
CONTRACT DRAFTING TIPS FOR GOVERNMENT & PUBLIC SECTOR LAWYERS

JANUARY 6, 2022 AT 12 P.M.

ISB GOVERNMENT & PUBLIC SECTOR LAWYERS SECTION

Ali Breshears, Deputy Attorney General
State General Counsel and Fair Hearings Division

TOPICS COVERED

- General Drafting Best Practices
- Contract Terms for Government and Public Sector Lawyers
 - Indemnification
 - Limitations of Liability
 - Arbitration
 - Public Records, & Non-Disclosure or Confidentiality Terms
 - Hiring Engineers, Architects, Landscape Architects, Construction Management, and Land Surveyors
 - Employment of Residents for Construction, Repair, and Maintenance Work
- 2021 Legislative Changes for Government Contracting

DRAFTING BEST PRACTICES ANATOMY OF A CONTRACT

- Preamble
- Recitals or Background
- Introduction & Words of Agreement
- Transaction Terms (Action Terms)
- Legal Terms
- Signatures

DRAFTING BEST PRACTICES TIPS

- Omit Surplus Words
- Use Active Voice (State shall pay Contractor... Contractor shall provide...)
- Use Short Sentences to Avoid Ambiguity
- Consider Arrangement of Words
- No Undefined Jargon or Abbreviations, Capitalize Definitions
- Include All Requirements
- Use Mandatory Words (Shall and Must Instead of May)
- Check Business Names at SCO Entity Look Up (To Ensure Accuracy of Party Description)
- Fully Understand Client's Expectations and Discuss Worst Case Scenarios

CONTRACT TERMS FOR GOVERNMENT AND PUBLIC SECTOR LAWYERS

INDEMNIFICATION

- **Indemnification of a contractor by a government entity is not permitted.**
- **For state agencies:** Idaho Constitution Article VII, section 11; Idaho Code § 59-1015; IDAPA 38.05.01.112; Idaho Code §67-3521; Idaho Code § 59-1015 through 59-1017.
- **For local governments:** Idaho Constitution Article VIII , section 3 (local governments shall not incur a liability in excess of appropriation without 2/3 vote); Idaho Constitution Article XII , section 15 (counties shall operate on a cash basis); Idaho Code § 50-1005 (municipal corporation's expenses shall not exceed appropriation); Idaho Code § 31-1607 (county expenses not to exceed appropriation).

INDEMNIFICATION

- Indemnification requires the party to provide and pay for a legal defense and to pay any resulting liability, including attorney fees and damages awarded to a third party.
- Void as a non-appropriated cost because it is a **promise to pay funds that have not been appropriated** in the current budget year or that may occur in a future budget year that has not yet been appropriated.
- Limiting an indemnification "to the extent permitted by the tort claims act" is of little effectiveness. The tort claims act does not limit contract remedies.

INDEMNIFICATION

- Attorney General Opinion No. 79-13 (opining that contract clauses requiring indemnification or "hold harmless" protections by cities and counties violate the constitutional debt limitation to the extent the city or county is assuming the existing or contingent tort liability of the contractor).
- Attorney General Opinion No. 82-11 (opining that Idaho Code section 59-1015 prohibits contracts that require spending money beyond the appropriation required).
- Attorney General Opinion No. 19-1 ((1)opining that contractual indemnification obligations, which are not funded by a specific appropriation, violate the Idaho Constitution and Idaho statutes, and (2) Idaho law does not establish a program of insurance with authority to name private parties contracting with the State as additional insureds).
- Miss.A.G. Opinion No. 1999-0241 (opining that contracts including requiring indemnity "to the extent permitted by law" are prohibited as attempting to create an indemnification in violation of Mississippi law).

LIMITATIONS OF LIABILITY

- Anatomy of the Clause
 - Scope
 - Liability Cap
 - Damages Exclusion
 - Warranties (Often Documented Elsewhere)
 - Exclusive Remedy
 - Exclusions (Carve-outs)

- Evaluate the real world risks and “worst case scenarios” of the contract.
- Evaluate the potential claims: contract remedies, tort law and remedies, equitable remedies, statutory law, third party claims, bankruptcy, duties such as data breach notification, and Tort Claims Act.

