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Contract Drafting or Review for Local Governments

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A Practice Note reviewing general considerations for drafting or reviewing a local government contract. This Note provides information on the standard elements of a local government contract, including the preamble, recitals, definitions, term, insurance, indemnification, non-appropriation or fund-out clauses, immunity, performance and payment bonds, confidentiality, assignment, and boilerplate provisions.

Attorneys representing local governments are often under a time crunch when juggling numerous requests to draft or review contracts. Regardless of the subject matter, the attorney must provide a rapid, thorough, and consistent review of the contract language. This Practice Note assists in contract drafting or review for local government attorneys.

While there are many similarities between contracts for private transactions and contracts with local government, there are some crucial differences. The other party to the contract is often unaware of these differences.

This Note discusses the components of a local government contract. This Note does not address specific state law for every jurisdiction. It does not address purchasing requirements or bidding laws. For additional information about contracts, see Commercial Contracts for State and Local Government Toolkit.

Introductory Terms

Preamble

The preamble contains:

- The name of the agreement (for example, "This Professional Services Agreement" or "This Contract for Office Supplies").
- The name of the parties (signatories) (for example, "ABC, Inc., a Delaware corporation" or "the City of XYZ, a home rule municipal corporation").

It may also contain the date the parties entered into the contract.

Parties

It is important to clearly identify the parties entering into the agreement. A contract cannot bind a nonparty (*E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002)). The local government attorney must examine the contract to determine if the document attempts to assign duties to a nonparty person or entity. Improperly assigning duties to a nonparty sometimes occurs with complex contracts or when there are multiple contracts involved in one project. For example, confusion may occur when a property owner (the local government) has two separate contracts with an architect and a contractor, and both contracts concern work on the same building. If the contract with the architect contains duties for the contractor, the contractor is not bound if not a party to that contract.

Recitals

Recitals are statements of fact providing the background about the contract. Recitals usually begin with the word "whereas."

Recitals for local government contracts commonly include:

- The parties.
- Any appropriate background facts that led up to the contract.
- That the local government has authority to enter into the contract and may cite the source of that authority.
- Why they want to enter into the contract.
- Purpose of the contract.

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- That the local government obeyed all required open meetings laws.
- That the parties followed all required purchasing laws.

The recitals must be clear and written in plain English, something a jury could read and understand. The recitals support the need for and the validity of the contract. They should not contradict the terms of the contract or create ambiguity in the rest of the contract.

The recitals are not substantive terms of the contract. The parties' obligations must not be solely in the recitals. If a requirement for a party is only in the recitals, that requirement may not be enforceable. (See Practice Note, Ensuring Consistency Among Contract Provisions: Contract Recitals Versus Operative Provisions and Standard Document, Sale of Goods Agreement (Pro-Buyer): Drafting Note: Recitals.)

Definitions

The reviewer must read definitions carefully. Definitions tailor words for a specific contract. The defined term may expand, limit, or completely change the word. Once defined, a word loses its ordinary meaning for the purposes of this contract. The attorney should consider whether the definition dilutes the other party's responsibilities or expands the local government's responsibilities.

While reviewing the contract, the attorney should check and re-check the definition of the word to see if it fits in the context of the contract and in the context of what the local government wants to acquire.

When drafting definitions, the attorney must ensure that the definitions:

- Do not materially alter the contract's terms.
- Are not contrary to law.
- Do not denigrate the local government's authority.
- Do not improperly designate legislative authority to a private party.

Definitions are often used:

- To provide an agreed-on understanding of a technical word or phrase.
- To prevent ambiguity and increase clarity. The drafter must ensure that the defined word does not create unintended changes in the operative language.
- To shorten or clarify a frequently used phrase. For example, defining the word "city manager" to include designee, so the drafter does not need to refer to "city manager or designee" throughout.
- To incorporate a definition from the local government's code of ordinances into the contract.

Drafters often capitalize defined words throughout the contract. The drafter and reviewer need to guard against random capitalization throughout the document, since capitalization indicates a defined term.

