

CONTRACT DUE DILIGENCE: MAKING SURE WE GET WHAT WE CONTRACT FOR

WHAT IS DUE DILIGENCE?

“Due Diligence” is a term used to describe the process of evaluating and checking proposed contract deals. In its plainest sense, it means the attention or *diligence* that is *due* to a particular matter.

An organisation will usually undertake due diligence before it enters into a contract to purchase a business: it will want to check the financial particulars of the business, the status of the businesses’ assets (physical assets and intellectual property assets like trade marks), or whether there are any legal or other liabilities that haven’t been disclosed.

Prudent organisations will also conduct due diligence when they enter into standard types of contracts, from consultancy agreements to licensing agreements to agency agreements to lease agreements. The due diligence might be less rigorous when it doesn’t relate to a sale of business, but the same essential questions will be asked: do we really know who we’re dealing with? and will we get what we expect?

WHEN SHOULD THE UNIVERSITY UNDERTAKE DUE DILIGENCE?

The University should undertake due diligence by making appropriate enquiries whenever it proposes entering into contracts with other organisations or individuals.

Due diligence may not be necessary if we are dealing with organisations with whom we are closely affiliated, or when we enter into contracts with Government Departments or statutory authorities. But it will be necessary in most other scenarios – whether local or international – and it

will be critical when we are dealing with organisations or individuals with whom we have not previously had dealings.

WHAT TYPES OF ENQUIRIES SHOULD WE BE MAKING?

In essence, we need to be as certain as we can that the organisation or person will be able to deliver on their promises.

If we enter into a services contract with a person who does not have the skills or experience they claimed to have we may be able to recover our fees by suing for breach of contract. But unless the individual has considerable assets at their disposal we may not be able to recover damages for our secondary losses (like loss of reputation, property damage, lost opportunities or even the cost of taking legal action). So too with companies who become bankrupt after they sign a contract with us – we may have a good case for recovering our fees or our overdue rent, but there may be few or no company assets left and we may be one of many creditors lining up to take action.

In some cases it will be impossible for us to anticipate these types of difficulties. But in many cases a quick search or asking around could have alerted us to past problems. Sometimes it may be a matter of seeking clarification from the organisation or individual themselves. You could conduct a quick GOOGLE search to check for any previous difficulties. If the contract is worth a large amount, you could even purchase a Dun & Bradstreet or similar financial report.

Legal Services must approve (or prepare) contracts before they are signed. If you are dealing with a company, we can conduct preliminary checks to find out if the company is subject to bankruptcy actions. But that is all we are able to do. It is your responsibility to make appropriate enquiries.

This article is intended as a general guide. Please contact Legal Services on 9479 2495 if you would like any further information regarding this guide or if you require particular advice.