

Missouri Municipal Attorneys Association  
Summer Seminar 2010

City Law 101:  
*Fundamentals of Municipal Contract Law*

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## FUNDAMENTALS OF MUNICIPAL CONTRACT LAW

### 1. BASIC PUBLIC CONTRACT REQUIREMENTS

#### A. Statutory Limits - § 432.070 RSMo. (Public Contract Statute of Frauds)

- All contracts by a city, town, or village must be:
  - Within the scope of its powers or be expressly authorized by law,
  - Made upon a consideration wholly to be performed or executed subsequent to the making of the contract,
  - In writing including the consideration,
  - Dated when made,
  - Subscribed by the parties thereto, or their agents authorized by law and duly appointed,
  - Authority to sign also in writing.

#### B. Cases -

- The provisions of § 432.070 “are mandatory, not merely directory...and...a contract made in violation of them is void rather than voidable.” *City of Fenton v. Executive Intern. Inn, Inc.*, 740 S.W.2d 338 (Mo. App. E.D. 1987)
- Written authorization of contract cannot be: “vague and uncertain...[and]...broad in scope,” and must “specifically authorize certain terms..., be specific and definite, and must include an outline of the terms of the proposed contract.” *Moynihan v. City of Manchester*, 265 S.W.3d 350 (Mo. App. E.D. 2008)
- Must be approved by governing body as governing body.
  - Gathering piecemeal approvals of majority of members of governing does not constitute valid approval of contract. *See Moynihan v. City of Manchester*
- The minutes of a governing body may be part of the “writing” showing express authorization of governing body to execute. *United Cooperatives, Inc. v. City of Smithville*, 630 S.W.2d 255 (Mo. App. W.D. 1982)
  - However, minutes must show that requirements of § 432.070 were met.
    - *City of Gainesville v. Gilliland*, 718 S.W.2d 553 (Mo. App. S.D. 1986) (Contract was unenforceable where minutes did not adequately state consideration supporting city’s execution of contract).
- Contracts are unenforceable where contract is not executed by public official and there is no ordinance authorizing execution of contract. *Sorkin v. City of St. Clair*, 800 S.W.2d 817 (Mo. App. E.D. 1990)
- Contracts that are outside scope of authority of political subdivision cannot be ratified.
  - *St. Charles County v. A Joint Bd. Or Com'n*, 184 S.W.3d 161 (Mo. App. E.D. 2006) County was 12<sup>th</sup> county signatory to cooperative agreement where statute only authorized 10 county signatories.

- “It is *ultra vires* for a Missouri municipality to incur a liability not within the scope of its corporate powers or one not expressly authorized by law.”
  - “The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.”
- Contracts made in violation of local requirements are also void.
    - *Riney v. City of Hannibal*, 712 S.W.2d 49 (Mo. App. E.D. 1986). In purchasing materials for road project, City exceeded limit contained in City Charter for purchases without bidding; supplier could not be paid for materials supplied in excess of Charter limit.
      - “As to the contention equity demands payment, concrete supplier is presumed to have knowledge of the restrictions contained in the city charter. Thus, it is not inequitable to deny concrete supplier any recovery in excess of the charter restrictions.”

### C. Recommendations -

- Approve contracts and authority to contract by resolution or ordinance, and include:
  - Approve contract (attach to approval to ensure terms/consideration is stated)
  - Authorize identified public official (usually Mayor) to execute contract
  - Authorize execution (use “authorized and directed” carefully)
  - May include “such other actions as necessary and proper to effect the contract”
- Use form CITY contracts where appropriate to reduce cost and ensure proper provisions

## 2. NO EXTRA COMPENSATION FOR WORK ALREADY PERFORMED

### Mo. Const., Art. III, § 39(3):

- The general assembly shall not have power: . . . to grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;

### Cases-

- *Kizior v. City of St. Joseph*, 329 S.W.2d 605 (Mo. 1959) - Where city had entered into an exclusive contract with private corporation for the collection and disposal of city garbage for a ten year period at a specified annual sum, amendatory contract providing for increased compensation to corporation which agreed to do nothing but to continue to collect and dispose of garbage in accordance with original contract was violative of constitution.

- *Sager v. State Highway Comm'n*, 160 S.W.2d 757 (Mo. 1942) - A highway contractor was not entitled to extra compensation for increased expense in excavating with labor instead of machinery, where contractor was paid for excavating on basis provided in contract, and condition necessitating labor could have been seen on examination of site.
- *Employee compensation/bonuses*
  - Vacation time is compensation for purposes of this section, which prohibits extra compensation to a public officer for past services. *Pippin v. City of Springfield*, 596 S.W.2d 770 (Mo. App. S.D. 1980).
  - State board of cosmetology could not grant bonuses to its employees because this provision prohibits granting or authorizing bonuses after service has been rendered. Op. Atty. Gen. No. 72, Pray, 6-14-55.

