

The Do's and Don'ts of Contracting

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The Do's and Don'ts of Contracting

- General understanding basic elements of all contracts and elements of specific types of contracts frequently entered into by Towns
- Complying with bidding and other requirements for contracts of various dollar values
- Addressing conflicts of interest



Contract Essentials

What basics should a Town have in all contracts?

1. Put it in writing / Signatures
2. Identification of the parties (proper corporate entities/municipal entities)
3. Recitals – what is the history?
4. Purpose / Scope

Contract Essentials

What basics should a Town have in all contracts?

5. Specific requirements / deadlines
6. Term and termination
7. Compensation
8. Events of default
9. Remedy upon default

Contract Essentials

What basics should a Town have in all contracts?

10. Insurance

- Type of Insurance
- Limits
- Per occurrence basis
- Town named as additional insured
- Certificate of Insurance

Contract Essentials

What basics should a Town have in all contracts?

11. Indemnification

- Indemnification of the Town
- Mutual indemnification under the proper circumstances

Contract Essentials

What basics should a Town have in all contracts?

12. Nonwaiver of liability limits or immunities
13. Minnesota law governs
14. No amendments except in writing and mutual agreement
15. Entire agreement

Contract Essentials

What basics should a Town have in all contracts?

16. State-mandated provisions

- Nondiscrimination – Contracts for materials, supplies and construction (Minn. Stat. § 181.59)
- Prompt payment (Minn. Stat. § 471.425)
- Subject to audit for six years (Minn. Stat. § 16C.05, subd. 5)

Contract Essentials

What basics should a Town have in all contracts?

16. State-mandated provisions

- Withholding (IC-134) (Minn. Stat. § 270C.66)
- Contractor bound by Data Practices Act (only Towns subject to the Act) (Minn. Stat. § 13.05, subd. 6 and 11)

Road Contract Essentials

What are the basic elements of a Town Road Agreement?

1. Accepted roads only
2. Unit price or lump sum
3. List of equipment
4. Provision of materials (gravel, salt and sand)
5. Status as independent contractor

Road Contract Essentials

What are the basic elements of a Town Road Agreement?

6. Place and maintain barricades and warning signs if needed
7. Notice to emergency services if roads will be blocked
8. Non-exclusivity

Road Contract Essentials

What are the basic elements of a Town Road Agreement?

9. Construction/improvement contracts over \$175,000
 - Payment and Performance Bond
 - Two successive weeks of notice for bids
 - Certification of completion filed with Clerk

Road Contract Essentials

What are the basic elements of a Town Road Agreement?

10. Detailed invoice (Minn. Stat. §§ 471.38 and 471.391)

Development Agreement Essentials

What are the basic elements of a Development Agreement?

1. Right to proceed
2. Scope of improvements
3. Itemization of plans
4. Sequence of activities
5. Escrow/Developer responsibility for costs

Development Agreement Essentials

What are the basic elements of a Development Agreement?

6. Security/Letter of Credit
7. Road status and acceptance
8. Stormwater maintenance
9. Erosion control
10. Right of final inspection

Development Agreement Essentials

What are the basic elements of a Development Agreement?

11. Warranty period for public improvements

12. Nonwaiver of liability limits or immunities

Professional Services Agreement Essentials

What are the basic elements of a Professional Services Agreement?

1. Scope of services
2. Detailed invoice and prompt payment (Minn. Stat. §§ 471.38, 471.391 and 471.425)
3. Professional liability insurance
4. Status as independent contractor

Professional Services Agreement Essentials

What are the basic elements of a Professional Services Agreement?

5. Look **carefully** for –

- Limited/no indemnification
- Liability caps
- Waiver of warranties
- Document ownership and use
- Expenses (travel, meals, etc.)
- Payments required if terminate early

Fire Contract Essentials

What are the basic elements of a Fire Contract?

