

B22 — The Fundamentals of Contracts and Competitive Bidding

April 27, 2022



THRUN
LAW FIRM, P.C.

Caution

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.
- Future legal developments may affect these topics.
- These slides and other materials are intended for use in conjunction with the oral presentation.
- This document may not be reproduced or redistributed, in whole or in part, without the express written permission of Thrun Law Firm, P.C.



Contract Formation



What Is a Contract?

“An agreement between 2 or more parties creating obligations that are enforceable or otherwise recognizable at law.”

- Offer
- Acceptance
- Consideration



Black's Law Dictionary (10th ed)



Formation

- Mutual Assent + Consideration = Contract
- Mutual Assent:
 - (1) Offer
 - (2) Acceptance
- Both require objective manifestations of a willingness to enter into an agreement
 - I.e., a joke could be binding if a third party would reasonably believe the offeror/offeree intended to create a contract



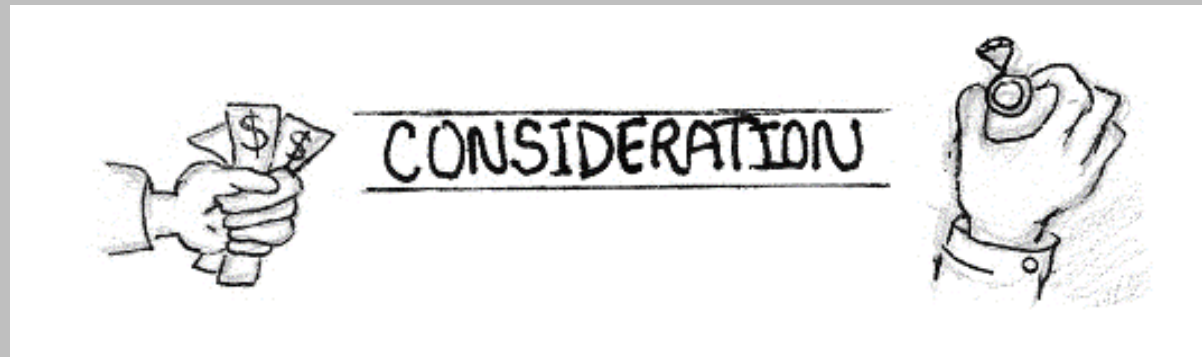
Consideration

- Consideration exists when there is a bargained-for exchange; there must be a **benefit** on one side, or a **detriment** suffered, or a **service** done on the other

Gen Motors Corp v Dep't of Treasury (Mich Supreme Ct, 2002)

- Not Consideration:

- Promise to make a gift
- Illusory promises
- Past consideration



Contract Formation

- Potentially enforceable verbal agreements
- Incorporated contract documents
- Contract signing may be a formality
- “Mirror Image” rule
 - RFP may not govern contract



Contract Negotiations

- If a contract is for services:
 - Must contain all essential terms (parties, subject, price, and quantity)
- If a contract is for goods:
 - Only needs to contain quantity
 - Uniform Commercial Code offers “gap-filler” provisions that will apply



Does it Need to be in Writing?

- “Statute of Frauds”
- Contracts must be in writing if:
 - Cannot be completed within 1 year
 - Goods at a price of \$1,000 or more
 - Transferring interest in real property
- Writing must:
 - (1) be signed by the party against whom enforcement is sought and
 - (2) contain the essential elements of the deal.



MCL 440.2201; MCL 566.106; and MCL 566.132
Adell Broad Corp v Cablevision Indus (ED Mich, 1994); MCL 450.841



Parol Evidence Rule

- Prevents a party from presenting outside evidence of a prior or contemporaneous agreement that contradicts the terms of the contract as written
- Best Practice: ensure that everything desired is included in the contract



Click-through or Clickwrap Agreements

- Contracts for software terms require:
(1) reasonable notice of terms and (2) a manifestation of assent to be bound
 - Pressing “I accept terms and conditions” creates assent
 - Must be conspicuous enough for proper notice of terms



Hancock v AT&T Co (CA 10, 2012)