Core Terms

Description of Goods or Services

The contract's description of goods or services is critical, since buying goods or services is the reason for the contract. The attorney should read this section and be able to identify the words requiring the other party to deliver what the local government wants. The product or services the local government receives under the contract should be unambiguous.

A useful practice is to attach any specifications issued for the goods or services as an exhibit. The attorney reviewing the contract needs to check with the department in charge of managing the contract to ensure that the goods or services described are correct.

In addition to a description of the specific goods or services, this section may also contain:

- The scope of work.
- Work schedule.
- Subcontractors and their duties.

For more information about terms and conditions when purchasing goods, see Practice Note, Ensuring Consistency Among Contract Provisions: Contract Recitals Versus Operative Provisions. For more information about professional services agreements, see Standard Document, Professional Services Agreement.

Price/Consideration

The consideration for the contract is one of the essential terms of any contract "no contract, whether express or implied-in-fact, is formed 'without an offer, an acceptance, consideration, and mutual assent to terms essential to the contract'" (*Mantiply v. Mantiply*, 951 So.2d 638 (Ala. 2006)).

Invalid consideration in a local government contract can invalidate the contract based on state constitutional prohibitions against gifts (See Cal. Const. art. XVI, § 6; *Page v. MiraCosta Community College Dist.*, 180 Cal. App.4th 471 (2009)).

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The amount of the purchase affects the application of state purchasing laws.

The amount due, the schedule and procedures for payment, the conditions precedent to payment, setoff, and any other requirement involving payment must be clear. If a contract extends over a period of years, it may have a cost-of-living adjustment (COLA) or periodic increases. The contract needs to state the price increase as a numerical amount or a percentage.

For more information about price terms for goods, see Standard Clause, General Contract Clauses: Pricing Terms (Sale of Goods, Pro-Buyer). For more information about price terms for services, see Standard Document, General Terms and Conditions for Services (Pro-Customer).

Amendments and Change Orders

The local government attorney must know what options are available for an amendment to the contract, and which option is preferable for this contract. Typical options include:

- Amendments must go to the governing body for approval.
- Amendments made administratively.
- A limited number of administrative amendments allowed. A governing body can limit the total number or dollar amount of administrative amendments.

The contract should state that amendments must be in writing and the permissible method of making an amendment (see Standard Clause, General Contract Clauses: Amendments).

Change orders usually occur in contracts were the nature of the work increases the likelihood that adjustments will be necessary. Change orders are the method used in many contracts, especially construction, to adjust contract terms. The local government cannot use change orders to avoid bidding requirements. State purchasing statutes often define the use and limits of change orders (for example, see Tex. Local Gov't Code §252.048).

If the contract allows change orders, the process for requesting a change order should be described (see Standard Document, Services Agreement: Change Order Form).

Most Favored Nation

Most favored nation clauses generally state that if the other party makes a better deal with someone else, the local government will also receive that deal. Depending on the contract, the change could be a lower price for a local government purchase or a higher fee for use of local government property. If the local government requests a most favored nation clause, the other party may counter that all other terms must be the same.

For more information on most favored nation provisions, see Practice Note, Contract Provisions to Review from a Litigator's Perspective: Most Favored Nation Provisions.

Billing and Payment

This provision states:

- The due date.
- Whether the contract allows setoff.
- If bills represent actual or estimated amounts due.
- If there is a discount for early payment.
- If there are fees or interest for late payment.
- Acceptable forms of payment.

This section should also include the local government's billing and payment procedures, including who receives bills or payments.

Many states have Prompt Payment Acts that require local governments to pay within a certain time (see Prompt Payment Acts (Public Projects): State Comparison Chart). These statutes may apply even if the contract gives more time to pay than the statute.

For more information on billing and payment, see Standard Clause, General Contract Clauses: Payment Terms.

Remedies

Contract remedies are either legal remedies, which usually consists of monetary damages, or equitable remedies. Different remedies may be available to the local government than the remedies available to the other party to the contract, as the scope of the state's waiver of sovereign immunity affects the damages available to the non-governmental party.

