

# PROTECTING DISTRICT RESOURCES WHEN NEGOTIATING, REVIEWING, AND DRAFTING CONTRACTS

By: Barry J. Berenberg and  
Elena M. Gallegos



**WALSH GALLEGOS**  
TREVINO RUSSO & KYLE P.C.

500 Marquette Avenue NW, Suite 1310  
Albuquerque, New Mexico 87102  
Phone: 505-243-6864

THE ILLUSTRATED ENGLISH NEWS

## CARBOLIC SMOKE BALL

WILL POSITIVELY CURE

OPHTHALMIA	CATARACT	BRUISES	HEADACHE	INFARCTA	COUGHS
IN THE EYE	IN THE EAR	IN THE NOSE	IN THE THROAT	IN THE LUNGS	IN THE BRONCHI
IN THE STOMACH	IN THE BOWEL	IN THE BLADDER	IN THE SPINE	IN THE JOINTS	IN THE NERVES
IN THE SKIN	IN THE HAIR	IN THE NAILS	IN THE TEETH	IN THE GUMS	IN THE FINGERS
IN THE TOES	IN THE FEET	IN THE HANDS	IN THE WRISTS	IN THE ELBOWS	IN THE SHOULDERS
IN THE NECK	IN THE CHEST	IN THE BACK	IN THE SHOULDERS	IN THE WRISTS	IN THE ELBOWS
IN THE SHOULDERS	IN THE WRISTS	IN THE ELBOWS	IN THE SHOULDERS	IN THE WRISTS	IN THE ELBOWS

At all the Diseases mentioned above proceed from one cause, they can be Cured by this Remedy

### £1000 REWARD

WILL BE PAID BY THE  
CARBOLIC SMOKE BALL CO.

## INFLUENZA,

£1000 IS DEPOSITED

THE CARBOLIC SMOKE BALL,

TESTIMONIALS

THE ORIGINAL OF THIS REMEDY, MAY BE SEEN AT OUR DISCOUNT STORE, 201 BROADWAY, N.Y.

THE CARBOLIC SMOKE BALLS WILL LAST IN A HEALTHY SEASON, MAKING IT THE MOST ECONOMY IN THE WORLD AT THE PRICE—5/6, PER DOZ.

THE CARBOLIC SMOKE BALLS CAN BE OBTAINED, WHEN NOT IN STOCK, FROM ALL DRUGGISTS.

CARBOLIC SMOKE BALL CO., 27, PRINCES ST., HANOVER SQ., LONDON, W.



Contracts 101



## What is a contract?

- ❑ A contract is a legally enforceable promise or set of promises.
- ❑ In order for a promise or set of promises to be legally enforceable, there must be:
  - An offer
  - An acceptance
  - Consideration
  - Mutual assent

New Mexico Uniform Jury Instruction (UJI), Civil, No. 13-801



## What do those elements mean?

- ❑ Offer: a communication of a willingness to enter into a contract.
- ❑ Acceptance: a statement or conduct showing agreement to the terms of the offer.
- ❑ Consideration: any bargained-for benefit, advantage, loss, or detriment that was a reason to enter into the contract.
- ❑ Mutual assent: the parties had the same understanding of the material terms of the agreement.

UJI Nos. 13-805, -807, -814, -816



## In plain language . . . .

A contract is a commitment of District resources that can be enforced by either party through legal proceedings.



## Every contract does two things

- It tells you what each party promises to do
- It tells you what happens when things go wrong



## The District's legal authority

- ❑ A local school board has the power:
  - Except for expenditures of salaries, to contract for the expenditure of money according to the provisions of the Procurement code. NMSA 1978, § 22-5-4(J)
  - To acquire, lease and dispose of property. *Id.* § 22-5-4(D)
  - To employ a local superintendent and fix the superintendent's salary. *Id.* § 22-5-4(B)
  - To accept or reject any charitable gift, grant, devise, or bequest. *Id.* § 22-5-4(L)
  - To approve any educational program that is to be conducted, sponsored, or carried on by a private organization or agency. *Id.* § 22-5-4(N)



## What about employment?

- ❑ The local superintendent shall employ, fix the salaries of, assign, terminate, or discharge all employees of the school district. NMSA 1978, § 22-5-14(B)(3)



## What laws govern contracts?

- Procurement Code
- Uniform Commercial Code (UCC)
  - Sales of goods
  - Security interests
  - Financing
- Contract common law
- Property law
- Construction law
- Alternative dispute resolution
- Others . . . .



## Do contracts have to be in writing?



An Israeli court said these emojis were a sufficient writing to accept a rental contract.

- No!
  - With a few exceptions.
- But government entities cannot be sued on unwritten contracts.



