

CONTRACTS AND MEMORANDUMS OF UNDERSTANDING

General Concepts

Contracts and memorandums of understanding (“MOUs”) must be negotiated, executed and approved in keeping with the Government, Public Contract, and Education Codes, as well as adopted Board Policies and Administrative Regulations. Failure to comply with these requirements may nullify the contract and/or make the person signing the contract personally liable for required payments. They must also address these standards:

The Writing. All public contracts, and each of their terms, must be in writing. There can be no oral contracts or amendments. Therefore, all necessary terms, conditions, requirements, and understandings must be placed in a single writing that is signed only by a duly authorized representative of the District (senior District officials only) before it is presented to the Board for final approval. After approval by the Board, there can be no modifications/changes to the contract unless those changes are also approved by the Board. Any addendums or extensions should be physically attached to the original contract and kept in the same file/location.

The Parties. The parties to the agreement must be identified by their legal names and capacities. The District cannot contract with a non-existent entity (i.e., if “Joe’s Widgets” or the “Football Booster Club” is not a corporation or partnership, **it doesn’t legally exist and you cannot contract with it**; you must contract with “Joe” or the “Boosters” individually). When in doubt, check the Secretary of State’s website.

The Contract Period. The contract term must be objectively specified (“x date to y date;” “one year from the date of execution,” etc.). Most contracts involving financial payments cannot legally exceed one fiscal year, although they may contain automatic renewal clauses.

Cancellation/Termination. The agreement should contain a mutual/unilateral cancellation clause (30/60 days notice) intended to address situations where there is general dissatisfaction with the quality or performance. It should also contain an immediate termination clause allowing the District to immediately/promptly end the relationship upon a determination of fraud or issues of safety or health are identified.

Specifications. The agreement must contain a clear understanding of the parties’ contractual obligations, which may involve issues of quantity, quality (objective description of quality, using “terms of trade” or product names), time deadlines/”time of the essence,” the location of where the products/services are to be provided, and any other specifications for which the vendor/other party will be held accountable. You cannot hold somewhat liable if you have not clearly told them what their obligations are under the contract. When in doubt, be over inclusive.

Indemnity/Insurance. Indemnity and insurance clauses should follow two standards: (a) when you’re paying for goods or services (legal counsel, accountants, IT, construction, products, etc), the other party properly assumes all risks of harm or damage arising from the goods or services for which it is being paid; **and** (b) the general rule is “my fault, my problem; your fault, your problem.” Insurance provisions then follow these same indemnity standards, with the coverage “rights” based on the type of contract (i.e., professional service agreements require both CGL and professional liability/errors and omissions coverage; standard contracts only require CGL). **See sample indemnity/insurance clause provisions on next tab. Absent the JPA’s advance consent,** it will not honor indemnity/insurance clauses (1) extending coverage to a third party for its own, separate negligent acts, or (2) that waive the JPA’s right of subrogation against the other party.

Contract vs. MOU. MOUs are a special type of contract that are subject to the same execution and approval requirements as other contracts, but have two primary differences: (1) they are almost always between two or more public agencies, who use the agreement to create joint ventures or shared services intended to save public funds or serve the public good; and (2) they involve duties not primarily focused on monetary payments (i.e., joint services, as opposed to a “paid for” service). MOUs should never be entered into with “for profit” companies; they may be entered into with “not for profit” companies if the sole purpose is for the “public good.”