

CONTRACTS:
A PRACTICAL GUIDE
FOR DISTRICT ADMINISTRATORS

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I. INTRODUCTION

In California, the Civil Code defines a contract as an agreement to do or not to do a certain thing.¹ Once entered into, a contract gives rise to an obligation or legal duty, enforceable in an action at law.² To be enforceable, a written agreement does not have to be called a contract.³ A contract has been defined as an agreement which includes sufficient consideration to do, or refrain from doing, a particular lawful thing.⁴

An agreement is defined as a manifestation of mutual assent by two or more persons to one another and may or may not have a binding legal effect.⁵ A contract is defined as the total legal obligation resulting from the agreement.⁶ A contract is a promise or set of promises for which the law gives a remedy or the performance of which the law in some way recognizes as a duty.⁷

In common practice, the word “contract” is often used as a synonym for “agreement.” Many times, individuals reach agreements, but whether that agreement results in a legally binding obligation can be complicated. In essence, an agreement is a manifestation of mutual assent on the part of two or more persons. A contract is an agreement which results in a binding legal obligation which can be enforced under the law.

The four basic elements of a contract are (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration.⁸ In addition, there must be at least two parties to a contract, a promisor and a promisee.⁹

II. FORMATION OF CONTRACTS

To form a contract, every contract requires consenting parties.¹⁰ Mutual consent is usually accomplished through an offer and acceptance.¹¹ An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his or her assent to that bargain is invited and will conclude it.¹² A contract is made when one party makes a proposal or offer that is accepted by another party.¹³

¹ Civil Code § 1549.

² Civil Code §§ 1427, 1428.

³ Agosta v. Astor, 120 Cal.App.4th 596, 15 Cal.Rptr.3d 565 (2004).

⁴ 14 Cal.Jur.3d, Contracts, § 1, p. 198-199.

⁵ Uniform Commercial Code § 1201(3).

⁶ Uniform Commercial Code § 1201(11).

⁷ Rest.2d, Contracts, § 1.

⁸ Civil Code § 1550; see, also, Weddington Productions v. Flick, 60 Cal.App.4th 793, 811, 71 Cal.Rptr.2d 265 (1998).

⁹ Rest.2d, Contracts, § 9.

¹⁰ Civil Code §§ 1550, 1565.

¹¹ Summary of California Law (10th Ed.), Contracts, § 117, p. 156 (2005).

¹² Rest.2d, Contracts, § 24; see, also, Donovan v. RRL Corp., 26 Cal.4th 261, 109 Cal.Rptr.2d 807 (2001); City of Moorpark v. Moorpark Unified School District, 54 Cal.3d 921, 1 Cal.Rptr. 896, 901, 71 Ed.Law Rep. 213, 218 (1991).

¹³ Tuso v. Green, 194 Cal. 574 (1924).

Acceptance of an offer is the offeree's manifestation of assent to its terms in the manner invited or required by law.¹⁴ To create a contract, acceptance of an offer must be communicated to the offeror.¹⁵ The acceptance must be by the person to whom the offer was made.¹⁶ Generally, an acceptance once made cannot be revoked.¹⁷

In addition to offer and acceptance, every contract requires consideration.¹⁸ A promise unsupported by consideration has no binding force or effect and is not enforceable at law.¹⁹ It is the benefit that is given or the detriment suffered that is the consideration for the act or promise of another.²⁰ The consideration, if it consists of a benefit, must have some value.²¹

In addition to offer, acceptance, and consideration, the parties must be legally competent to enter into the contract (e.g., eighteen years of age), and the subject matter of the contract must be legal or lawful.²² If any part of a contract is unlawful, the entire contract is void.²³ For example, a contract which includes the payment of interest above legal limits would be unlawful and unenforceable.

