

Local Government Contracting: Common Pitfalls

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Council/Board Approval

- Agreements must be approved by governing body by resolution or bylaw
- Power to contract may be delegated by bylaw
- Purchasing policies
 - Passed by resolution
 - Cannot delegate the power to enter into agreements
 - Should be used to guide the use of delegated power to contract

Council/Board Approval

- Resolution in Open vs. Closed Meeting
 - Agreements must be considered and approved in an open meeting unless closed under *Community Charter* s.90
 - 90(1)(e) – acquisition or disposition of land or improvements
 - Discussion in closed
 - Approve a binding offer to purchase (a contract) in closed
 - 90(1)(i) – consideration of legal advice
 - Only applies to the legal advice, not the business terms of an agreement

Council/Board Approval

- Invalid Authority
 - Agreement may be set aside
 - Other party may be entitled to compensation

Public Notice

- Content of the notice
 - Community Charter section 26;
 - LGA section 286
- Publication
 - Newspaper that is distributed at least weekly
 - Once each week for two consecutive weeks
 - Potential legislative changes to the notice requirement coming

Public Notice

- Timing

- Notices must run before signing the agreement

- Lesser Interests

- Grants of leases, easements, options to purchase require notice
- Releases of covenants and SRWs containing substantive rights require notice

- Notice of assistance

- Notice of assistance to a society or to a business under a partnering agreement

Fettering

- Local governments must exercise legislative and administrative powers in the public interest
 - Local governments cannot agree:
 - to adopt a bylaw
 - to not adopt a bylaw
 - to issue a permit
 - Agreements containing obligations like these will be considered void
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Fettering

- Agreements conditional on regulatory action
 - Dispositions that are conditional on adoption of a zoning bylaw or issuance of a permit are lawful
 - Local government must
 - Be meticulously fair
 - Observe public notice requirements
 - Provide opportunity to be heard
 - Make the decision with regard to the relevant criteria and the public interest
- Language of the agreement should make it clear the decision is within the sole discretion of the governing body

The “5 Year” Rule

- A local government must not incur a liability under an agreement longer than 5 years without elector approval
- Modified by Regulation to include only loan guarantees and liabilities of a “capital nature”
- Capital Liabilities
 - To be interpreted in accordance with accounting principles
 - In the income tax context, a capital expenditure results in the creation of an asset

The “5 Year” Rule

■ Approval Free Zone

- No elector approval required where the annual cost of servicing the aggregate liabilities of the municipality, including the proposed liability, does not exceed 5% of the annual revenue from the previous year

■ Indemnity and Maintenance Obligations

- Rule does not apply to agreements under which a local government undertakes maintenance and indemnity obligations

The “5 Year” Rule

- Term
 - Renewals within sole discretion do not extend term beyond 5 years
 - Term of the liability counts; not the term of the agreement

Assistance

- No assistance to a business
- Consequences may include personal liability and disqualification from office
- Not limited to business corporations
- Market Value
 - Public process
 - Appraisals
 - Assessed value

Contract A

- Implied Contract (Contract A)
- Implied terms:
 - Only accept a materially compliant bid
 - Treat all bidders fairly and equally
- Breaching Contract A results in damages

Contract A

- Avoiding Contract A Liability
 - Avoid Contract A
 - Requires clear language
 - No contrary contractual intention
 - Disclaim implied terms
 - Bidders accept these terms when submitting a bid
 - Exclude or limit damages
 - Can be interpreted narrowly
 - Clear language required
 - Limitation of liability is less risky

Trade Agreements

- Canada – European Union Comprehensive Economic and Trade Agreement (CETA)
 - \$9.1 million construction; \$365,000 other
- Canadian Free Trade Agreement (CFTA)
 - \$302,900 construction; \$121,000 other
- New West Partnership Trade Agreement (NWPTA)
 - \$200,000 construction; \$75,000 other

Trade Agreements

- Bid Protest Mechanism
 - Available to suppliers for procurements under NWPTA, CFTA and CETA
 - Arbitration before a single arbitrator
 - Costs award
 - \$5,000 for legal costs
 - ~\$5,000 costs of the arbitrator
 - Up to \$50,000 for the supplier's costs of preparing a bid
 - Notably no compensation for lost profits
- Trade Agreements cannot be avoided

Thank you.