### 3. COMPETITIVE BIDDING

- No general statute requirement that cities to use competitive bidding generally; Bidding procedures often required by ordinance. See annual legislative bills seeking to alter this.
- Exception - cities are required to competitively bid by statute in special situations such as:
  - Construction Management Services – § 8.679 RSMo.
  - Health and Life Insurance for Employees – § 67.150 RSMo.
  - Construction of Initial Waterworks – § 91.170 RSMo.
  - City Depository Services (3<sup>rd</sup> class cities) – § 95.280 RSMo.
  - Insurance contracts – § 376.696 RSMo.
  - Contracts with officials and employees of political subdivision over \$500 per transaction or \$5000 per year – § 105.454/.458 R.S.Mo. (see below).
  - Federal and state grants – See specific grant provisions and applicable law.
  - LOCAL ORDINANCE – consider express waiver provision

### 4. CONFLICTS OF INTEREST

- **Cities may not contract with Public Officials (elected, appointed or employees) for good or services worth over \$500.00 per transaction or \$5000.00 per year unless contract is competitively bid. § 105.454 RSMo.**
  - Applies to appointed or elected officials or employees § 105.454 RSMo., and members of governing body, § 105.458 RSMo.
  - Includes contracts with sole proprietorships, partnerships, joint ventures, or corporations in which the member of governing body is the sole proprietor, a partner having more than a 10% partnership interest, or a co-participant or owner of in excess of 10% of the outstanding shares of any class of stock.

- **Recusal required where there is “special monetary benefit” -**
  - No elected or appointed official or employee of ... any political subdivision... shall ... Favorably act on any matter that is so specifically designed so as to provide a **special monetary benefit** to such official or his spouse or dependent children.” § 105.452 RSMo. Recusal is required.
  - “[S]pecial monetary benefit’ means being materially affected in a substantially different manner or degree than the manner or degree in which the public in general will be affected or, if the matter affects only a special class of persons, then affected in a substantially different manner or degree than the manner or degree in which such class will be affected.”
- **Disclosure required where there is “Substantial Personal or Private Interest”**
  - A member of governing body of a political subdivision must disclose “substantial personal or private interest in any measure, bill, order or ordinance” proposed or pending before the governing body, “before such official passes on the measure, bill, order or ordinance.” § 105.461 RSMo.
    - How to Disclose:
      - Member must “file a written report of the nature of the interest with ...the clerk of the governing body;” recorded in the appropriate journal or other record of proceedings of the governing body (minutes).
    - “Substantial Personal or Private Interest”:
      - “ownership by the individual, the individual's spouse, or the individual's dependent children, whether singularly or collectively, directly or indirectly, of ten percent or more of any business entity, or of an interest having a value of ten thousand dollars or more, or the receipt by an individual, the individual's spouse or the individual's dependent children, whether singularly or collectively, of a salary, gratuity, or other compensation or remuneration of five thousand dollars, or more, per year from any individual, partnership, organization, or association within any calendar year.” § 105.450 RSMo.
- See other requirements - §105.454 RSMo., *et seq.*

## 5. IMMIGRATION STATUTES:

- **Affidavit of Participation in Federal Work Authorization Program – § 285.530 RSMo.:** As a condition for the award of any contract or grant in excess of five thousand dollars ... by any political subdivision ... to a business entity ...the business entity shall, by sworn affidavit and provision of documentation,
  - Affirm its enrollment and participation in a federal work authorization program with respect to the employees working in connection with the contracted services.

- E-Verify = “federal work authorization program”
  - Affirm that it does not knowingly employ any person who is an unauthorized alien in connection with the contracted services.
  - Does not apply to business entities that are merely providing goods or products. 15 CSR 60-15.020(7)
- **Proof of Lawful Presence** – § 208.009 RSMo.: **At the time of application for any state or local public benefit**, an applicant who is eighteen years of age or older shall provide affirmative proof that the applicant is a citizen or a permanent resident of the United States or is lawfully present in the United States.
  - “Public Benefit” = “any grant, contract, or loan provided by an agency of state or local government....”
  - “Affirmative Proof” = “documentary evidence recognized by the department of revenue when processing an application for a driver's license, a Missouri driver's license, as well as any document issued by the federal government that confirms an alien's lawful presence in the United States.”
  - Applicant may submit affidavits of lawful presence allowing for “temporary benefits” for 90 days.