LIMITATIONS OF LIABILITY & OTHER TERMS

- Conditions precedent – a fact other than mere lapse of time which must exist or occur before a duty of immediate performance of a promise arises
- Indemnification – a contractual obligation by which one person engages to secure another against an anticipated loss
- Disclaimer – repudiation of an underlying obligation
- Waiver – intentional relinquishment of a known right
- Limitations of remedies – only remedy is repair, replace, or refund
- Limitations of liability

LIMITATIONS OF LIABILITY – SAMPLE TERM

Limitation of Liability. Contractor's liability for damages to the State for any cause whatsoever is limited to [DOLLAR AMOUNT]; provided, however, that the following shall not be subject to the foregoing limit:

1. Patent and copyright indemnity required by the Contract;
2. Liquidated damages assessed under the Contract;
3. Claims for personal injury, including death;
4. Claims for damage to real property or tangible or intangible property arising from the Contractor's acts or omissions under the contract;
5. The insurance coverage required by the Contract;
6. Damages arising from the gross negligence or willful misconduct of the Contractor, its employees, its subcontractors, or its agents; and,
7. Government fines and penalties not imposed by the State.

LIMITATIONS OF LIABILITY – MORE SAMPLE TERMS

- The Damages Cap on Contractors' Liability

Contractor's liability for damages to any Using Governmental Unit shall not exceed [*the greater of a dollar amount or*] an amount equal to [*a multiple of*] the Aggregate Contract Price. As used in this clause, the term "Aggregate Contract Price" means the total price for all agreements that both arise out of this Contract and are between Contractor and the Using Governmental Unit making the claim.

- Cap on the Government's Liability – General

The Using Governmental Unit's liability for damages, if any, shall in no event exceed an amount equal to [*the greater of a dollar amount or*] an amount equal to [*a multiple of*] the Aggregate Contract Price. Nothing herein shall be construed to waive any law or clause regarding the availability or appropriation of funds, sovereign immunity, or any other immunity, restriction, or limitation on payment or recovery provided by law.

ARBITRATION

Idaho Code section 29-110 provides that any term of a contract subjecting a party to arbitration conducted outside the State of Idaho is void.

PUBLIC RECORDS AND NON-DISCLOSURE AGREEMENTS OR CONFIDENTIALITY TERMS

- **“Every person has a right to examine and take a copy of any public record of this state** and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.” I.C. § 74-102.
- “Public record” includes, but is not limited to, **any writing** containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency **regardless of physical form or characteristics**. . . .” I.C. § 74-101(13).

What does this mean:

- Entities subject to the Public Records Act cannot by contract vary the requirements of the Act or agree to violate the Act by withholding records properly subject to release under the Act.
- NDA’s or contracts with confidentiality terms should only be signed where the information is exempt from public disclosure.

PUBLIC RECORDS CLAUSE & CONFIDENTIALITY SAMPLE CLAUSE

- **Public Records.** Pursuant to Idaho Code section 74-101, *et seq.*, information or documents received from the Contractor may be open to public inspection and copying unless exempt from disclosure. The Contractor shall clearly designate individual documents as "exempt" on each page of such documents and shall indicate the basis for such exemption. The State will not accept the marking of an entire document as exempt. In addition, the State will not accept a legend or statement on one (1) page that all, or substantially all, of the document is exempt from disclosure. The Contractor shall indemnify and defend the State against all liability, claims, damages, losses, expenses, actions, attorney fees and suits whatsoever for honoring such a designation or for the Contractor's failure to designate individual documents as exempt. The Contractor's failure to designate as exempt any document or portion of a document that is released by the State shall constitute a complete waiver of any and all claims for damages caused by any such release.
- **Confidentiality.** Except as provided in the Idaho Public Records Law, Idaho Code title 74, chapter 1, and Section ____ of this Agreement, both Parties agree to keep the other Party's Confidential information confidential and will protect the information from unauthorized use. The following information shall be defined as "Confidential:" _____.

IDAHO CODE SECTIONS 67-2320 AND 67-2806

I.C. § 67-2320(1)

Notwithstanding any other provision of law to the contrary, it shall be the policy of this state that **all public agencies and political subdivisions of the state of Idaho** and their agents shall make selections for **professional engineering, architectural, landscape architecture, construction management, and professional land surveying services**, including services by persons licensed pursuant to chapters 3, 12, 30, and 45, title 54, Idaho Code, **on the basis of qualifications and demonstrated competence** and shall negotiate contracts or agreements for such services.