Types of monetary damages may include:

- Actual damages.
- The balance that is still owed under the contract, including any change orders.
- Attorney's fees.
- Interest.

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Houston Community College System v. HV BTW, LP, 589 S.W.3d 204 (Tex. App.—Hou. [14th Dist.] 2019).

Equitable damages include:

- Specific performance.
- Injunction.
- Reformation.
- Rescission and restitution.
- Accounting of profits.
- Constructive trust.
- Subrogation.

Some contracts specifically limit or eliminate the other party's ability to seek equitable relief.

For more information on equitable relief, see Practice Note, Contracts: Equitable Remedies. For more information about monetary relief, see Practice Note, Remedies: Adequate Liability Coverage.

Termination

Some contracts provide for termination before the end of the contract for convenience. A termination for convenience occurs when either party provides a certain amount of notice, typically 30 days. Other contracts only allow for termination with cause before the contract ends. A termination with cause occurs when a party breaches its obligations. To terminate a contract based on cause, the terminating party must review the contract's required procedures or opportunities to cure the breach (see Standard Clause, General Contract Clauses: Term and Termination).

Term of Contract

Length of Term

The length of term must be clear. The start and end dates for the contract must also be easy to determine. For example, if the term is five years "beginning on the start date" then the drafter must include instructions on calculating the start date, for example:

- Setting out a specific date.
- Describing or listing an action that triggers the start date. The date the governing body approves the contract is an easily ascertainable start date.

If the contract contains automatic renewals, and the end date is not clear, the local government could find itself continually beginning a new term.

Long-Term Contracts

It is always important to assure that contract terms are acceptable to the local government. This is especially so for a long contract term since the negative effects of a long-term contract are usually more severe than those of a short-term contract.

Additionally, contracts that exceed one year or extend over more than one fiscal year must have non-appropriation clauses (see Non-Appropriations Clause).

Opt-Out Provision

If possible, when the local government is paying for goods or services, it should seek to have a provision allowing it to opt-out of the contract with no penalty. Some companies offer local government an opportunity to opt-out after 30 days' notice.

Renewal

The local government should decide if renewal provisions are useful or not. In some cases, it may be labor intensive and inefficient to go through the procurement and contracting process every year for certain ongoing, necessary services. However, if a renewal is automatic, the local government must assign someone with the task of tracking the agreement. That person must determine when the opportunity to opt out of the renewal occurs and when the renewal takes effect. Before an automatic renewal, the person tracking the agreement should alert the proper decisionmakers about the upcoming renewal in enough time to opt out of the renewal. There should be a limit to the number of automatic renewals, they should not continue indefinitely.

Holdover

A holdover term usually occurs in a lease. The holdover term, usually in a lease, states any additional charges to the tenant for staying in the premises past the lease term. If the local government is the tenant, the local government attorney must be aware of the holdover provisions (see Legal Update, Government Tenant Liable for Holdover Rent).

Local Government Protections

Non-Appropriations Clause

A non-appropriations clause (also called a fund out clause) makes the ongoing funding of a multi-year contract subject to the appropriation of funds by the governing body in the budget each fiscal year. The clause must:

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- Avoid constitutional or statutory requirements limiting a local government's ability to acquire debt.
- Prevent a current governing body from obligating future governing bodies.

A local government contract that does not obey state restrictions on debt or obligates future councils is void ab initio. The contract is void even if the parties try to avoid these restrictions by budgeting for future years' costs in the current budget. (*Borde v. Board of County Com'rs of Luna County*, 514 Fed. Appx. 795, 808 (10th Cir. 2013).)

For more information about drafting non-appropriation clauses and related clauses, see Standard Clause, Contract Clauses for Local Government: Non-Appropriations, Non-Substitution, and Best Efforts.

Bonds and Letters of Credit

Payment Bond

Payment bonds protect subcontractors who provide materials or labor for a public works contract but are not parties to the contract. A subcontractor cannot sell or put a lien on public property if the contractor does not pay.