## 6. DRAFTING ISSUES

- **Annual Appropriation/Debt** - Mo. Const. Art. VI, § 26(a) does not allow Cities to enter into any contract requiring the City to pay more than its “income and revenue provided for such year plus any unencumbered balances from previous years.”
  - The effect is that multi-year contracts should generally be subject to annual appropriation by governing body.
  - Copier rental agreement signed by school district that accelerated rent payments upon default was voidable upon showing that contract required school district to pay amounts greater than school districts’ income and revenue for current year, plus unencumbered balances from previous years. *Mercantile Bank of Illinois v. School Dist. of Osceola*, 834 S.W.2d 737 (Mo. banc 1992).
  - Certificates of Participation with 15-term issued by City were not violative of Mo. Const. Art. VI, § 26(a) where Certificates set up yearly payments by City and yearly payments did not exceed City’s annual income and revenue, plus unencumbered balances. Entire debt undertaken by City under Certificates was not required to be counted as a single year’s expenditure. *Burks v. City of Licking*, 980 S.W.2d 109 (Mo. App. S.D. 1998).

- **Confidentiality/Sunshine Law** - Generally, contracts executed by municipalities are public records under Chapter 610 RSMo. (the Sunshine Law) –
  - Cities therefore cannot agree to unqualified confidentiality agreements;
  - Settlement Agreements may be closed upon court order upon finding that the adverse impact to a plaintiff or plaintiffs to the action clearly outweighs the public policy considerations of Sunshine Law, however amounts paid by or on behalf of City are open. § 610.021(1)
  - A few specific provision relating to contract closure:
    - 610.021(1) – settlements – “made public upon final disposition ... or upon signing” unless closed by court order.
    - 610.021(2) – real estate lease and purchase agreements may be closed if consideration would be adversely affected but “shall be made public upon execution”
    - 610.021(12) – documents related to a negotiated contract may be closed “until the contract is executed.”
  
- **Indemnification**
  - **OF the City:**
    - **Hold Harmless/Indemnification** – Basic indemnification; Requires contractor to pay amounts awarded against City in suits by third parties. Hold Harmless generally arises when damages are awarded against City and may or may not include duty to defend.
    - **Duty to Defend** – Different from hold harmless; requires contractor to provide defense to City in suits by third parties regardless of ultimate liability.
      - Duty to defend may arise when suit against City is filed - “If the complaint merely alleges facts that give rise to a claim potentially within the policy's coverage, the insurer has a duty to defend.” *McCormack Baron Mgmt. Services v. Am. Guaranty & Liability Insurance Co.*, 989 S.W.2d 168, 170 (Mo. banc 1999).
    - **Sovereign Immunity** – Requiring contractors to provide insurance in amount no less than sovereign immunity limits contained in § 537.601 RSMo. ensures there are no gaps in coverage in suits by third parties arising from contractor’s performance of contract.
      - Current sovereign immunity limits (2010, adjusted annually for inflation):
        - For all claims arising out of a single accident or occurrence:
          - \$2,509,186

- For any one person in a single accident or occurrence:
    - \$376,378
- (Available at <http://insurance.mo.gov/industry/sovimmunity.htm>)
- **Own Negligence** – **In contracts for construction work**, agreements to indemnify a party against that party’s own negligence or wrongdoing are void as against public policy (i.e., Contractor’s promise to indemnify City against City’s own negligence); § 434.100.1 RSMo.; Subject to the following exceptions:
  - Contracts between political subdivisions
  - Contracts for use of public property or public facility
  - Permits, authorizations or contract to move property on public roads
  - Construction bonds, insurance contracts
  - Contracts requiring indemnitor to obtain insurance and providing opportunity for indemnitor to recover cost of insurance in contract price.
- **BY the City:**
  - Political subdivisions cannot execute contracts that require the political subdivision to indemnify and hold harmless a contractor. Agreements to indemnify are waivers of sovereign immunity, which only General Assembly can waive; Op. Atty. Gen. No. 138, Webster, 12-18-1987; *but see* claimed exception of governmental agencies demanding indemnification (*e.g.*, MoDOT).

## 8. UTILITY FRANCHISES AND RIGHTS-OF-WAY AGREEMENTS

- **Utilities are required to have “consent” to use the rights-of-way;** § 393.010 R.S.Mo. (gas, electric, water); § 392.080 R.S.Mo. (telephone). Additional, city as landlord or trustee of property has inherent right to require consent of property it owns or is charged with protecting unless otherwise preempted. Consent historically granted by franchise or right-of-way use agreement.
- **Rights-of-way regulation of utility-type users are subject to § 67.1830, *et seq.*,** which requires granting such consent, authorizes reasonable regulation, and among other things, prohibits a political subdivision from:
  - (1) Unlawfully discriminating among public utility right-of-way users;
  - (2) Granting a preference to any public utility right-of-way user;
  - (3) Creating any unreasonable requirement for entry to the public right-of-way;
  - (4) Requiring a “franchise” from a telecommunications company;



(5) Requiring payment for use of right-of-way except as provided in the statute

- **Exception:** Cities with ordinances charging rights-of-way users lineal-foot fees before May 1, 2001 are “grandfathered” in; may pass new ordinances or amend ordinances with linear-foot fees.