EMPLOYMENT OF RESIDENTS OF IDAHO IDAHO CODE SECTION 44-1001

I.C. § 44-1001

In all state, county, municipal, and school construction, repair, and maintenance work under any of the laws of this state the contractor, or person in charge thereof must **employ ninety-five percent (95%) bona fide Idaho residents as employees** on any such contracts except for procurement authorized in section 67-2808(2), Idaho Code, or where under such contracts fifty (50) or less persons are employed the contractor may employ ten percent (10%) nonresidents, provided however, in such a case employers must give preference to the employment of bona fide Idaho residents in the performance of such work;

2021 LEGISLATIVE CHANGES – CONTRACTING

- Higher Education Contracts – House Bill 141 (2021) Added New Section 67-2332A
- Anti-Boycott Against Israel Act – Senate Bill 1086 (2021) Added New Section 67-2346
- No Public Funds for Abortion Act – House Bill 220 (2020) Added Title 18, Ch. 87

STATE INTERAGENCY CONTRACTS WITH HIGHER ED. IDAHO CODE SECTION 67-2332A

- House Bill 141 (2021) Added New Section 67-2332A Restricting State Agencies & Higher Ed.
 - (1) Notwithstanding the provisions of section 67-2332, Idaho Code, no agency may enter into a noncompetitive contract with a state institution of higher education, unless authorized pursuant to section 67-9221, Idaho Code. Contracts between such entities must be competitively solicited pursuant to the provisions of the state procurement act, chapter 92, title 67, Idaho Code. However, the solicitation may limit competition to only the state institutions of higher education.
 - (2) The provisions of subsection (1) of this section do not apply to procurements of surplus property governed by other state or federal law.
 - (3) As used in this section:
 - (a) "Agency" has the same meaning as provided in section 67-9203(3), Idaho Code.
 - (b) "State institution of higher education" means Boise state university, Idaho state university, Lewis-Clark state college, or the university of Idaho.

ANTI-BOYCOTT AGAINST ISRAEL ACT IDAHO CODE SECTION 67-2346

I.C. § 67-2346

(2) A public entity in this state may not enter into a contract with a company to acquire or dispose of services, supplies, information technology, or construction unless the contract includes a written certification that the company is not currently engaged in, and will not for the duration of the contract engage in, a boycott of goods or services from Israel or territories under its control. The provisions of this section shall not apply to contracts with a total potential value of less than one hundred thousand dollars (\$100,000) or to contractors with fewer than ten (10) employees.

ANTI-BOYCOTT AGAINST ISRAEL ACT IDAHO CODE SECTION 67-2346

Certification Concerning Boycott of Israel. Pursuant to Idaho Code section 67-2346, if payments under the Contract exceed one hundred thousand dollars (\$100,000) and Contractor employs ten or more persons, Contractor certifies that it is not currently engaged in, and will not for the duration of the Contract engage in, a boycott of goods or services from Israel or territories under its control. The terms in this section defined in Idaho Code section 67-2346 shall have the meaning defined therein.

NO PUBLIC FUNDS FOR ABORTION ACT IDAHO CODE SECTIONS 18-8701 THROUGH 18-8712

I.C. § 18-8703

(1) **The state, a county, a city, a public health district, a public school district, or any local political subdivision thereof may not enter into any contract or commercial transaction with an abortion provider or an affiliate of an abortion provider.**

(2) Subsection (1) of this section shall not apply to:

- (a) A contract or commercial transaction that is subject to a federal law related to medicaid; or
- (b) A hospital, as defined in section 39-1301, Idaho Code.

NO PUBLIC FUNDS FOR ABORTION ACT IDAHO CODE SECTIONS 18-8701 THROUGH 18-8712

- I.C. § 18-8709. PENALTY FOR VIOLATION. Any intentional violation of the provisions of this chapter by a public officer or public employee shall be considered a misuse of public moneys punishable under section 18-5702, Idaho Code.
- I.C. § 18-5702(3). Except as otherwise provided in subsections (1) and (2) of this section, any public officer or public employee who misuses public moneys in violation of section 18-5701, Idaho Code, **is guilty of a felony** punishable by a fine not exceeding **ten thousand dollars (\$10,000)**, or by imprisonment in the state prison for not less than one **(1) year nor more than fourteen (14) years**, or by both.

Questions?

Ali Breshears
Ali.Breshears@ag.Idaho.gov
208-334-4525