



Lear Education Law

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# Who I am...

## □ Erin Preston

- Attorney in Utah since 1996
  - Education Law with emphasis in charter law
  - Bonding, finance & real estate
  - Employment & Contract Law
- Superintendent (2011-2014), Board Chair (2008-2011) and Founder of 2,100+ student K-12 International Baccalaureate charter school
- Construction management consultant since 2007
  - Oversaw construction of 14 school facilities

# Types of Contracts Common to Charters

- **Employment** (separate discussion)
- **Professional Services**
  - **Business management**
  - **Legal**
  - **Insurance**
- **Construction**
  - **Development/Finance**
  - **Construction/Architecture**
  - **Land purchase**
- **Product purchasing**



# Elements of a Contract

- Offer.
- Acceptance.
- Mutuality of Obligation “meeting of the minds”
- Consideration.
- Competency and Capacity
  - ▣ LEA and Board member
  - ▣ authority/liability to act



# Contract Process - Procurement

- **Utah Procurement Code (Utah Code 63G-6a)**
  - **Charter schools must follow for:**
    - **Construction & Development**
    - **Professional Services**
    - **Product purchasing**
  - **Applies to Charter Schools explicitly beginning 2015 (63G-6a-104(1i))**



# Elements of a Contract (cont.)

## Offer

- There must be a definite, clearly stated offer to do something. *For example: A quotation by sub-contractor to the main contractor.*
- An offer does not include ball park estimates, requests for proposals, expressions of interest, or letters of intent.
- An offer will lapse:
  - ▣ when the time for acceptance expires;
  - ▣ if the offer is withdrawn before it is accepted; or
  - ▣ after a reasonable time in the circumstances (generally the greater the value of the contract, the longer the life of the offer).

# Elements of a Contract (cont.)

## Acceptance

- **Only what is offered can be accepted.** This means that the offer must be accepted exactly as offered without additional conditions. If any new terms are suggested, this is a counter offer which can be accepted or rejected.
- **There can be many offers and counter offers** before there is an agreement. It is not important who makes the final offer; it is the acceptance of that offer that brings the negotiations to an end by establishing the terms and conditions of the contract.
- **Acceptance can be given verbally, in writing, or inferred by action which clearly indicates acceptance** (performance of the contract). In any case, the acceptance must conform with the method prescribed by the offeror for it to be effective.
- Agreements/Contracts to buy and sell LAND must be in writing.

# Elements of a Contract (cont.)

- **Consideration**
- In order for a contract to be binding, it must be supported by valuable consideration. That is to say, one party promises to do something in return for a promise from the other party to provide a benefit of value (the consideration)
- **Consideration is what each party gives to the other as the agreed price/value for the other's promises.** Usually the consideration is the payment of money but it need not be; it can be anything of value including the promise not to do something, or to refrain from exercising some right.
- The payment doesn't need to be a fair payment. The courts will not usually intervene where one party has made a hard bargain unless fraud, duress or unconscionable conduct is proved.



# When is a Contract NOT a Contract?

A contract can be **voidable**, as opposed to automatically unenforceable, but usually requires litigation:

- 1) Unconscionability: A contract may be voided where the terms of the contract are so extremely unjust or overwhelmingly one-sided in favor of the party who has the superior bargaining power, that it “**shocks the conscience**.” Factors courts look at in determining whether a contract is unconscionable include: gross inequality of bargaining power; no meaningful choice as to the terms of the contract; the resulting contract is unreasonably favorable to the stronger party; whether one party is uneducated or illiterate; whether the party had the opportunity to consult an attorney; and whether the price of goods or services is excessive.

# When is a Contract NOT a Contract?

## (cont.)

A contract can be **voidable** (usually requires litigation) for:

- Undue Influence: Undue influence in contract formation refers to improper persuasion that causes a person to enter into an unfair transaction.
- Examples of these relationships include:
  - ▣ husband and wife, parent and child, trustee and beneficiary, guardian and ward, attorney and client, doctor and patient, etc.
  - ▣ Utah law defines a confidential relationship as one which under the circumstances, “create[s] a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other.” *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985). (e.g. blackmail/bribery)

# When is a contract NOT a Contract?

## (cont.)

A contract can be **voidable** (again through litigation) for:

- 3) Misrepresentation: Where one party to a contract **misrepresents a material fact and that material fact induced the other party to assent to the contract.**
- ▣ Generally, courts require the misrepresentation to be one of fact—for example, a person selling a car may represent that the battery is a brand new battery, when in fact, it is several years old.
  - ▣ Statements regarding opinions or interpretations of the law, even if those statements are misrepresentations, generally will not render a contract voidable. However, Utah courts recognize an exception to this rule where a confidential relationship exists (as described above) or where one party possessed superior means of information or **willfully misled** the other party into a misconception of his rights and liabilities. *Gadd v. Olson*, 685 P.2d 1041, 1044 (Utah 1984).

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# Utah Procurement Code Limits

- **Greater than \$1K up to \$5K**
  - ▣ 2 competitive quotes that include minimum specifications. Select lowest.
- **Greater than \$5K up to \$50K**
  - ▣ 2 competitive quotes that include minimum specifications.
  - ▣ Independent procurement authority rules apply (e.g. public posting).
- **Over \$50,000**
  - ▣ Shall conduct an invitation for bids or other procurement process outlined in the Utah Procurement Code.

# Contract Term – Legal Requirements under UT Procurement Code

- **Limitations on multi-year contracts (63G-6a-1204)**
  - Contracts may be bid as multi-year contracts
  - A multiyear contract, including any renewal periods, may not exceed a period of five years, unless:
    - (a) the procurement officer determines, in writing, that:
      - (i) a longer period is necessary in order to obtain the procurement item;
      - (ii) a longer period is customary for industry standards; or
      - (iii) a longer period is in the best interest of the procurement unit; and
    - (b) the written determination described in Subsection [\(7\)\(a\)](#) is included in the file relating to the procurement
- **No evergreen renewals!**

# Contract Process - Procurement

- **Prohibition (and potential legal penalty for):**
  - Dividing a procurement into one or more smaller purchases (63G-6a-408(8))
  - Unlawful Conduct and Penalties (63G-6a-24)
  - Socializing with Vendors and Contractors (R33-24-104)
  - Financial Conflict of Interests Prohibited (R33-24-105)
  - Personal Relationships, Favoritism or Bias Prohibitions (R33-24-106)

# School Official or Board Member PERSONAL Legal Responsibility for Contract or Procurement Violation?

- Governing Board
  - Covered under O+D insurance when in scope of duties
  - Personal liability if conflict or fraud
  - Violation of Procurement Code can result in legal penalties
    - Misdemeanor
    - Felony
    - Err on the side of caution—and seek legal counsel. Utah law protects *government officials under governmental or sovereign immunity*, but the law is unsettled and uncertain as to charter school officials.
  
- Staff
  - Covered when within scope of duties or employment--*to some extent*
  - Violation of Procurement Code may result in legal penalties
    - Misdemeanor
    - Felony
    - Err on the side of caution—though it is sometimes cumbersome, charter schools are absolutely PUBLIC schools. Staff members are public employees., even more certainly than board members are public officials. BUT, in charters, roles are often multiple and blended.



# Additional QUESTIONS???

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