(6) Contracting for exclusive use, occupancy or access to any public right-of-way.

- **Other special situations:**

- Cable and video service providers – subject to special regulations/limitations – R.S.Mo. § 67.2681 RSMo (no local franchise but ROW regulations still applicable)

- **R.S.Mo. § 71.520. – utility use of rights-of-way:**

- “Any city, town or village in this state may by ordinance authorize any person, or any company organized for the purpose of supplying light, heat, power, water, gas or sewage disposal facilities, and incorporated under the laws of this state, to set and maintain its poles, piers, abutments, wires and other fixtures, and to excavate for, install, and maintain water mains, sewage disposal lines, and necessary equipment for the operation and maintenance of electric light plants, heating plants, power plants, waterworks plants, gas plants and sewage disposal plants, and to maintain and operate the same along, across or under any of the public roads, streets, alleys, or public places within such city, town, or village, for a period of twenty years or less, subject to such rules, regulations and conditions as shall be expressed in such ordinance.”

- **R.S.Mo. § 71.530. – for supply of utility service:**

- Any city, town or village may contract . . .for the purpose of supplying it with gas, electricity or water. The contract may be for any length of time which shall be agreed upon between the city, town or village and the corporation, for a term not to exceed twenty years. . . All renewal contracts entered into under the provisions of this section shall be subject to voter approval of the majority of the voters voting on the question, pursuant to the provisions of section 88.251, RSMo. Every initial contract for such services shall be approved by a majority of the voters of the municipality voting on the question. Nothing herein contained shall be so construed as to prevent the governing body of any city, town or village from contracting with any person, association or corporation for furnishing the city, town or village with gas, electricity or water in municipalities where franchises have already been granted and where gas, electric or water plants and facilities already exist, without a vote of the people.

- **Other common or appropriate provisions for franchises or rights-of-way agreements (not exhaustive):**
  - Relocation of facilities at cost of franchisee/rights-of-way user
  - Indemnification of City by franchisee/rights-of-way user
  - Insurance/Posting of performance and maintenance bonds to guarantee work within public right-of-ways (see Chapter 67.1830, *et seq.*, possible exemptions)
  - No waiver of sovereign immunity/damage actions
  - Permitting requirements
  - Compliance with code
  - Duration (5-20 years)
  - Scope of grant (purpose, no property right granted, etc.)
  
- **Recent Franchise Cases:**
  - *City of Bridgeton v. Missouri-American Water Co.*, 219 S.W.3d 226 (Mo. 2007)
    - Water utility operating under implied franchise agreement was required to relocate its facility at its own expense to accommodate City's road project.
  
  - *Stopaquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. W.D. 2005)
    - Electric utility's receipt of certificates of necessity from PSC did not exempt utility from complying with county zoning regulations.
    - *But see, Union Electric Co. v. City of Crestwood (Crestwood I)*, 499 S.W.2d 480 (Mo. 1973) – Zoning did not provide authority for city to require under-grounding of intrastate transmission lines.
      - However, under-grounding may be required as part of terms of franchise agreement.
  
  - *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8<sup>th</sup> Cir. 2007)
    - City's per-linear-foot fees to occupy rights-of-way was not a "barrier to entry" under Federal Telecommunications Act without evidence that fee actually or effectively prohibited telecommunications company from providing services. Safe harbor in Section 253(c) of the Act allowing for management of ROW and for "fair and reasonable compensation" does not create a cause of action against a City and applies only where actual prohibition (Section 253(a)) has first been shown.

## 9. PUBLIC WORKS CONTRACTS

- **Mandatory Requirements for Public Works Contracts, RFPs & Other Calls for Bids:**
  - OSHA Training - § 292.675 RSMo.
  - Payment Bond - § 107.170 RSMo.
  - Participation in Work Authorization Program - § 285.530 RSMo.
  - Prevailing Wage - § 290.210 RSMo., *et seq.*

- Proof of Lawful Presence - § 208 009 RSMo.
- Excessive Unemployment - §§ 290.550 – 290.580 RSMo.
- Prompt Payment Act - § 34.057 RSMo.
- American Products - § 34.353 RSMo.
  
- **Other Public Works Contract Issues**
  - Davis-Bacon (federal prevailing wage on federally funded or financed project)
  - Liquidated Damages
  - Discretion in Awarding Bids (how to describe notice of bid)
  
- **For more Public Works contracting information –**
  - See “Training” on CVR website ([www.municipalfirm.com](http://www.municipalfirm.com)):
    - “Requirements for Public Works Contracts” by Paul V. Rost – [www.municipalfirm.com/documents/MCCMA2010Presentationfinal.pdf](http://www.municipalfirm.com/documents/MCCMA2010Presentationfinal.pdf)

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