State statutes often require a payment bond (Tex. Gov't Code § 2253.021). They also may impose liability on the local government for failure to follow statutory requirements (Tex. Gov't Code § 2253.027).

In addition to reviewing the contractual provisions about payment bonds, the attorney must review all bonds. In many states, the state agencies that regulate insurance also regulate sureties. The website of those agencies may also provide additional information about a surety's qualifications.

Performance Bond

A performance bond protects the local government entity in a public works contract. The amount of the bond usually equals the contract amount. The bond provides money to the local government if the other party does not complete the work required or improperly performs the work.

In addition to reviewing the contractual provisions about performance bonds, the attorney must review all bonds. In many states, the state agencies that regulate insurance also regulate sureties. The website of those agencies may also provide additional information about a surety's qualifications.

Maintenance Bond/Improvement Bond/ Construction Deposit

Some local governments require a maintenance or improvement bond or a construction deposit when a developer installs infrastructure (for example streets, sewers, drainage improvements). The purpose of that bond or deposit is to ensure that the infrastructure is adequate. Subdivision improvement agreements are the type of agreement that usually requires a maintenance bond.

Most maintenance bonds are for two years, but the local government should consider whether that is enough time. The developer installs infrastructure first. If the two years begins immediately, the ongoing construction can damage that infrastructure.

The authority for maintenance bonds is usually a local government regulation, not state law. Many states have a general enabling statute.

In addition to reviewing the contractual provisions for maintenance bonds, the attorney must review all bonds.

Letter of Credit

A party cannot require a local government to accept letters of credit instead of bonds (*City of Philadelphia v. American Coastal Industries, Inc.*, 704 F.Supp. 587 (E.D. Penn. 1988)). Substituting letters of credit for statutorily required bonds may not meet statutory requirements.

The local government's ability to draw on a letter of credit depends on the terms of the letter of credit, not on performance of the contract. The independence principle provides that the ability to draw on a letter of credit depends on meeting its terms, not the terms or performance of the underlying contract.

Warranties

Companies often try to disclaim all warranties for goods and services. That provision may be unacceptable to the local government for certain purchases. For example, the local government does not want to purchase computers or playground equipment without warranties, only to find out that the computers do not function or the equipment is defective.

If the local government is the seller, it should disclaim all warranties. Warranting goods or services can be subject to the same problems as indemnification (see Indemnity).

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Immunity

Whether a local government retains immunity in a contractual relationship is a matter of state law. The reviewer must be aware of any statute or constitutional provision that affects the local government's immunity in a contract action. For example, Georgia's constitution waives sovereign immunity for breach of a written contract (Ga. Const. art. IX, §II, ¶ IX).

Whether waived or not, the attorney can require a clause that states that nothing in the contract waives sovereign immunity (See Standard Clause, Non-Waiver of Sovereign Immunity Clause and Practice Note, Sovereign Immunity of State and Local Governments in State Courts).

Insurance

Require Insurance From Other Party

To protect the interests of the local government, the local government usually requires the other contracting party to provide insurance that covers any local government losses. The amount and type of insurance required may vary based on the type of contract and the risk involved. The local government is the benefitting or benefited party for the insurance coverage. (See Standard Clause, General Contract Clauses: Insurance Covenant (Sale of Goods).)

Some states have additional requirements. For example, a local government cannot require the other party to obtain insurance from a specific source (Cal. Gov't Code § 4420).

Amount of Insurance

The local government determines the types and amounts of insurance needed by the risk involved in the activity, services, or products acquired or provided under the contract.

Umbrella or excess risk policies provide coverage if the contracted for activity could result in damages that exceed maximum amounts of the policy. In that case, the additional amount of insurance needed is covered by an umbrella policy.

The umbrella policy does not pay until the maximum amount of the underlying policy is reached. The contract should state that an umbrella or excess liability insurance must attach directly over the underlying primary policies, with no breaks or gaps in coverage. (See Insurance Policies and Coverage Toolkit and Insurance Coverage for Losses Due to Catastrophic Events Chart.)

