CONTRACTS
ESSENTIAL TERMS FOR A BASIC CONTRACT

(SPECIALIZED CONTRACTS (CONSTRUCTION, HARDWARE/SOFTWARE LICENSES, REAL PROPERTY, LEASES))
NECESSITATE ADDITIONAL TERMS

1. Scope of Work/Services
2. Compensation and Payment Terms;
3. Term – Binding Successor Boards – Absent specific statutory authority (Examples: 16th Section leases, public financing transactions), no contract can be entered into that binds successor boards.

When is there a “successor board”? Until the term of a majority of the members of the board that entered into the agreement has expired. Generally, 3 years for a 5-member board with one member’s term expiring each year (usually municipal separate school districts), but it may more complicated for other types of boards. Note: Exception is when there is a disposal of surplus property pursuant to MCA 37-7-471 et seq.

Regarding municipal separate school district, 5 members, with term of one expiring each year: See August 1, 1983 AG Opinion to LaVone Warren – a 6-year contract can’t be done because it extends beyond the term of the “present board.” See also May 10, 1995 AG Opinion to C. Benvenuti, regarding an automatic renewal clause. It was opined that no contract or automatic renewal thereof can extend beyond the term of a majority of the present board members and bind successors in office.

Any such contract is voidable at the discretion of a successor board. February 4, 2000 AG Opinion to H. Kirk Moore, Jr.

4. Termination- Ideally, with and without cause termination provisions;
5. Warranties/Representations – any required/desired by contractor/vendor;
6. MS Governing Law; Venue in Local Courts

Illegal Contract Provisions

8. Indemnity Provisions - Prohibited by Miss. Constitution Art. 4, Section 100
9. Payment in Advance, Payment of Taxes, Governing Law of a State Other Than MS: AG June 1, 1984, Opinion W. B. Regan (municipality).
10. May Not Limit the Liability of a Contractor For Its Own Negligence; Public Body May Not Assume Contingent Liability of Another Entity; Cannot Limit the Liability of the Contractor For Its Own Negligence to the Fees Paid by Public Body; Cannot Waive Liability for Consequential, Special, Indirect, Incidental, Punitive or Exemplary Losses. Note: Inserting the Text, “To the Extent Permitted by Applicable
Law” is not prohibited, but has no legal effect: May 28, 1999, AG Opinion to B. Griffith (county)

11. Plans, Specifications and Change Orders: Public body can seek advice and expertise from another, but cannot delegate this authority. Also cannot delegate: Responsibilities Under MCA 31-7-13 (Examples: determining lowest and best bid, determining equivalents, declaring emergencies, authorizing a contract); Rejecting Work on Public Contracts; Cannot Allow Another Party to Control Litigation Arising Under a Public Contract. AG Opinion To Steve Pittman, 2/12/1999 (state, city and county entities for economic development project)

12. Waive Right of Trial By Jury;
13. Resolution of Disputes by Binding Arbitration;
14. Waive Consequential, Special, Punitive or Any Other Type of Damages;
15. Limit Damages to Contract Price or Some Other Amount;
16. Limit the Public Body’s Right to Cancel, Reduce or Set off;
17. Waive Rights or Remedies Under UCC;
18. Lower or Modify the Statute of Limitations for Filing a Claim;
19. Limit Warranties of Merchantability or Fitness For a Particular Purpose. [Items 12 – 19 all covered in AG Opinion to R. Chamberlin, 10/18/2002

Problematic Contract Provisions in Software Licensing Contracts

20. Finding the Contract Terms – may have to go to vendor’s website;
21. District Has an “Unconditional” Obligation to Ensure Software and Other Info/Data of Vendor is Kept Confidential, and to Avoid Breaches/Hacks and Unauthorized Use – revise such that district will take “reasonable” steps to avoid
22. Disclaimer of All Warranties, Including Non-Infringement – insert a representation/warranty of title and intellectual property infringement indemnification for the benefit of district (Be sure the provision is not restricted to the U.S.; also negotiate a right to continue to use the same or a functionally similar product)
23. Waiver of Damages and Limitations of Liability; Disclaimer of Warranties; “AS IS” License;
24. Updating/Changing Contract Terms with No Prior Notice – Get prior written notice of any changes/updates and get a right to terminate the agreement, with pro rata refund if we don’t agree with the changes;
25. Confidentiality Provisions – the agreement is not confidential; have vendor specifically identify and justify any claimed proprietary/trade secret info;
26. Ownership and Use of District Data – district owns its data and vendor can use it solely to provide services under, even if the data is aggregated and de-identified;
27. Seeking an Injunction Without Proving Damages; Posting Bonds, Specific Performance - disallow

MISCELLANEOUS CONTRACT ISSUES

28. Contracts to Lower Interest Rate in 31-7-305 and 31-5-25
31-7-305 - late payments on contracts for goods and services; 31-5-25 - late payments on construction contract payments. Since these sections are primarily for the benefit of the vendor/contractor, it may be waived or reduced by them. A contract that shortens the time or increases the interest rate cannot be entered into. AG Opinion to M. Collins, February 18, 1993 (city)

Only the board can pass on a claim and order it paid. No other official (attorney, administrator or individual board member) can do so. AG Opinion to D. Compton (supervisors), March 23, 1994. If board refuses to pay, vendor has recourse to courts of law and payment of interest under 31-7-301 et seq. AG thinks only those board members who voted against payment would be held personally liable.

29. **Sole Source Purchases/Contracts:** Look at the functionality of the software; not whether it's trademarked or copyrighted. If other software performs essentially the same function; it's not sole source.

30. **Copy of the Contract Must Be in the Minutes or Enough of the Terms and Conditions Must be In the Minutes to Determine the Liabilities and Obligations of the Parties, Without Resorting to Other Evidence**

   **Some Ways to Fix Problematic Contracts/Contracting Issues:**

31. **Ratification of Contracts:** Ratification is the act of adopting or confirming a contract that was invalid at the time of making. If a contract was invalid at the time of making because of an irregularity, but it was a contract that could have lawfully been entered into at the time made and is within the district’s power to make at the time of and in the manner of its ratification, the district will be deemed to have impliedly ratified the contract by accepting and retaining the benefits with full knowledge of all the facts, or the district could expressly ratify a contract not yet performed.

32. **Quantum Meruit Proceeding:** 31-7-57 - Failure to Follow Required Procurement Process: Vendor, in good faith, provided services or commodities, amount claimed is FMV; the item/service purchased is an object that’s authorized by law, vendor had no control of, participation in, or actual knowledge of the error of failure by public body to comply with purchasing law. Vendor’s “good faith” cannot be adjudicated by district, vendor must resort to a court of competent jurisdiction. 1/17/97 AG Opinion to R. Williams.

33. Each Person or Firm Contracting with a Public Body is Responsible to Ensure that the Contract is Legal and Properly Recorded in Minutes of Board. Thompson v Jones County Community Hospital, 352 So.2d 795 (1977)

2017 AIA Construction Documents Have Been Released. Time to Prepare Standard Revisions