Browne Jacobson

Education sector contracts – top 10 tips on how to get it right

20 November 2023

Contract disputes can be time consuming, stressful and expensive. For our Education clients, we see a lot of contractual disputes relating to catering, cleaning, energy and IT services, as well as the provision of school uniforms and other products, many of which could have been prevented by a little pre-contract planning.

Effective contract management can ensure that the parties minimise risks and avoid disputes arising. We have set out below our top tips for avoiding contract disputes in the education sector.

1. Do your homework

Do you know who are entering into a contract with? Before entering into a contract, you should do your due diligence and check that the other party is legitimate and has good financial standing.

You can do a few simple checks to put your mind at rest, as follows:

1. If the supplier is a company, do a quick search on Companies House to check that the company exists on the Register. You will be able to see who the directors and shareholders of the company are; the company's registered office address; the company's filed accounts and, importantly, whether any strike off/insolvency action has been taken against the company;
2. If the supplier is an individual or sole trader, you may be able to find some useful information about them on the internet. You can also check the Individual Insolvency Register which will contain details of any bankruptcies, debt relief orders and individual voluntary arrangements;
3. You can also undertake credit searches. There are many providers online.

2. Get it in writing

Once you have decided on your supplier, it is vital that the parties conclude the contract in writing before services are provided (after having fully considered the terms) as it will govern the relationship between you and the supplier for the entire duration of the contract.

You should question if the terms reflect exactly what has been agreed between the parties. Spell out clearly what processes will be used for monitoring and reviewing performance and what recourse there should be if the agreed standards are not met.

Unfortunately, we see too many situations where the contract does not reflect what was envisaged by the parties and disputes arise as to the interpretation of the terms. If you are ever in doubt, you should seek legal advice.

3. Understand the obligations of both parties

In contracts, each party exchanges something of value, whether it be a product, services or money. One common pitfall is that the parties do not know what is expected of them. That is usually because either; 1) there is no written contract (verbal agreements are still legally binding); 2) the contract does not set out clearly what those obligations are; or 3) the contract does set out the obligations clearly, but the parties have failed to review those terms before entering into the contract. It is easy to see how those circumstances could be avoided.

Before entering into the contract, both parties should know exactly what is expected of them. For example, if you are the paying party you must check that you are able to meet the payment terms. If you fail to meet the payment terms, it is likely that the other party will seek to charge interest. That may be statutory or contractual interest already. Failure to meet the payment deadlines may also lead to the contract being terminated and will increase the risk of debt recovery action being taken against you.

It is also important to note that often contracts refer to terms and conditions which are not contained within the main contract document but have still been incorporated into the agreement. For example, the contract may ask you to confirm that you have read and understood the terms and conditions contained on the supplier's website. This is often missed and can be avoided by ensuring that you read the entire contract, including the small print, to ensure that you have considered all the terms before agreeing/signing.

4. Consider the length of the contract

Many disputes arise where a party has wrongfully terminated or seeks to terminate a contract prior to the expiry of the term and there is no contractual right to do so. Therefore, you must ensure that you understand how long the contract is effective for and when and in what circumstances you can terminate the contract.

If you want to define a period, or term, where an agreement will be effective, you need to use a duration clause. In addition to defining the length of the contract, these clauses also describe circumstances for early termination of the effective period. You may also want to ensure that there are no automatic renewal terms within the contract. We see many instances where a contract automatically renews for 1, 2, 3 or 5 years if you fail to give notice before the end of the initial term.

If you are currently a party to a fixed term contract and you are preparing to terminate, you must ensure that you can do so before the expiry of the term. If you wrongly terminate, the other party may pursue for breach of contract and damages.

5. Exclusion/limitation of liability

Exclusion clauses and limitation of liability clauses (i.e. caps on the losses you can recover) are important features of many contracts. Drafted correctly, they allow parties at the outset to balance risk and limit or exclude the liability of the defaulting party. Liability can arise in a number of ways from; 1) a breach of contract; 2) negligence; 3) misrepresentations; and 4) infringement of IP rights. A limitation of liability clause serves to limit the amount of compensation one party can recover from the other. It is important to check for these clauses, as it may impact on the amount that you can claim. However, despite their importance and widespread use, there are not always enforceable. You should take legal advice if you are unsure.