III. THE POWER OF SCHOOL DISTRICTS AND COMMUNITY COLLEGE DISTRICTS TO CONTRACT

The Education Code authorizes school districts and community college districts to enter into contracts. The governing board of the district is liable in the name of the district for all debts and contracts made in conformance with law.²⁴

Education Code sections 35160 and 70901 provide school districts and community college districts broad authority to initiate and carry on any program activity or to act in any manner which is not in conflict with, or inconsistent with, or preempted by any law, and which is not in conflict with the purposes for which school districts are established. In addition, the governing board may execute any powers delegated by law to it by delegating to an officer or employee of the district any of those powers or duties. The governing board, however, retains ultimate responsibility over the performance of those powers or duties so delegated.²⁵ Section 35161 states:

¹⁴ In Re First Capital Life Ins. Co., 34 Cal.App.4th 1283, 40 Cal.Rptr.2d 816 (1995).

¹⁵ Commercial Casualty Ins. Co. v. Industrial Accident Comm., 116 Cal.App.2d 901, 254 P.2d 954 (1953).

¹⁶ Ott v. Home Savings & Loan Assoc., 265 F.2d 643 (9th Cir. 1958).

¹⁷ Martyn v. Western Pacific Railroad Co., 21 Cal.App. 589, 132 P. 602 (1913).

¹⁸ Civil Code § 1550; Rest.2d, Contracts, § 71.

¹⁹ Western Lithograph Co. v. Vanomar Producers, 185 Cal. 366, 197 P. 103 (1921); U.S. Ecology Inc. v. State of California, 92 Cal.App.4th 113, 111 Cal.Rptr.2d 689 (2001).

²⁰ Pacific Imperial Co. v. Maxwell, 26 Cal.App. 265, 146 P. 900 (1915).

²¹ See, Civil Code § 1605.

²² See, Civil Code § 1607.

²³ See, Civil Code § 1608.

²⁴ Education Code § 35200.

²⁵ Education Code § 35161.

“The governing board of any school district may execute any powers delegated by law to it or to the district of which it is the governing board, and shall discharge any duty imposed by law upon it or upon the district of which it is the governing board, and may delegate to an officer or employee of the district any of those powers or duties. The governing board, however, retains ultimate responsibility over the performance of those powers or duties so delegated.”

Other provisions of the Education Code authorize districts to delegate authority to agents or employees. Education Code section 17604 states:

“Wherever in this code the power to contract is invested in the governing board of the school district or any member thereof, the power may by a majority vote of the board be delegated to its district superintendent, or to any persons that he or she may designate, or if there be no district superintendent then to any other officer or employee of the district that the board may designate. The delegation of power may be limited as to time, money or subject matter or may be a blanket authorization in advance of its exercise, all as the governing board may direct. However, no contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, the approval or ratification to be evidenced by a motion of the board duly passed and adopted. In the event of malfeasance in office, the school district official invested by the governing board with the power of contract shall be personally liable to the school district employing him or her for any and all moneys of the district paid out as a result of the malfeasance.”

Education Code section 17605 states:

“The governing board by majority vote may adopt a rule, delegating to any officer or employee of the district as the board may designate, the authority to purchase supplies, materials, apparatus, equipment, and services. No rule shall authorize any officer or employee to make any purchases involving an expenditure by the district in excess of the amount specified by Section 20111 of the Public Contract Code. The rule shall prescribe the limits of the delegation as to time, money, and subject matter. All transactions entered in by the officer or employee shall be reviewed by the governing board every 60 days.

“In the event of malfeasance in office, the school district officer or employee invested by the governing board with the

power to contract shall be personally liable for any and all moneys of the district paid out as a result of the malfeasance.”

IV. BASIC TERMS AND CONDITIONS OF CONTRACTS

All contracts should contain certain basic information. This information should include but is not limited to the following:

- The name of the parties.
- The dates or term of the contract.
- The responsibilities and obligations of the parties.
- The terms of payment.
- The procedure for termination of the contract.
- Signature lines for the authorized individuals executing the contract

V. THE MOST COMMON ERRORS IN CONTRACTING

The most common errors in contract preparation include:

- Failure to clearly identify the parties.
- Failure to explain the justification or the reason for the contract.
- Including unacceptable terms and conditions in the contract.
- Failure to clearly define terms and conditions.
- Failure to clarify fictitious names of businesses so as to clearly indicate the responsible parties.
- Referencing attachments and/or exhibits in the contract and then failing to carefully review them and/or include the attachments/exhibits with the contract.
- Making changes to the terms and conditions of the contract without a written amendment executed by the parties to the contract.