Board Authorization

A school district/ISD “***may** enter into agreements, contracts, or other cooperative arrangements with other entities, public or private, ... as part of performing the functions of the school district.*”

MCL 380.11a(4)

MCL 380.601a(2)



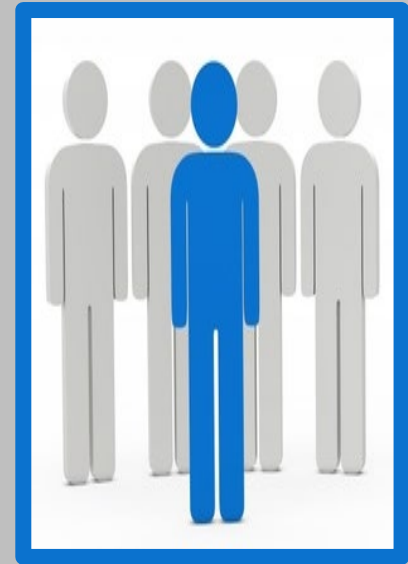
Johnson v Menominee (Mich App, 1988)

- “[T]hose dealing with public officials must take notice of the powers of the officials.”
- “If the officer’s act is beyond the limits of his or her authority, the municipality [or school district] is not bound.”



Individual Authorization

- Approval from board
- Authority of individual signatories
 - Board policy
 - Direct approval (i.e., resolution, minutes)
- No implied authority



Common Types of Contracts

- *Professional services*
 - Attorneys, accountants, consultants
- *Non-instructional services*
 - Custodial, transportation, food service
- *Construction*
 - Architect, CM, Contractor
- *Technology*
 - Software agreements



Competitive Bidding



Do I Need to Bid?

- At or over bid threshold (currently \$26,046) AND:
 - *Purchases of materials, supplies, and equipment*
 - MCL 380.1274
 - Labor and materials for construction, addition, repair, or renovation of a *school building*
 - MCL 380.1267
 - Energy improvement project under MCL 380.1274a
 - Federal projects/board policy



Exceptions?

- Repairs normally performed by school employees
- Emergency repairs
- DTMB bulk purchasing program – MiDEAL
- Food less than \$100,000

But was bidding *really* required?

- Service contracts
- Not a “school building”



Purchasing

- Very different than construction bidding
- The Revised School Code requires each school to adopt a purchasing policy . . . and follow it
- Discretionary authority to craft bid process – use it!
 - Soliciting quotes from known vendors
 - What about bid cooperatives?

MCL 380.1274



Construction

- Competitive bidding process identified in Revised School Code
 - Bid advertisement in local newspaper and state-designated website (SIGMA)
 - Bid deadline
 - Late bids cannot be accepted
 - Date and time of bid opening
 - Familial disclosure affidavit
 - 5% bid security
 - Board awards bids

MCL 380.1267



Who Gets the Contract?

- “It is incumbent upon the board to determine the abilities of any prospective contractor and make the award, if it makes any at all, to ***the lowest responsible bidder.***”
OAG, 1959-1960, No. 3303
- “To invite competition, guard against favoritism and extravagance, and to secure the best work at the lowest price practicable.” *JJ Zayti Trucking v Detroit*, 359 NW2d 201 (Mich Ct App 1984)
- Michigan-based business preference
 - Best practice: identify preference amount in policy (e.g., 10%)



When is a Bidder “Non-Responsible”?

- No legal authority
- Good bets:
 - Past prior experience
 - Other schools’ past experience
 - Inadequate capitalization
 - New company
 - Recommendations of consultants



Other Bidding Issues

- Prequalification and disappointed bidders
- Post-bid negotiation (cardinal change rule)
- Disaggregating projects to avoid bid threshold



Bad Contract Language



Auto-Renewal

“This agreement will be automatically renewed for successive five year periods, unless either party serves written notice upon the other party of its intention to cancel at least 90 days, but not more than 120 days, before the end of the term.”

Bad Result: contract renews for 5 years if school does not cancel within 30-day window



Hidden Fees

“We may charge you and you agree to pay, a one-time processing fee of \$75,000. You authorize us to adjust the lease payment by up to 15% if the cost of Equipment differs from the Supplier’s estimate.”



