence
  - Normally, everyone is liable for their own negligence
  - Not uncommon for other parties to try to reduce their liability by only accepting liability for their gross negligence
- Gross negligence is rare – higher standard – requires recklessness
  - If they are only liable for their reckless behavior, it means the District is liable for their negligent behavior. Huge difference.
  - Do not agree to gross negligence language

Terms: intellectual property

- Software, computer hardware (laptops, Chromebooks, etc.) and architect contacts.
  - Typically, you receive a license to use the property (software, drawings, etc.) you do not acquire ownership of the property.
  - Software restrictions are usually very rigid; no changes are allowed to the software itself.
  - Contract terms are very difficult to change from the seller’s boleplate; will need a compelling reason to do so, and even then a software company may refuse because it’s not worth it to them.

Terms: compensation

- Terms must be clear
- Watch for:
  - Reimbursable expenses (e.g., construction contract)
  - High interest rates (perhaps substitute Minn. Stat. § 549.09)
  - Short payment periods (need to accommodate Board approval process)
  - Termination fees
  - Undefined or open-ended costs incurred without approval
  - Overage fees (a percentage over actual costs)
Terms: lease purchase agreements

- Statutory requirements (Minn. Stat. § 465.71)
  - Title cannot be held by the School District
  - Non-appropriation clause is required. Terminate at the end of any fiscal year
  - Commonly used for computers and equipment
  - Not all lenders are comfortable with statutory requirements

Terms: energy efficiency contracts

- Statutory requirements (Minn. Stat. § 471.345, subd. 13)
  - Energy conservation measures only, not general maintenance
  - Idea is that energy savings pay for the improvements
  - Watch for "agreed upon" savings
  - No voter approval required
  - 20 year max
  - Procedural requirements must be followed

Bid Law

- Bid law must be followed or contract is void as matter of law
  - Minn. Stat. §§ 471.345 and 123B.52
  - Over $175,000 requires a bid
  - Between $25,000 and $175,000 - can bid or do RFP
  - If do bid, must follow all requirements
  - Do not confuse bidding with seeking proposals - keep terminology clear
  - Bidder mistakes - seek advice of counsel
Questions?