VI. CHECKLIST FOR DRAFTING CONTRACTS

A. Identification of the Other Party to the Contract

- Determine if the other party is an individual, sole proprietor, partnership, or corporation.
- If the other party uses a fictitious name, clearly identify the other party by name and acknowledge the fictitious name (i.e., John Smith d/b/a Smith's Repairs).
- Verify that all data of the other party is up to date, including social security number and/or federal identification number, address, and telephone number. Avoid using a post office box number as the address.
- If a contract involves activities requiring additional licensing or permits (i.e., asbestos abatement, transportation services, etc.), include the license number/permit information in the contract.
- The identification of the other party should be consistent throughout the contract.
- Explicitly identify the other party as an "independent contractor" or as an employee of the district. (Before a party is identified as an independent contractor, the district administrator should carefully analyze whether the independent contractor test is met.
See www.irs.gov/businesses/small/article/0,,id=99921,00.html)

B. Dates

- The effective/commencement date should be stated.
- Are the dates throughout the contract consistent as to the commencement date and the termination date?
- If the contract must be completed by a certain date, is that noted as a specific condition within the contract?
- If a renewal, is it being prepared prior to the expiration of the previous contract? **(If not, then a new contract must be completed)**

- If an amendment, is the amendment completed prior to the termination of the contract? **(If not, no amendment is possible.)**
- Are the signatures dated prior to the commencement of the services? **(If not, the other party is working without the benefit of a contract.)**

C. Title of Contract

- If a renewal, amendment or modification, is this indicated on the first page of the contract?
- Are all pages, including attachments, properly numbered for identification and marked with the number of the contract should the papers separate from the contract?

D. Services Requested In Contract

- Are the specific terms of the contract clearly set forth without contradiction as to any other provisions in the contract?
- Does the contract clearly state its justification and purpose within the description of services requested (e.g., the district is unable to provide this service, the district does not have the equipment to provide this service)?
- Is there a need to attach, incorporate and reference other documents to the contract (e.g., the district's request for proposal, the response to the RFP and/or an estimate prepared by the other party)?
- If there is a mandatory time frame for the completion of services, is it clearly stated in the contract?
- Does the term of the contract exceed five years (including renewals, original plus four renewals equals five years)?²⁶
- Does the contract include terms as to the place, time and method of payment?
- Does the contract clearly state any and all per diem expenses or travel expenses?

²⁶ Education Code sections 17596, 81644 limit contracts for services to five years.

- If for rental services of a hotel/motel or restaurant, does the contract prohibit alcoholic beverage charges? If for rental/lodging/catering services, does the contract specify that the charge will be based on a pre-confirmed number or the actual number of attendees?
- If a contract for written, photographic or artistic services, does the contract specify that the services requested are a work for hire and that the district retains any and all copyright interest in the product?

E. Standard Terms and Conditions

- Duties and obligations of the parties
- Term of Contract
- Renewals
- Cost of the Contract
- Compensation/Expenses
- Invoices
- Payment
- Taxes
- Assignment of Antitrust Claims
- Ownership Rights
- Termination of Contract
- Independent Contractor Status
- Audit Provisions
- Warranty
- Compliance with Americans with Disabilities Act
- Assignability and Subcontracting

- Nondiscrimination/Sexual Harassment Clause
- Force Majeure
- Default
- Hold Harmless/ Indemnification Provision
- Insurance
- Patent, Copyright and Trademark Indemnity Amendments/
Modifications
- Integration
- Severability
- Compliance with Law
- Applicable Law

F. Signatures

- If a corporation and an officer cannot sign, is there a certified resolution giving an individual the ability to sign on behalf of the officer and bind the corporation to the contract? (A resolution may not confirm signatory authority of a corporation to one person.)
- Are the titles of the signatories noted?
- Does the district administrator have a written delegation from the Board of Trustees of the district, to sign contracts on behalf of the district?

