



CONTRACT DRAFTING ESSENTIALS

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Local governments prepare and review many contracts, so we have prepared a checklist which might assist you. This checklist is not intended to be exhaustive, but merely a sampling of some issues your local government may wish to consider when negotiating, preparing and administering its various contracts.

A. Procedural Requirements	
1.	Is electoral approval required? <ul style="list-style-type: none"> ➤ is the term of the contract over 5 years? ➤ are you incurring a capital liability? <ul style="list-style-type: none"> ▪ municipalities refer to <i>Community Charter (CC)</i>, s. 175 and <i>Municipal Liabilities Regulation</i> ▪ regional districts refer to <i>Local Government Act (LGA)</i>, s. 819 and <i>Regional District Liabilities Regulation</i> ➤ if electoral approval is required, both municipalities and regional districts refer to CC, ss. 84-88
2.	Is a notice of a disposition required? <ul style="list-style-type: none"> ➤ are you disposing of land or improvements? <ul style="list-style-type: none"> ▪ municipalities refer to CC, s. 26 ▪ regional districts refer to LGA, s.186 ➤ also refer to procedural requirements in CC, s. 94 and LGA, s. 187, as applicable
3.	Does the contract provide for unlawful assistance to a business? <ul style="list-style-type: none"> ➤ municipalities refer to the prohibition in the CC, s. 25 ➤ regional districts refer to the prohibition in the LGA, s. 182 ➤ Consider whether a partnering agreement is required (CC, s. 21, LGA, s. 183)
4.	Do any of the provisions of the contract fetter the Council or Board's discretion? <ul style="list-style-type: none"> ➤ If so, the provision will be unenforceable, unless statutorily authorized (e.g. section 905.1(5) of the LGA regarding phased development agreements)
B. Structuring & Drafting Consideration	
1.	Contract formation: <ul style="list-style-type: none"> ➤ there must be evidence of offer, acceptance and consideration (consideration need not be adequate, provided it has some value) ➤ where there is no consideration, there is only an unenforceable gratuitous or voluntary promise to perform
2.	Parties: <ul style="list-style-type: none"> ➤ does the other party have legal capacity? (unincorporated voluntary associations and organizations, infants, drunks, and the mentally incompetent) ➤ does the contracting party have any assets? ➤ is there a beneficial owner involved? ➤ consider whether a Beneficiary Authorization and Charge Agreement is required for the purpose of authorizing a nominee to execute contracts with the municipality/regional district on behalf of the beneficial owner and to bind the beneficial owner's interest

3.	<p>Dates:</p> <ul style="list-style-type: none"> ➤ determine when the contract should become legally binding ➤ differentiate between reference dates, acceptance dates, effective dates and registration dates (if applicable) ➤ Make sure blank dates are filled in before the contract is signed
4.	<p>Recitals:</p> <ul style="list-style-type: none"> ➤ set out background facts and purpose of the contract ➤ not binding, but may be used by a court to interpret the contract where the intent of the parties is ambiguous ➤ consider whether the parties should acknowledge and declare that the recitals are true and correct in substance and in fact
5.	<p>Definitions:</p> <ul style="list-style-type: none"> ➤ do not use unnecessary definitions or definitions that state the obvious ➤ keep as simple as possible ➤ be consistent throughout the agreement (e.g. capitalize defined terms) ➤ do not draft “ping-pong” definitions that require the reader to look to other provisions or other agreements (unless appropriate, e.g. addendums that form part of the original contract)
6.	<p>Interpretation provisions:</p> <ul style="list-style-type: none"> ➤ use only for the purpose of clarifying the parties’ intentions (if they do not, either amend them or do not use them)
7.	<p>Covenants:</p> <ul style="list-style-type: none"> ➤ ensure that all performance obligations are the responsibility of the other party <ul style="list-style-type: none"> ▪ e.g. delivery of notices and documents (insurance certificates, financial information, permits, approvals, plans and specifications etc.) ▪ e.g. exercise of renewals and extensions ➤ remember that obligations to be performed by a third party will not be binding on the third party unless they are a signatory to the contract
8.	<p>Waiver clauses:</p> <ul style="list-style-type: none"> ➤ require that waivers be made in writing to avoid any argument that you have waived a right by silence, inaction or conduct ➤ provide that a written waiver will not be considered a waiver of any other right in the contract ➤ provide that failure or delay in exercising a right will not constitute a waiver
9.	<p>Payment terms:</p> <ul style="list-style-type: none"> ➤ specify performance expectations and payment terms very clearly ➤ consider whether security should be required
10.	<p>Indemnities and releases:</p> <ul style="list-style-type: none"> ➤ it is always better to receive than to give ➤ remember that a contractual indemnity is only as good as the “giver’s” ability to back the indemnity. If the giver has no money or assets, the indemnity may not be worth much
11.	<p>Insurance clauses:</p> <ul style="list-style-type: none"> ➤ consider having complex clauses reviewed by your insurance provider
12.	<p>Termination clauses:</p> <ul style="list-style-type: none"> ➤ either provide for termination on a specific date or that parties may terminate after a specific notice period (note: in the absence of a termination provision in a continuing contract, the courts will generally hold that a contract may be terminated on reasonable notice. What is reasonable will depend on the circumstances)

