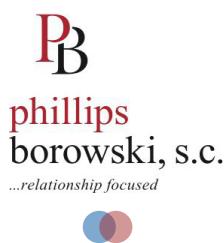




Avoiding Trojan Horses in Contracts: Practical Advice for School Business Managers



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BY Steven M. Schindhelm, Phillips Borowski, S.C.

One of the challenges faced by business managers of school districts is the administration and management of contracts. Business managers must negotiate and approve the terms of contracts ranging from the mundane (e.g., purchase of school supplies, copier lease agreements) to highly specialized (e.g., professional services, real estate agreements, employment contracts). Since the nature of the schools' business is general, school typically do not have the luxury of using their own form agreements to simplify the contracting process. In this context, business managers must make decisions on contract terms that, in many cases, have been prepared by the other party to the contract. But have these contracts been prepared with the best interest of the school districts in mind?

>> WHAT ARE THE RISKS?

The most obvious concern is that the contract may not meet the school district's expectations or the negotiated terms of the deal. When relying on agreements prepared by others, the school district may find its interests compromised by one-sided terms that only protect the other contracting party (e.g., extended rights to cure), by limitations that seem reasonable when entering into the contract but that might have an unintended effect after the passage of time (e.g., automatic renewal provisions, rights to directly market services to school district members). If the contract fails to provide terms that are needed or expected to the school district, the district might not be adequately protected in the event of a dispute or litigation.

Another area of concern is that the school district's flexibility might be impaired by the contract's terms such as restrictions on termination or exclusive rights to provide goods and services. This may limit the school district's ability to take advantage of competitive opportunities to reduce costs or to get out of a contract that no longer serves the best interests of the school district.

>> DO ALL CONTRACTS NEED LEGAL REVIEW?

In an ideal world, school districts would have the resources for legal review of all of its contracts. But since resources are scarce, business managers need to make informed decisions as to when to seek assistance. Whether legal review is needed depends upon a number of factors including: (i) the amount of money that the school district has at risk, (ii) the nature of the relationship with the contractor or vendor, (iii) prior history with the type of agreement or the contractor/vendor, and (iv) the perception of limited legal risk to the school district. But inevitably, budgetary concerns and a sometimes mistaken perception of low risk factor in.

>> WHY FLY SOLO?

In making the decision whether to seek legal assistance, business managers are performing legal "triage" - that is, an assessment of the legal (and business) risks of entering into a particular contract. Business managers may be well-qualified to perform this analysis where the contracts involve: (i) ordinary transactions such as the purchase of basic goods and services, (ii) purchase amounts that are small relative to the school's budget, (iii) limited school obligations beyond payment obligations, and (iv) goods or services that, if they fail, do not have a significant operational impact (e.g., if substitutes are readily available, it is unlikely that much is at risk).

But not all contracts fall within such parameters. Business managers may be presented with form contracts that might not be tailored for the specific deal with the school district. Sometimes contract forms are overly complicated or contain what appear to be unnecessary terms. Further, an otherwise acceptable agreement might contain a "Trojan horse" -- an unexpected term that might unfairly impair the school district's rights.

>> TRIAGE VERSUS FULL LEGAL REVIEW

One cost-effective method for obtaining legal assistance is the request for a limited legal review. In essence, this is a request for counsel to provide a second opinion on the triage you perform or to search for any significant provisions that might be unfair or that might significantly affect the school district's rights. The benefit of this approach is that you obtain some assurance that the school district is not undertaking unwarranted legal risk, but at a greatly reduced cost. Potential disadvantage may be mitigated by an opportunity to consider a more thorough review in the event problems are uncovered.

>> WHEN IS LEGAL REVIEW DESIRABLE?

For risk averse school districts, legal review of most agreements may be desirable. Such review gives the school district greater assurance that its legal agreements have been subjected to a process designed to uncover significant legal risks and to obtain reasonable and fair terms. However, where this option is not feasible or desired, it may be useful to consider some types of agreements and terms that warrant closer inspection and expert assistance. Some that qualify for scrutiny include:

- » specialized areas of law, such as real estate transactions, intellectual property rights (e.g., copyrights, trademarks), and software licenses
- » unique, hazardous or nonstandard service agreements (e.g., medical services, consultants, software hosting, construction or environmental remediation)
- » form agreements of others
- » goods that are costly to replace
- » contracts that place obligations or limitations on school districts (e.g., indemnification provided by the school district, restrictions on warranties)
- » contracts for more than one year or that limit the school district's right to terminate at any time
- » contracts that give the other party special or exclusive rights (limitations on liability, right of first refusal, exclusive rights to sell to the school district, access rights to students and others in the school system, severance or other forms of liquidated damages)

>> SUMMARY

If you have ever experienced being forced to live with a bad contract or unfair business terms, you have an appreciation for the need to approach contracts with an appropriate measure of care and caution. While not every contract will warrant the cost of a detailed legal review, it is important for business managers to perform effective triage to determine when legal review may be necessary or desirable.

Although the benefits of legal review are not always apparent at the time of negotiating business transactions, recognizing when legal review is needed can save school districts a significant amount in litigation costs and avoid the cost and frustration of being locked into an unfavorable contract. Knowing when to bring in legal counsel is important for ensuring that the business of your school district is being protected.

If you have any questions or would like information regarding this article, please contact Steve Schindhelm at Phillips Borowski, S.C., at 262-241-7788.