6. Authority

You must ensure that there are clear guidelines internally as to who has authority to agree contracts, particularly those relating to energy, IT and photocopying. Often, we see issues where staff have entered into contracts and, technically, they don't have authority to do so (but it can still bind the school into the contract because of the apparent authority). When this situation arises, the school often seeks to terminate the contract (because they do not need the goods and/or services) and we have advised on termination and/or negotiated a settlement in order to bring the contract to an end. This can be a costly exercise for the school, which can be avoided by having clear internal structures.

The authority point is also relevant when using energy brokers. Often energy brokers are instructed to save the school time and costs in negotiating energy contracts but the brokers themselves frequently have very widely drafted letters of authority. We can help to draft very strict letters of authority so that the extent of the broker's remit to enter into contracts is clearly detailed.

7. Monitor progress and address any issues

Once your project is up and running (with a contract in place), consider appointing a key person as your 'contract compliance officer'. This person should be familiar with the contract and should carry out regular checks to ensure the terms of the contract are being followed, and so that any issues are picked up quickly.

Failure to address issues promptly can result in further issues for the party trying to ensure performance of the contract. For example, if a project is allowed to continue in contradiction of the contract's terms or if there is a delay in acting upon your contractor's breach, this continuance/delay may prejudice or even prevent your ability to do something about the issue when it is picked up.

If there is slippage, keep on top of it. If there are issues, make sure they are documented and dealt with. Again, the documentation could prove crucial in establishing liability in any future dispute (as discussed further below).

8. Keep records – checklist

1. Gather and keep evidence of all communication with the other party about the termination or grounds for it;
2. Document the grounds for termination and any chance given to cure a breach; and
3. Retain proof of how and when you gave notice of termination (if you have terminated informally, confirm the termination in writing as soon as possible).

9. Consider dispute resolution procedure

Most contracts contain a dispute resolution clause, which is often found towards the end of the contract (and forgotten about!). These clauses have profound implications for how any dispute is resolved and the contractual rights and obligations enforced.

Make sure that the dispute resolution clause is clear, concise and workable. If it is not, negotiate those terms with the other party before entering into the contract. The courts are generally keen to uphold terms the parties have agreed, including agreements as to the method of dispute resolution.

The dispute resolution clause usually specifies how the disputes are to be resolved and this may include; 1) a series of escalating stages through which the parties will attempt to resolve the dispute i.e. a meeting with the manager, and then escalation to a senior manager; 2) negotiation; 3) mediation; 4) arbitration; or 5) litigation. Generally, which ever procedure is specified in the contract, the parties are encouraged to follow it. This saves time and avoids incurring unnecessary legal costs. Whether or not you are bound to follow all steps of the agreed dispute resolution procedure very much depends on the wording of the clause. If you do have a dispute and you are unsure how to proceed, take legal advice.

10. Exit strategy

A contract should ideally allow for early termination (especially from the user's point of view), by providing break clauses under which the contract may be ended. In addition, there should be provisions relating to early termination in the case of a breach e.g. where the supplier has failed to supply the services within the specified timeframe agreed.

There are many other reasons why a party may want to terminate a contract. For example:

- The contract is no longer profitable;
- The customer no longer needs the goods or services;
- The other party is insolvent; and/or
- One party has been bought by a competitor.

In light of the above, you may also want to include terms that reflect those circumstances.

You should think carefully about the practical consequences of termination as it could cause disruption and have an impact upon your budgets. In addition, you need to make sure that you have the right to terminate and that notice of termination is given in accordance with the notice provisions (which are also often found towards the end of the contract). If you terminate without the right to do so or termination has been carried out incorrectly then the other party could dispute your termination as being wrongful and bring a claim against you.

It is therefore vitally important that any contract termination is dealt with correctly, after having taken legal advice in relation to your position.

It is also important to note that a right that is not exercised may be lost and a financial claim may be lost with it hence why we have stressed the need to act promptly.

We would suggest keeping a record of when key contracts are due to expire – be that catering, telephony, photocopying, IT etc. This way you will have time to (1) shop around for alternatives before the term has ended; (2) negotiate a new and/or better contract with the current supplier; and/or (3) seek legal advice and possibly terminate.

Summary

The above tips will hopefully help minimise the risk of a contractual dispute. If a dispute still arises then you should be in the best position to deal with it and we are here to help if you need any support.

Contact

Amba Griffin-Booth

Senior Associate

Amba.Griffin-Booth@brownejacobson.com

+44 (0)330 045 2489

Related expertise

Services

Commercial services in higher education

Governance of schools and colleges