Notice of Changes

The contract's insurance section should include a requirement that the other party cannot cancel any required insurance coverage without first obtaining alternative insurance as required by the contract. The contract must also require that the other party cannot cancel or materially change the policy without providing the local government at least 30 days' advance written notice.

Primary Insurance

The contract must specify that the insurance required under the contract is primary. If a triggering event occurs, the contract designation as primary insurance makes it clear that the other party's insurance pays for the loss. This designation avoids disputes about whether the local government's insurance pays.

Additional Insured or Additional Named Insured

The contract must state that the local government is an additional insured or an additional named insured under the insurance policy. The other party usually resists using the additional named insured designation.

The contract must state that the duty to defend in the insurance policy covers the local government, whether an additional insured or additional named insured (see Duty to Defend).

For more information about the difference between an additional insured and an additional named insured, see Practice Note, Insurance Terms: Types of Insurers and Insureds and Practice Note, Additional Insureds: Basic Issues.

Waiver of Subrogation

Subrogation authorizes one party (subrogee) to act in place of another (subrogor). When a party (subrogee) is subrogated to the rights of another party (subrogor), the subrogee can exercise the rights and remedies that belong to the subrogor against a third party.

Insurers have statutory subrogation rights to pursue an action against a third party that caused an insurance loss. Many contracts include waivers of subrogation clauses. The waiver of subrogation means the insurance company bears the loss, without mitigating it by suing the responsible party, which could be the contracting parties.

For more information about waivers of subrogation, see Practice Note, Insurance Implications of Waivers of Subrogation in Commercial Contracts.

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Evidence of Insurance

If the contract requires insurance, it must also require the party responsible for obtaining insurance to provide proof of insurance to the local government. Many parties seek to provide that proof with a certificate of insurance.

Certificates of insurance typically contain language that the form is only for informational purposes and does not confer any rights. Because of the disclaimer language, the terms of the policy will control, not the certificate. In discussing those certificates, one state supreme court stated that acceptance of these certificates is not due diligence and that "those who take such certificates at face value do so at their own risk" (*Via Net v. TIG Ins. Co.*, 211 S.W. 3d 310 (Tex. 2006)).

If a certificate of insurance is used as proof, the local government can also require additional documentation, such as:

- A copy of the endorsements applicable to this contract.
- Written verification of the insurance from the insurance agent.
- A provision that the local government has the right at any time to require further assurances.

Common Types of Insurance in Contracts

The types of insurance that may be required in a contract include:

- Commercial general liability (CGL) insurance (see Practice Note, Commercial General Liability Insurance Policies: Property Damage and Bodily Injury Coverage (Coverage A)).
- Cyber insurance.
- First-party property insurance.
- Environmental insurance.
- Directors and officers (D&O) liability insurance.
- Employed lawyers professional liability insurance.
- Errors and omissions (E&O) insurance (also known as professional liability insurance).
- Workers' compensation insurance.
- Automobile insurance.

(See Practice Note, Insurance Basics for In-House Counsel and Practice Note, Insurance Policies and Coverage: Overview.)

Insurance Policy Exclusions

Local government attorneys should also require that the party responsible for providing insurance advise the local government of any applicable exclusions to the policy that could affect an action arising under the contract.

Local government attorneys may also review insurance policy contracts for insurance purchased by the local government. When acquiring insurance for the local government, the attorney should review all the exclusions in the insurance contract. Insurance policy contracts for local governments may not cover liability arising under Section 1983 or inverse condemnation.

Duty to Defend

If the contract gives the other party a duty to defend the local government, the other party must defend the local government against third-party claims that arise under the contract. The duty to defend is often linked with the duty to indemnify, but they are two separate duties. The duty to defend begins with the filing of a claim. The duty to indemnify occurs after a judgement or final settlement. The contract must include both requirements.