1. LMCIT/MAT form agreement
2. Service territory
3. Payment allocation method (formula)
4. How capital purchases are funded and decided
5. Authority for the Town to collect emergency services fees

Fire Contract Essentials

What are the basic elements of a Fire Contract?

6. Annual meeting and review
7. Development of City budget
8. City ownership of buildings and equipment
9. Indemnification of the Town by the City

Contract Levels

Requirements for contracts \$0 to \$25,000 in value:

1. Direct negotiation (no bids) or quotes
2. If quotes are obtained, at least two and retain for at least one year

Contract Levels

Requirements for contracts \$25,000.01 to \$175,000 in value:

1. At least two quotes or sealed bids
2. If quotes, retain for at least one year
3. If sealed bids, must comply with all sealed bid requirements
4. Must consider purchasing through the State's cooperative purchasing program

Contract Levels

Requirements for contracts more than \$175,000 in value:

1. Sealed bid process
2. Must consider purchasing through the State's cooperative purchasing program

Contract Levels

Contracts exempt from municipal contracting law

1. Purchase of real property
2. Professional services
3. Purchases and sales among governmental entities
4. Purchase of road maintenance/snowplowing service from another governmental entity

Contract Levels

Contracts exempt from municipal contracting law

5. Piggyback on county road contract so long as the county followed required procedure
6. Purchases through State cooperative purchasing program
7. Emergencies

Contract Levels

Responsible Contractor Law (Minn. Stat. § 16C.285)

- Applies to contractors, subcontractors and motor carriers
- Does not apply to design professionals (architects, engineers, etc.) or material suppliers
- Requirements vary by the amount of the contract

Contract Levels

Responsible Contractor Law – Contracts under \$50,000

- Use of sealed bids is optional
- Responsible Contractor Law does not apply

Contract Levels

Responsible Contractor Law – Contracts between \$50,000 and \$175,000

- Use of sealed bids is optional
- Responsible Contractor Law applies **only if** the Board uses sealed bids

Contract Levels

Responsible Contractor Law – Contracts over \$175,000

- Sealed bids are required
- Responsible Contractor Law applies

Contract Levels

Responsible Contractor Law

- If the law applies, the contractor must verify that it meets certain minimum criteria
- Criteria include insurance requirements, state registration and authority to transact business, tax identification, free of state and federal law violations

Contract Levels

Responsible Contractor Law

- Contractor must submit its verification with its bid
- Contractor must also submit list of all first-tier subcontractors
- Prior to entering into the contract, the contractor must submit verification that all subcontractor meet the criteria

Conflicts of Interest

1. Statutory conflicts of interest

- Minn. Stat. §§ 365.37 and 471.87
- Applies to all contracts
- Abstention Plus (Voting plus workup)
- There are exceptions to statutory conflicts of interest (Minn. Stat. § 471.88)
(contracts with no sealed bids required, small towns, etc.)

Conflicts of Interest

- For any exception under §471.88, Board must authorize by unanimous vote (interested officer must abstain)
- With regard to the exception for contracts less than \$175,000, the Board must pass resolution setting out the essential facts and determining the contract price is as low or lower than could be obtained elsewhere (Minn. Stat. § 471.89, subd. 2)

Conflicts of Interest

- Additionally, the interested officer must submit an affidavit itemizing the services provided, the contract price, the reasonable value, the interest of the officer and a statement that to the best of the officer's knowledge, the contract price is as low or lower than could be obtained elsewhere (Minn. Stat. § 471.89, subd. 3)

Conflicts of Interest

- Another common exception is for Town with a population of less than 1,000
- In those instances, 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 for violations of statutory conflicts of interest

Conflicts of Interest

2. Common law conflicts of interest

- Not necessarily contract related
- Abstention generally resolves the conflict
- Voting in spite of a conflict is not criminal, as with statutory conflicts of interest, but it can invalidate the Board's decision

Conflicts of Interest

- Before determining whether an officer is disqualified to vote, they 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

Thank you! Questions?



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