

**MINNESOTA ASSOCIATION OF TOWNSHIPS
TOWN LAW REVIEW 2019
“THE DO’S AND DON’TS OF CONTRACTING”**

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1. Contract Essentials

A. Contracts in General

- In writing / Signatures
- Identification of parties
- Background facts (Recitals)
- Purpose of the contract; scope; specifications
- Any specific performance requirements or timelines
- Term and termination
- Compensation
- Events of default
- Remedy upon default
- Insurance
 - Identification of type of insurance (commercial general liability, automobile, worker’s compensation, errors and omissions, umbrella)
 - Insurance limits (amount of insurance required is dependent on level of potential risk – road work contracts, for example, should require at least \$1.5 million per occurrence in commercial general liability coverage)
 - Per occurrence basis
 - Named as an additional insured
 - Provide a certificate of insurance
- Indemnification
 - Indemnification of the Town (mutual indemnification in some cases is ok)
- Nonwaiver of liability limits or immunities
- Minnesota law governs
- No amendments except in writing and mutually agreed to
- Entire agreement
- State-mandated provisions
 - Nondiscrimination (Minn. Stat. § 181.59); contracts for materials, supplies, or construction
 - Prompt payment (Minn. Stat. § 471.425)
 - Subject to Audit for six years (Minn. Stat. § 16C.05, subd. 5)
 - Withholding (IC-134) (Minn. Stat. § 270C.66)
 - Data practices act – contractor bound by (Minn. Stat. § 13.05, subd. 6 & 11); only for towns subject to the act

B. Road Agreements

- Accepted roads only
- Scope of services
- Unit price or lump sum
- List of equipment
- Provision of materials (gravel, salt, sand)
- Status as independent contractor
- Place and maintain barricades and warning signs if needed
- Notice to emergency services if roads will be blocked
- Non-exclusivity
- Construction/improvement contracts over \$175,000
 - Payment and Performance bond
 - Two successive weeks of notice for bids
 - Plans and specifications approved by board in advance
 - Certification of completion filed with clerk
- Detailed invoice (Minn. Stat. §§ 471.38, 471.391)

C. Development Agreements

- Right to proceed
- Scope of improvements
- Itemization of plans
- Sequence of activities
- Escrow / Responsibility for costs
- Security / Letter of credit
- Road status and acceptance
- Stormwater maintenance
- Erosion control
- Right of final inspection
- Warranty period for public improvements
- Nonwaiver of liability limits or immunities

D. Professional Services Agreements

- Scope of services
- Detailed invoice and prompt payment (Minn. Stat. §§ 471.38, 471.391 and 471.425)
- Professional liability insurance
- Status as independent contractor
- Look carefully for:
 - Limited/no indemnification
 - Liability caps
 - Waiver of warranties
 - Document ownership and use
 - Expenses (travel, meals, etc.)
 - Payments required if terminate early
- Non-exclusivity

E. Fire Contracts

- LMCIT/MAT Form
- Scope of services
- Service territory
- Payment allocation method (formula)
- How capital purchases are funded and decided
- Authority for Town to collect emergency services fee
- Annual meeting and review
- Development of City budget
- City ownership of buildings and equipment
- Indemnification of the Town by the City

2. Contract Levels

A. \$0 to \$25,000.00 (Minn. Stat. § 471.345, subd. 5)

- Direct negotiation or quotes
- If quotes, obtain at least two and retain for at least one year

B. \$25,000.01 to \$100,000 (Minn. Stat., § 471.345, subd. 4)

- At least two quotes or sealed bids
- If quotes, retain for at least one year
- If sealed bids, must comply with all sealed bid requirements
- Must consider purchase through the state cooperative purchasing program

C. Over \$175,000

- Sealed bid process
- Must consider purchase through the state cooperative purchasing program

D. Contracts outside of municipal contracting law

- Purchase of real property
- Professional services
- Purchases and sales among governmental entities
- Purchase of road maintenance/snowplowing service from another governmental entity
- Piggyback on county road contract so long as the county followed required procedure
- Purchases through state cooperative purchasing program
- Emergencies

3. Conflicts of Interest

A. Statutory Conflicts of Interest (Minn. Stat. §§ 365.37 and 471.87)

- All contracts
- Abstention Plus
- Exceptions (Minn. Stat. § 471.88)
 - For any exception, Board must authorize by unanimous vote (interested officer must abstain)
 - Contract is less than \$175,000, but Board must pass specific resolution and officer submits an affidavit with claims for payment (Minn. Stat. § 471.89)
 - In a Town with a population of less than 1,000, an officer can contract with the Town for construction materials and/or service so long as the sealed bid procedure is used
- Criminal penalties and expulsion from office

B. Common Law Conflict of Interest

- Not contract related
- Before determining if disqualified to vote, the officer must consider –
 - Nature of the decision being made
 - Nature of the financial interest
 - Number of officers making the decision
 - The need, if any, to have an interested person make the decision
 - Other means available to ensure that the officer will not act arbitrarily to serve their self-interest
- Abstention
- Voting in spite of a conflict not criminal, but can invalidate the Board's decision