G. Attachments

- If a renewal, modification or amendment, is the original contract attached?
- Are all exhibits attached to the contract? (If a public works contract, then all bid documents must be attached.)

H. Miscellaneous

- Are all “blank” spaces in the contract completed or marked “not applicable” (i.e., N/A)?
- Are all handwritten changes, amendments, modifications, and insertions initialed by **ALL** signatories? (If two signatures of the other party are required, **both** individuals must initial these items.)
- If a corporate seal is required on any document, the name on the seal must identically match the other party’s name as it appears on the contract.

VII. CONTRACT REVIEW CHECKLIST

A. Initial Review

The district administrator should review the contract in its entirety and ensure that all attachments and exhibits referred to in the contract are attached or available for review. The district administrator should discuss background facts and circumstances with persons or administrators most closely involved in the contract.

B. Identification of the Parties

The district administrator should ensure that the company or agency contracting with the district is properly identified. The district administrator should check to be sure that all abbreviated descriptions of the parties are consistent throughout the contract.

C. Recitals

The district administrator should review the recitals to be sure that they clearly state the intent of the parties and the reasons for entering into the contract. The recitals should state the expectations and understandings of the parties.

D. Term and Termination

The district administrator should ascertain that there is a clear starting and ending date for the contract. The contract should include a no-fault termination clause that allows the district to end the contract by giving written notice (e.g., thirty days’ written notice). The agreement may include a provision for renewal of the contract at the district’s option or by mutual written agreement. Automatic renewals of contracts should be avoided.

The contract should also include clauses that allow termination for breach of the contract, termination upon the happening of an event, termination upon payment of a stipulated amount,

automatic termination at the end of the contract, termination for unsatisfactory performance or default. The termination for default or breach of contract should be mutual and apply to both parties. There should be a procedure for the provision of written notification of default, and there may be a provision which allows either party to cure a breach or default.

E. Consideration

There should be adequate consideration for the contract. The contract should clearly and accurately state the consideration for the contract if cash payments are to be made, and when and where payments are due.

F. Duties and Obligations

The contract should be reviewed to make sure that the parties' obligations under the contract are clear. Each duty and obligation should be clearly stated in the contract. If appropriate, clear time limits should be stated for the performance of duties and obligations. If any obligations are conditional upon a triggering event, that triggering event and the resulting obligation should be clearly stated in the contract. If appropriate, the location of the performance of each duty and obligation should be clearly identified and described with sufficient clarity so that the parties know how each duty and obligation will be performed.

G. Hold Harmless/Indemnification

The contract should include an indemnification clause which indemnifies the district's Board of Trustees, its officers, employees, and agents.

H. Arbitration Clause or Alternative Dispute Resolution Clause

Generally, districts should avoid arbitration clauses or alternative dispute resolution clauses unless it is clearly in the best interest of the district. Districts should have legal counsel review arbitration clauses or alternative dispute resolution clauses to be sure that it is appropriate for that specific contract. Legal counsel should also review the arbitration or alternative dispute resolution clauses to be sure that the particular rules of arbitration are identified clearly and are acceptable to the district.

I. Insurance

The contract should require the other party to obtain insurance. The type of insurance required, the minimum amount of insurance required, the provision of proof of insurance, and the requirement that the insurance be acceptable to the district should be included in the insurance clause. The district administrator should review with the district's risk manager the type of insurance and the minimum amount of insurance required. If appropriate, the other party should be required to name the district as an additional insured with proper endorsements.

J. Miscellaneous Provisions

The contract should be dated and state that it will be governed by California law and that the contract will not be assigned to another company, agency or party without the express written agreement of the district. The contract should state specifically where written notices under the contract should be sent, it should be gender-neutral, and contain a severability clause in case one of the provisions of the contract is found to be void or voidable. The contract should contain a signature line with the appropriate signatures. If the contract is being submitted for a second review as a result of it being returned by the other party with corrections or additions, the district administrator needs to approve them **prior to submission** to the district's Board of Trustees.