

REVIEWING COUNTY CONTRACTS
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An exhausting but not exhaustive outline of practice pointers
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I. FRAMEWORK FOR REVIEW

- A. Common law of contracts – Are the elements of an enforceable contract present? Offer, acceptance, consideration, capacity, mutuality, legality.
- B. State Constitution and North Carolina General Statutes- Limitations on county contracting- public purpose, authority, budgetary authority, bidding requirements. Limitations on contracts in general ex) statute of frauds, UCC, N.C.G.S. Chapter 22B. Also, does a specific statute address your subject matter ? ex) LME or fire protection contract
- C. if applicable, Federal Law ex) HIPAA, ARRA. Are there any terms that must be included or ancillary agreements that must be executed?
- D. Your County Budget Ordinance- check here for Manager's authority to execute contracts- purchases, leases, grant agreements, change orders, amendments, limitations
- E. Your County Finance Department Policies- be familiar with your county's contract control procedure- what happens before/after contract gets to you? Who checks what? Does your county have a list of required terms? Insurance limits?

II. TYPES OF CONTRACTS- know what you are reviewing and any unique requirements of that type of contract.

- A. Purchase of Goods and Services
- B. Revenue Contracts
- C. Interlocal Agreements
- D. Grants
- E. Leases, Real and Personal property
- F. Real Estate agreements
- G. Multi year contracts
- H. MOUs

III. IMPORTANT CONTRACT PROVISIONS FOR COUNTIES:

- A. Scope of Services
- B. Term
- C. Maximum Amount Payable

- D. Relationship of Parties
- E. Cancellation
- F. Indemnification
- G. Non-assignment
- H. Governing Law
- I. Dispute Resolution (construction, renovation and repair contracts)
- J. Insurance
- K. Pre-Audit certification
- L. Non-appropriation
- M. Third Party Beneficiaries

IV. PROBLEMATIC CONTRACT PROVISIONS FOR COUNTIES AND WHY

- A. Indemnification- 1) sovereign immunity 2) pre-audit requirement
- B. Arbitration- sovereign immunity
- C. Foreign forum – sovereign immunity
- D. Contractual modification of Statute of Limitations - sovereign immunity
- E. Contractual agreement that breach causes irreparable harm justifying injunctive relief- sovereign immunity
- F. Waiver of jury trial- sovereign immunity
- G. Limitation of liability- 1) sovereign immunity 2) N.C. Constitution’s exclusive emoluments prohibition
- H. Liquidated damages – sovereign immunity
- I. Payment of other party’s attorney fees – 1) sovereign immunity 2) pre-audit requirement
- J. Non-compete clauses- counties must comply with competitive bid requirements

V. DO’S:

- A. DO ensure that the agreement captures all terms needed by the Department to carry out County business
- B. DO ensure that there is an appropriate transfer of legal risk to the other party through insurance and indemnification provisions.
- C. DO, if appropriate, ensure that the agreement documents and supports the independent contractor status of the other party.
- D. DO ensure that the subject matter of the contract is within the scope of the Department/County’s authority
- E. DO ensure that the contract is executed with requisite formality by both parties, paying close attention to corporate executions.
- F. DO ensure that any changes are initialed and dated by both parties.
- G. DO encourage departments to include required contract terms in the RFP if the inclusion of the terms may become an issue later.
- H. DO educate your departments. Review their templates, and explain why certain provisions are required or prohibited. Help (or have Finance Department help) with specific problematic issues if needed prior to submission.

VI. WORDS OF CAUTION:

- A. Look for outdated insurance language, or old ACORD certificate.
- B. Beware of “the fine print”- boilerplate terms and conditions which the other party wants to attach to the main contract.
- C. Ensure that all terms can be found within the four corners of the document, or tied to an easily identifiable external source ex) the bid documents, current price lists .
- D. Discourage “agreements to agree”.
- E. Discourage automatic renewals.