If there is no duty to defend, the local government pays for its own defense and can later seek reimbursement of those costs under the indemnification provisions.

If the duty to defend is included in the contract, there are additional considerations for the local government counsel, including:

- Selection of defending attorney. The local government should include the right to approve or veto the attorney selected for its defense.
- Procedure. The duty to defend provision needs to include procedures for invoking the duty to defend. The contract must also state that the defending attorney must meet all filing and procedural deadlines.
- Participation by local government. The contract should require that the defending attorney keep the local government informed about the claim or lawsuit. The contract should give the local government the ability to refuse a settlement of the claims. However, such a refusal may require the local government to handle the defense going forward.

The duty to defend must clearly require the other party to defend. The other party's insurance company usually carries out the defense. The contract makes the local government an additional insured or additional named insured under the insurance (see Insurance). The contract

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must state that the duty to defend in the insurance policy covers the local government, whether as an additional insured or additional named insured.

Indemnity

The indemnity requirement is usually worded as an obligation "to indemnify and hold harmless" the local government. Contracts with local governments typically require that other party to indemnify the local government.

The local government does not indemnify the other party. That prohibition includes reciprocal indemnification provisions. Some state constitutions or statutes forbid or limit the ability of local government to indemnify another party. "Because nothing in OCGA § 36–33–1 can be construed to permit a municipality to waive its sovereign immunity by contracting to indemnify a third party, the indemnification agreement between the City and CSX is void as an ultra vires contract." (*CSX Transp., Inc. v. City of Garden City*, 277 Ga. 248 (Ga. 2003).)

Some of the constitutional or statutory provisions limiting indemnity may not use the word "indemnify" because sometimes the prohibition is broader than indemnity, such as a prohibition against incurring debt. For example, the Texas Constitution prohibits local government debt unless the local government creates a sinking fund or collects a tax for that obligation (Tex. Const. art. 11 § 7). A promise by a local government to indemnify the other party is a debt, so the debt provision prohibits indemnification (*T. & N. O. R. R. Co. v. Galveston Cty.*, 169 S.W.2d 713 (Tex. Comm'n App. 1943)). There is an exception for interlocal agreements (Tex. Const. art. 11, § 7(b); see Practice Note, Interlocal Agreements).

Although the local government cannot indemnify the other party, usually the local government requires the other party to indemnify the local government. The indemnity section usually requires the other party to indemnify the local government and its governing body, employees, agents, volunteers, or others acting on its behalf. For more information on statutes and indemnification, see Construction Anti-Indemnity Statutes: State Comparison Chart.

The indemnification section should cover payment of all costs of the local government, including:

- Payment of damages and all associated costs and expenses incurred by the local government.
- Attorneys' fees, including any attorneys' fee expended enforcing the indemnity agreement.
- Litigation expenses such as:
  - court, arbitration, or other alternative dispute resolution (ADR) costs;
  - deposition and hearing transcripts;
  - witness and expert fees; and
  - Any other costs or expenses.

Indemnification of the local government should include indemnification of the local government's elected officials, appointed officials, employees, and other agents.

An obligation to indemnify does not necessarily include an obligation to defend. The contract must state both obligations must separately.

For more information on indemnification, see:

- Practice Note, Indemnification Clauses in Commercial Contracts.
- Standard Clause, General Contract Clauses: Indemnification (Unilateral, Pro-Indemnifying Party).
- Standard Clause, General Contract Clauses: Indemnification.

Special Areas of Interest or Concern for Local Government

Acknowledgement of Tax-Exempt Status

When the local government purchases goods or services that are subject to sales taxes, the contract should provide the procedure to eliminate sales tax charges. Typically, it requires the local government to provide the vendor with an exemption certificate.

Confidentiality

Most states have public record laws (see State Public Records Laws Chart). These laws may invalidate confidentiality provisions in local government contracts. If a confidentiality provision inflicts penalties on the local government if breached, the attorney should strike it. If a confidentiality provision remains in a contract, it should acknowledge the existence of state public record laws and that the local government is bound to those laws.