## Types of contracts

- Employment
- Collective Bargaining Agreements
- Transportation
- Property purchase or lease
- Purchase of goods or services
- Construction
- MOU or MOA
- Settlements
- Experts



10.1. Indemnified Claims. Vendor shall defend, hold harmless and indemnify Customer and Customer's Associates (as defined below) against any "Indemnified Claim," meaning any third party claim, suit, or proceeding arising out of, related to, or alleging: ~~(a) direct infringement of any patent, copyright, trade secret, or other intellectual property right by the Software; and (b) unauthorized disclosure or exposure of any Customer Data.~~ Vendor's obligations set forth in ~~this~~ Section 10.1(a) do not apply to the extent that an Indemnified Claim arises out of: (a) Customer's breach of this Agreement; (b) revisions to the Software made without Vendor's written consent, except as authorized in the Documentation; (c) Customer's failure to incorporate Upgrades that would have avoided the alleged infringement, provided Vendor offered such Upgrades without charges not otherwise required pursuant to this Agreement; or (d) Vendor's modification of Software in compliance with specifications provided by Customer; or (e) use of the Software in combination with hardware or software not provided by Vendor, unless the Documentation or Specifications describes the functionality achieved by the combination. ~~in the event of an Indemnified Claim, Vendor may exercise the remedies in Subsections 9.1(b)(i) through 9.1(b)(iii) above, including without limitation its right therein to terminate licenses and require return of the Software.~~ (As used in this Article 10, Customer's "Associates" are its officers, directors, shareholders, parents, subsidiaries, agents, successors, and assigns.)

## Contract Negotiations



## How do you set the terms of a contract?

- Through negotiation
- Which can be delegated
- Following the rules of the Procurement Code, if applicable



## What can be negotiated?

- Anything



## Well, there are some legal exceptions . . .

- ❑ Licensed school instructor contracts: NMAC 6.66.2.8
- ❑ Licensed school administrator contracts: NMAC 6.66.3.8
- ❑ Transportation: NMAC 6.43.2.13, 6.43.2.14
- ❑ But these are "directory," not "mandatory," meaning the statutes do not impose a penalty if you do not follow the contract forms.

*Bd. of Educ. of Alamogordo Pub. Schs. Dist. No. 1 v. Jennings*, 1982-NMCA-135, ¶ 55, 98 N.M. 602.



## . . . and some practical exceptions . . .

- ❑ Large companies often have "take it or leave it" forms.
  - Called "contracts of adhesion."
- ❑ Even small companies may not want to negotiate.





## What are the legal implications of negotiation?

- You make an offer.
- If it is accepted, you have a contract.
  - Remember, it is legally enforceable.
- If it is rejected, you have no contract.
- If a counteroffer is made, you are in negotiations.
- Be careful, a counteroffer is a rejection!
  - If your counteroffer is rejected, the original offer is gone.
  - You can say you will take the original terms, but the other party has no obligation to accept them.



## How do you avoid rejecting an offer with a counteroffer?

- Pose it as a question
- Would you be willing to accept \_\_\_\_\_ ?
- If we offer \_\_\_\_\_, would you accept it?
- If you will accept \_\_\_\_\_, I think my client will agree.



## Open Meetings Act and contracts

- ❑ Contract discussions are subject to the Open Meetings Act . . .
- ❑ . . . Except for:
  - Bargaining strategy preliminary to collective bargaining negotiations.
  - Sole source purchases over \$2,500.
  - Discussion of competitive sealed proposals.
  - Discussion of the purchase, acquisition, or disposal of real property or water rights.
  - Delegated negotiations.
  - Discussion and (possibly) approval of settlements.
- ❑ Final decisions must be made in open session.

WG



Common Contract Terms

WG

## Recitals

- ❑ Identify the purpose of the contract.
  - WHEREAS the Board wants to accomplish some purpose, and
  - WHEREAS the Vendor has something that will help the Board accomplish that purpose,
  - THEREFORE, the Parties agree
- ❑ Helps in contract interpretation if there is ever a dispute.



## Promises and consideration

- ❑ Identify what each party is obligated to do under the contract.
- ❑ Identify what each party has given up in exchange for the obligations.
- ❑ Often included as an attachment, such as a statement of work (SOW).



## Definitions

- Define any terms that have a specialized or uncommon meaning
- Define any terms that you use in an unusual manner
- Define any "shortcut" terms you use in the contract
  - County School District ("District")
  - Acme Widget Co. ("Vendor")
  - (collectively "Parties")
- Avoid ambiguous language
  - Many (most?) lawsuits are about ambiguities
  - Ambiguities allow the introduction of evidence outside of the contract
  - Ambiguities are interpreted against the party that wrote them



## Term and termination

- How long does the contract last?
- Can the contract be extended?
- How can the contract be extended?
- Can either party terminate the contract?
- Can the contract be automatically terminated?
- How can the contract be terminated?