Bad Result: School subject to unilateral increases or acceleration clause



Personal Guarantee

“I hereby unconditionally guarantee the prompt payment and performance of all the Lessee’s [School District] obligations stated above.”

Bad Result: School official signing lease is *personally liable* for lease payments



Indemnification/Hold Harmless

“The School District shall indemnify and hold Contractor harmless from any and all claims or causes of action by any person or entity against the Contractor which may arise out of this contract.”

Bad Result: Revised School Code does *not* authorize school to indemnify third parties



Liability Limitation

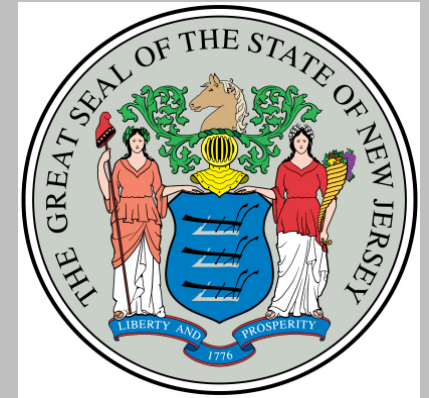
“In no event shall the Vendor be liable to the customer for any cause of action in contract, tort, or strict liability.”

Bad Result: Other party disclaims any and all future liability related to contract



Forum and Venue

“This agreement is governed by the laws of the State of New Jersey. I consent to the jurisdiction of any state or federal court located within New Jersey.”



Bad Result: Contract litigation takes place outside of Michigan



Hypos



Question

Feeling terrible that he forgot his birthday, Fredric promises to give his brother, Zack, a golden helicopter for Christmas. Because Zack has a lot of experience with Fredric's empty promises, Zack makes Fredric put his promise in writing, and they both sign it.

On Christmas day, Zack opens Fredric's gift and, instead of a golden helicopter, finds an 8 inch centipede. In an attempt to teach Fredric a lesson, Zack sues Fredric for breach of contract for breaking his promise. Will Zack be successful?



Answer

No.

A contract requires an offer, acceptance, and consideration. Here, the promise is one-sided, as Zack has not promised to pay or do anything in exchange for the gift. There is no “bargained-for consideration” here, and the promise is not enforceable.



Question

Fredric is the vice president of the school board. Upon hearing from Adam Sandler about how disgusting the school lunches are, Fredric acts on behalf of the school board and contracts with Ruth's Chris Steak House to cater ribeyes to the students daily.

A month into this arrangement, Ruth's Chris sends Fredric and the school board a bill for \$306,000. Is the school board required to pay this amount?



Answer

No.

Absent a specific delegation of authority by the school board to act as the representative of the board for a particular purpose, individual board members have no greater rights or authority than any other qualified voter in the district. No contract was formed because Fredric did not have the authority to enter into such an agreement.



Question

Fredricsville Community Schools issues an RFP soliciting bids to construct a new pole barn. The RFP contains lots of school-favorable terms and conditions.

Nose-Picking General Contractors, Inc. submits the low bid on the back of a paper napkin, identifying all material terms, including contract price and time for completion. At the next regular meeting, the Board accepts the bid. Later, after discovering that Nose-Picking is too aptly named and is owned, operated, and staffed by a bunch of no-good nose pickers, the Board rescinds its acceptance of the bid and awards to the next lowest bidder. A final, written AIA contract was never approved or signed.

Nose-Picking sues Fredricsville, asserting that the school breached a contract by rescinding its bid award and awarding to another contractor. Will Nose-Picking be successful?



Answer

Yes.

A contract was formed when the Board accepted the bid. The RFP was a request for an offer, the bid was an offer, and Board approval was an acceptance of the offer.

Garrison Co v Bishop Int'l Airport Auth, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2010 (Docket No. 293415)

But . . . what are the contract terms? What if the RFP said that no contract will exist until the Board approves a final, written AIA contract and authorizes the superintendent to sign it?



Questions



Fredric G. Heidemann

(517) 374-4535

fheidemann@thrunlaw.com