Attorneys' Fees

Generally, a winning party in court does not recover attorneys' fees unless authorized by statute or contract (*Buckhannon Bd. And Care Home, Inc. v. West Virginia*

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Department of Health and Human Resources, 532 U.S. 598 (2001)). Many states have statutes that allow the recovery of attorneys' fees in a contract case. Local government attorneys should reject a requirement that party who loses a lawsuit pays the prevailing party's attorneys' fees. Such a clause creates a potentially large liability. Local governments usually work hard to control their own attorneys' fees, but they have no control over the other side's fee. Whenever possible, the contract should explicitly state that in case of litigation, both parties pay their own fees.

Contact Information for Notices and Emergencies

A contract should include a section that gives the contact information for a person (either by name or position) the other party can contact to give notices or ask questions. Depending on the contract, the parties may need a contract person who is always available. Contact information must include the name or position of a person, the address, telephone number, email, and, in the case of a corporation or other entity, the agent for service.

The contact information section must also contain a requirement that each party update the information in the case of any changes.

For an example of a notice section, see Standard Clause, General Contract Clauses: Notice.

Liability Caps

A liability cap limits liability to either a fixed or floating amount. A fixed limitation states a specific dollar amount, for example, the total consideration under the contract. A floating cap limits a party's liability to an unknown future amount, for example, the amount paid that the time the liability event occurs. A hybrid cap is usually the greater or lesser of the fixed or floating cap.

Such caps usually benefit one party more than the other. When the local government receives no benefit from the cap, the attorney should strike the liability cap language.

For more information on liability caps, see Standard Clause, General Contract Clauses: Limitation of Liability and Practice Note, Indemnification Clauses in Commercial Contracts.

Force Majeure

Force majeure clauses excuse performance if certain events occur, usually extreme, unforeseen events. The reviewing attorney must read these clauses carefully. The clauses may excuse performance for events that are not extreme or unforeseeable, for example, required maintenance. Strike non-emergency events from these clauses.

For more information on force majeure clauses, see Practice Note, Force Majeure Clauses: Key Issues.

Governing Law and Venue

This section should state that the governing law is the law of the state where the local government is located. Venue should be in the county where the local government is located.

Authority to Sign

The contract should contain language affirmatively stating that the person signing a contract on behalf of a company has authority to sign on behalf of the company and that their signature is binding on the company.

For major contracts, it is a best practice to have a notarized acknowledgement that states that the signatory has authority to bind the company that is a party to the contract.

Signatures

The attorney should review the contract before it is signed by either party, since the attorney may request changes. However, once the contract is complete, the local government needs to have a signed original for its records.

If the agreement needs to go to the governing body for approval, obtain the other party's signature before the meeting of the governing body. Some companies and other contracting parties do not understand the difficulty of requesting changes after approval by the governing body. Obtaining their signature before the governing body's meeting prevents the other party from requesting changes after governing body approval.

Attachments/Exhibits

Contracts often refer to and incorporate other documents. A document is not incorporated into a contract unless the contract explicitly states that the document is incorporated by reference.

All documents incorporated into the contract must be:

- Provided to the local government counsel.
- Thoroughly reviewed and checked for any inconsistencies with the primary contract document. The attorney should address and correct any inconsistencies.

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- Specifically incorporated by reference.
- Included in the list of attachments.
- Attached to the primary contract.

Third-Party Beneficiaries

Most local government contracts state that there are no third-party beneficiaries for that contract. The local government attorney must consider how that clause interacts with other parts of the contract.

Specifically, if the other party indemnifies agents of the local government (see Indemnity), the reviewer must consider whether to except the indemnification provision from this section. The local government agents (usually employees or elected officials) are not parties to the contract. However, those agents receive a benefit (indemnification) from the contract. This clause could create an inconsistency with the indemnity section. (See Practice Note, Indemnification Clauses in Commercial Contracts.)