## Payment schedule and penalties

- When are payments due.
  - Periodically.
  - Milestones.
- When are payments late.
- How much interest will be owed.



## Ownership of deliverables

- If the contract is to develop media (e.g. written materials), who owns them?
  - District could have rights only during the term of the contract.
- Each party retains ownership of materials used in development.
- Are copyright, patent, or trademark assignments or transfers required?
- Are there trade secrets that need to be protected?



## Warranties and representations

- ❑ Parties warrant that they have all necessary rights to intellectual property.
- ❑ Disclaimers of warranties:
  - Implied warranties.
  - Express warranties.
- ❑ Make express warranties.



## Indemnification

- ❑ Agree to “hold harmless” the other party from claims.
- ❑ Can cover almost anything.
  - Any type of claim.
  - Can be limited to your own negligence.
  - Monetary damages, costs of litigation, attorney’s fees.
- ❑ Especially important when intellectual property is involved.
- ❑ Don’t waive sovereign immunity . . .
  - . . . although that may not be possible.



## Insurance

- Require insurance coverage
  - General liability
  - Property
  - Automobile
  - Umbrella
  - Worker's compensation
- Require minimum coverage
- Require proof and certificates
- "Additional" or "named" insured



## Appropriations

- Contract may need to be subject to sufficient appropriations.
- Automatically terminates if appropriations are insufficient.
- Identify what the District might be liable for.



## Relationship of parties

- Usually want the vendor to be an independent contractor.
  - Describe the relationship, don't just say "independent contractor."
- Are there additional duties owed to the other party?
  - Protecting confidential information, like FERPA or HIPAA.



## Background checks

- Will the vendor need access to the campus or have contact with students?
- Should the vendor be subject to the same background checks as non-certified employees or volunteers?





## Choice of forum and law

- ❑ Choice of forum
  - In what state or county can you sue or be sued?
  - In what court (state or federal)?
- ❑ Choice of law
  - Which state's laws apply
  - Does not have to be the forum state's
  - Can be overridden by state law if a term is against public policy



## Dispute resolution

- ❑ Before going to court, the contract might require:
  - Discussions
  - Mediation
- ❑ Arbitration provisions
  - Parties agree to arbitrate instead of going to court
  - Supposed to be cheaper and faster
  - You give up rights in exchange



## Integration

- The contract is the final agreement and supersedes and previous agreements.
- Mostly limits the contract to the terms in the document.



## Amendments

- What if either party wants to change some of the terms?
- Require changes to be in writing, signed by both parties.



## Assignment

- Can either party delegate its duties to someone else?
- What happens if a company is bought or merges with another company?



## Survival

- Do any of the terms of the contract survive beyond termination?



## Authority and capacity to contract

- ❑ The person signing the contract has the authority to sign for the entity he/she represents.
- ❑ The contract is entered into at “arms length.”
- ❑ The parties had an opportunity to consult with an attorney and are not relying on what the other party told them.



## Compliance with laws

- ❑ Each party agrees to comply with all applicable laws
  - Procurement Code
  - Worker’s Compensation
  - Civil Rights/Non-Discrimination
  - Insurance
- ❑ Each party agrees to do whatever is necessary to implement the contract
  - For example, contractor agrees to get permits



## Counterparts and execution

- Each party may print and sign their own copy of the contract.
- That is the same as if each party signed the same copy.
- The contract identifies the title of the person who signs.



## Tips

- Read the contract.
- Ask about anything you don't understand.
- Have your attorney review the contract during negotiations and before signing.
- Tell your attorney about any changes you make.
- Don't require arbitration.
- Choose New Mexico law and New Mexico courts.
- You can add terms to statutory contracts, like benefits for a Superintendent.



## Contact

**Barry J. Berenberg**

Email: [bberenberg@wabsa.com](mailto:bberenberg@wabsa.com)

**Elena M. Gallegos**

Email: [egallegos@wabsa.com](mailto:egallegos@wabsa.com)



Walsh Gallegos Treviño Russo & Kyle P.C.  
500 Marquette Avenue NW, Suite 1310  
Albuquerque, New Mexico 87102

Phone: 505-243-6864  
Fax: 505-843-9318  
Web: [www.WalshGallegos.com](http://www.WalshGallegos.com)

The information in this presentation was prepared by Walsh Gallegos Treviño Russo & Kyle P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.

