



Contracts Fairness is What Both Parties Should Expect

Business, including the business associated with education, often relies upon contracting for delivery of services. School districts may contract for services such as maintenance, food services and security. School districts also enter into lease agreements where they may be either the owner of the property (the landlord) or the occupant of property owned by others (the tenant). Contract values range from a few thousand dollars for a simple purchase order to million dollar service contracts.

When entering into a contract it is important to consider more than just the contract price. You should also assess the risks associated with the contract and ensure the contract language adequately protects the school district by placing responsibility for those risks with the party best able to control them.

When drawing up a contract or thinking of entering into one worded by someone else, take the position that fairness is the least you can expect. If the service that you are soliciting is worth the price the vendor asks, the consideration is fair and reasonable. Once you have determined that the cost is fair, there are two other elements that you should scrutinize for fairness: the indemnity and the insurance agreement.

Indemnity Agreement

The indemnity agreement is sometimes difficult to identify because there is often no subheading or boldface printing to indicate it. Review the contract carefully and locate the part that describes each party's responsibility to the other.

Indemnity agreements tend to be phrased so as to provide ultimate protection to the entity that wrote the contract. It is important that you review the indemnity agreement to ensure that it is fair and reasonable to both parties to the contract.

When a school district is entering into a lease agreement with a landlord, for instance, the landlord will usually design the lease. What follows is an example of an indemnity found in many leases:

“The school district agrees to indemnify and hold harmless the landlord from and against all claims, demands, liabilities, judgements, and losses, including legal costs and expenses arising during the school district's use and occupancy of the premises.”

This clause has the effect of making the school district legally liable for all losses and does not take into consideration that some losses may be due to the negligence of the landlord. To make the agreement fair to both parties, a simple addition to the above indemnity could be:

“excepting always liability arising out of the acts or omissions of the landlord.”

With this change, the school district accepts responsibility for their own negligence but is excluded from being responsible for the negligence of the landlord.

SPP coverage is available for bodily injury or property damage losses for which the school district is legally liable; however, school districts should limit their loss exposure by carefully reviewing or wording their indemnity agreements.

Insurance Agreement

Most contracts, including leases, have a section that relates to insurance. A properly worded insurance clause (or insurance section) in a lease would establish that each party to the contract is responsible for insuring their own property and insuring against their own liability as it relates to the agreement. Additional wordings including waiver-of-subrogation clauses and cross-liability clauses can further limit a school district's potential costs in a claim situation.

In reviewing a contract, ask yourself these questions:

Does the contract clearly outline the insurance requirements of each party?

Ambiguity leads to assumptions, and assumptions can be dangerous. It is wise to seek clarification of any ambiguity then have the contract amended.

Are the insurance requirements fair?

For example, as a tenant with no obligation to maintain building systems, should you agree to a waiver of subrogation in favour of the landlord when it will prevent you (or SPP) from seeking repayment from the landlord for water damage to your contents caused by the landlord's lack of building maintenance? Should you agree to include someone as an Additional Insured without limiting this coverage to liability arising from your own operations?

Do the insurance requirements reflect the respective obligations of the parties as set out in the contract?

It is reasonable in a service contract, such as one with a food service provider, to include an Indemnity/Hold Harmless in favour of the school district. Any indemnity, however, is only as good as the indemnifier's ability to pay. To protect the school district, it is wise to require the contractor to provide evidence they have Commercial General Liability insurance that includes Blanket Contractual Liability, and that shows the school district as an Additional Insured with respect to the contractor's operations.

Are the insurance requirements you impose on others adequate?

For instance, your contract with the above food service provider should require the contractor's liability insurance include Products and Completed Operations coverage so

claims due to such things as foreign objects in food are covered.

If you have questions regarding contract wordings please contact SPP or refer to your school district's secretary-treasurer or risk management designate.

Risk Ed Volume 12 Issue 3, Fall 2007