



THE BROWN ACT AND CONTRACTS: HOW IT APPLIES AND WHEN IS A CONTRACT A CONTRACT

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PRESENTED BY:
PATRICK GUNN
JOSHIE COX
BILL MCGUIRE

The views and opinions expressed in this presentation are those of the authors and do not necessarily reflect those of CASBO.

**The Brown Act
and Contracts:
How It Applies and When
Is A Contract A Contract**

CASBO Workshop Series
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Presented by:
Patrick Gunn
Joshie Cox
Bill McGuire

LS

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Presentation Objectives

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Agenda

- The Contract's Purpose
- What is a Contract?
- Negotiating and Drafting
- When is a Contract Formed?
- Standard Clauses
- Types of Contracts
- Contract Management



CONTRACTS: WHAT IS THE PURPOSE?

Contracts

To establish the agreement that the parties have made and to fix their rights and duties in accordance with that agreement.



WHAT IS A CONTRACT?

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Contracts

“A contract is an agreement to do or not to do a certain thing.”
Civil Code section 1549



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What is a Contract?



- Offer/counter offer
- Acceptance/rejection
- Consideration

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Anatomy of a Contract

Preamble
Recitals
Terms
Signatures
Exhibits

Names of Contracts

- Letter of Intent?
- Memorandum of Understanding?
- Purchase Order?
- Voucher?
- Term Sheet?

CONTRACT DRAFTING: Think Back to the Future



What is a Contract? A Bridge of Understanding

“When I use a word”, Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean - neither more nor less.”



What is a Contract? A Bridge of Understanding

From the California Supreme Court: The English language is imprecise - “a rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained”

What is a Contract?

In a dispute, the court’s job will be to determine the mutual, objective intent of the parties when they entered into the contract.

Negotiating and Drafting Contracts



Know your Counterparty

- Licenses required/status
- Financial status
- References
- Google/Social media
- Professional networks



“This Memorandum of Agreement is effective August 1, 2005 by and between the Kremen School of Education and Human Development California State University Fresno (“University”) and participating school districts of the Central Valley of California: . . .”

Bargaining Power



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“IBM may change the terms of this Agreement by giving you three months written notice by regular mail or by sending notification to the email address of the Enterprise Key Contact that you provide on the Master Record. These changes are not retroactive.”

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Read the whole contract!



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Negotiation and Drafting

- Understanding the contract
 - Read the fine print
- Scope of agreement
- Clarity of issues
- Clarity of definitions
- Is this the agreement as you understood it?



4 Point Font

“Any Party’s delay in, or failure of performance under this Agreement will be excused where such delay or failure is caused by an act of nature, fire, acts of war, terrorism, or other catastrophe, work stoppage, direction or effect of an order from a court or a government agency or body, or any other cause beyond a Party’s reasonable control (each such event a “Force Majeure Event”). A Force Majeure Event will not affect the obligation to pay money hereunder.”

Delegation of Authority

Ed Code 17604 - Board may delegate by majority vote to District Superintendent (or to “any persons that he or she may designate”). However, no contract made pursuant to this delegation is valid unless “the same shall have been approved or ratified” by the Board by a motion duly passed and adopted.

Delegation of Authority

- Education Code section 17605 delegation for supplies, equipment and services – governing board may delegate authority to purchase supplies, material and services not in excess of amounts under section 20111 of the Public Contract Code. (\$15,000 for public works projects; the dollar amount is updated annually for equipment, materials, supplies and services per section 20111(d)).
 - \$88,300 effective January 1, 2017



WHEN IS A CONTACT FORMED?

Void Contracts

- No Board Approval
- Super Majority Approval
- Conflict of Interest
 - Gov Code 1090
 - Political Reform Act (FPPC)
 - Common Law





Void Contracts

- Ultra Vires
 - Contrary to law
 - Improper bid award



Public Policy/Constitutional Issues

- Contract cannot bind future Board's legislative decision-making
- Contract cannot bind future budgets (exceptions)
- Duration for work, services or equipment not to exceed 5 years; for materials or supplies not to exceed 3 years (Ed Code 17596)

Standard Contract Clauses



Standard Contract Clauses

Remedies for Default/Breach

- Time to cure
- Termination for non-performance
- Specific performance
- Proof of breach



Standard Contract Clauses

- Non-delegation of rights, duties, and obligations
- Attorneys fee clauses – to use or not to use
- Governing Law/Venue
- Alternative Dispute Resolution (ADR)
- Interpretation

Standard Contract Clauses

- Indemnity/Hold harmless/Defense
- Integration clause
- Binding effect – successors and assignees
- Written modification



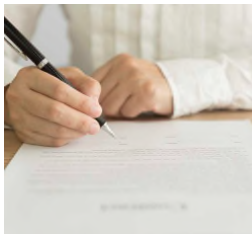
Standard Contract Clauses

- Execution by Facsimile or Counterpart
- Severability
- Authority to Sign
- Board Approval/Ratification

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Types of Contracts



- Procurement Agreements
- Real Property Agreements
- Construction Contracts
- Professional Services Agreements
- Settlement Agreements
- Employment Contracts



For All Agreements

- Consider the purpose.
- What have the parties agreed?
- Are essential terms included clearly?

For All Agreements

- Hope for the best, plan for the worst



Construction Contracts

- Heavily regulated and litigated area of the law
- Utilize owner-friendly agreements
- Coordination between attorneys and architects in developing contracts
- Tailor contract to construction delivery method

Construction Contracts

- Consider current changes in the law (i.e. prequalification of contractors or new DSA requirements)
- Changes to the project
- Time of completion
- Dispute resolution and claims process



Professional Services Agreements

- Consider applicable selection process
- Utilize owner-friendly forms
- Again, hope for the best, plan for the worst

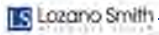
Procurement Agreements

- Purchase Orders
- Contracts
- Verbal Agreements?



Real Property Agreements

- Property Acquisition Agreements
- Property Sale Agreements
- Leases
- Licenses
- Easements



Real Property Agreements

- Process Considerations
- Third Party Approvals
- Financing
- Representations & Warranties



Contract Management



Monitor the Contract!

- Follow through on terms
- Calendar deadlines



Avoiding Litigation

- “Pay me now or pay me later.”
- Simplify when possible
 - Plain English is allowed!
- Eliminate/limit ambiguity
- Review contract – trust but verify
- Vendor’s contract will favor vendor

Don’t assume attorney got it right

The business decision is yours.



Questions



Thank You

- Jay Van Duzer - Accountant, Internal Business Services, Sutter County Superintendent of Schools and Chair of the Sacramento State Purchasing Professional Council
JayV@sutter.k12.ca.us
(530) 822-2918
- Genevieve Gilmore - Senior Buyer, Ventura Unified School District, Assistant Chair of the Southern Section Purchasing Professional Council
Genevieve.Gilmore@venturausd.org
(805) 641-5000 ext. 1253