Assignment/Delegation

Assignment occurs when a party transfers its rights under a contract to a third party. Delegation occurs when a party transfers its duties under a contract to a third party. Often, the word assignment describes both the transfer of rights and duties. If the assignment or delegation provisions only benefit the other party and do not benefit the local government, or may diminish the local government's rights, the local government attorney should consider eliminating or modifying the clause. Limitations on assignment and delegation include:

- Requiring written permission from the local government.
- Limiting the ability to assign or delegate to another company that meets certain standards (for example, the proposed company can demonstrate its operating capabilities or financial stability).
- Allowing an assignment or delegation to the company's parent or subsidiaries and disallowing any other assignment.
- Forbidding any assignment or delegation and requiring that an attempt to assign or delegate terminates the contract.

For more information on assignment and delegation, see Practice Note, Assignability of Commercial Contracts and Standard Document, General Terms and Conditions for the Purchase of Goods and Services (Pro-Buyer): 21. Assignment.

General Boilerplate Terms

Non-Violation of Statutes

A non-violation provision is a section of the contract that asks the one or both parties to agree that their actions under this contract do not violate any specified laws, usually laws prohibiting discrimination.

Entire Agreement

A provision that the written contract document or documents contain the entire agreement between the parties, also called an integration clause (see Standard Clause, General Contract Clauses: Entire Agreement).

A clause that states the written contract contains the entire agreement prevents a party from using parol evidence to try to change or expand the terms of the contract. It is important to limit the contract terms to the written terms. During contract negotiations, the other party frequently speaks to multiple staff members. This clause prevents arguments about the admissibility of parol evidence to show detrimental reliance, promissory estoppel, or other claims using parol evidence based on a comment during those negotiations.

Severability

A severability clause states that, if a court finds one section of the contract invalid, the rest of the contract survives without the invalid clause. The rest of the contract continues in effect without the invalid clause.

Severability clauses are standard boilerplate clauses. However, the local government attorney must consider the effect of the severability clause and whether striking certain clauses makes the contract unacceptable to the local government. For example, if the court strikes the clause that specifies what the local government is purchasing, the local government may want to terminate the contract.

If any clause or clauses are central to the contract, the local government attorney can except those clauses from the severability section. In some cases, the local government attorney may not want the contract to be severable.

For more information on severability clauses, see Standard Document, General Terms and Conditions for the Purchase of Goods and Services (Pro-Buyer): 27. Severability.

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Survival

A survival clause states which clauses continue in effect even after the contract ends. Typically, provisions that survive the end of the contract are indemnity, confidentiality, jurisdiction, and venue.

The attorney must consider which clauses should survive the end of the contract. If a clause is favorable to the local government and applies after the end of a contract, then the survival of that clause is good. A clause placing venue in the county where the local government is located is an example of a clause that should survive termination of a contract.

For more information on survival clauses, see Practice Note, Contract Provisions to Review from a Litigator's Perspective and Standard Clause, General Contract Clauses: Survival.

Captions or Headings

A captions or headings clause states that the captions or headings are for reference or convenience and do not affect the meaning of the contract (see Standard Clause, General Contract Clauses: Headings). The reviewing attorney must examine the captions and the text and ensure no contract terms exist only in the captions.

Order of Precedence

An order of precedence clause states which provision or language prevails if there is conflicting language between:

- Different parts of the contract.
- The contract and an attachment.

(See Practice Note, Ensuring Consistency Among Contract Provisions.)

Counterparts

This clause allows the parties to sign multiple identical copies (counterparts) and provides that each counterpart counts as an original.

The local government needs an original of the contract for its records. Since the other party may want an original also, this provision allows for multiple originals. The clause usually states that all the different originals are the same contract.

Each counterpart is enforceable against any party who has executed it, even if a particular counterpart does not have all of the signatures. Executing a contract in counterparts does not create multiple contracts between the parties.

For more information on counterparts, see Standard Clause, General Contract Clauses: Counterparts and Standard Document, Sale of Goods Agreement (Pro-Buyer, Short Form).

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