13.	<p>Assignment:</p> <ul style="list-style-type: none"> ➤ consider whether the contract should be assignable. Contracts are generally assignable absent an express provision to the contrary (<i>Law and Equity Act</i>, s. 36)
14.	<p>Notices:</p> <ul style="list-style-type: none"> ➤ establish a procedure that applies to all notifications and communications required or permitted to be given under the contract, including formal notices, approvals, delivery of certificates and other ancillary documents ➤ ensure that alternative modes of delivery are required to be confirmed by a signed original ➤ identify a person/position to receive notices
15.	<p>Dispute Resolution:</p> <ul style="list-style-type: none"> ➤ consider whether negotiation, mediation or arbitration, or a combination of all three, is appropriate given the term, complexity and nature of the contract
16.	<p>Remedies:</p> <ul style="list-style-type: none"> ➤ consider whether termination of the contract, damages, specific performance, or injunctive relief is appropriate given the term, complexity and nature of the contract ➤ the desired remedies may differ depending on whether the contract is a purchase and sale agreement for land, a lease, a servicing agreement or a development covenant
17.	<p>Miscellaneous clauses:</p> <ul style="list-style-type: none"> ➤ <u>compliance with laws</u> – make non-compliance with laws a breach of contract so that you will have a contractual remedy for a breach, especially where another regulatory authority may not be prepared to enforce its laws ➤ <u>access</u> - ensure that there are access rights to private property if site inspections are required or if the local government has the authority to enter the property to remedy performance defaults under the contract ➤ <u>prime contractor</u> - consider whether you need to appoint a prime contractor at a multiple-employer worksite – refer to section 118 of the <i>Worker’s Compensation Act</i> and <i>Occupational Health and Safety Regulation</i> ➤ <u>legal costs</u> – consider requiring the other party to pay your legal costs in connection with the negotiation, preparation, registration (if applicable) and enforcement of the contract ➤ <u>no derogation</u> – provide that nothing in the agreement will fetter the council/ board’s discretion or prejudice the rights and powers of the municipality/regional district in the exercise of its functions pursuant to the <i>Local Government Act</i> and the <i>Community Charter</i> ➤ <u>independent legal advice</u> - consider whether you need to advise the other party to obtain independent legal advice (such clauses are used to limit the court’s exercise of its equitable or common law jurisdiction to upset a transaction on the basis of undue influence, duress, inequality of bargaining power, fraud, misrepresentation and unconscionability) ➤ <u>priority</u> – if the contract is being registered in the Land Title Office against the contracting party’s land, ensure that it will be registered in priority to any financial encumbrances on (or to be placed on) title
18.	<p>Signatures:</p> <ul style="list-style-type: none"> ➤ ensure contracts are signed by both parties to establish evidence that the parties have reached agreement on the terms of the contract and that they intend the contract to be legally enforceable ➤ consider whether counterpart or facsimile execution is appropriate ➤ remember that documents being registered in the Land Title Office must be signed in the presence of a lawyer, notary or other person authorized by the <i>Evidence Act</i> to take affidavits in British Columbia and originally signed copies must be submitted

C. Contract Administration	
1.	<p>Structure the contract to minimize your responsibilities:</p> <ul style="list-style-type: none"> ➤ ensure that all performance obligations are the responsibility of the other party <ul style="list-style-type: none"> ▪ e.g. delivery of notices and documents (insurance certificates, financial information, permits, approvals, plans and specifications etc.) and exercise of renewals and extensions ➤ require that waivers be made in writing to avoid any argument that you have waived a right by silence, inaction or conduct ➤ provide that failure or delay in exercising a right will not constitute a waiver ➤ identify the person responsible for administering the contract ➤ establish a procedure that applies to all notifications and communications, including formal notices, approvals, delivery of certificates and other ancillary documents ➤ ensure that alternative modes of delivery are required to be confirmed by a signed original
2.	<p>Know the contract:</p> <ul style="list-style-type: none"> ➤ identify the <u>complete</u> contract (keep all modifications and addendums with the contract) ➤ know your authority under the contract (and do not exceed it) ➤ know the responsibilities of each party ➤ know the key procedures to follow (e.g. notices, deliveries, payments, inspections etc.) ➤ know the termination provisions ➤ know the obligations for obtaining payments
3.	<p>Diarize critical dates:</p> <ul style="list-style-type: none"> ➤ completion, possession and adjustment dates ➤ waiver/removal of subject conditions ➤ delivery of notices (contract extensions and renewals etc.) ➤ insurance requirements ➤ commencement provisions and effective dates ➤ termination and expiry provisions ➤ expiry dates of letters of credit ➤ survival of indemnities
4.	<p>Maintain an up-to-date centralized file which includes:</p> <ul style="list-style-type: none"> ➤ the contract and all modifications and addendums ➤ all contract correspondence (emails, faxes, meeting notes etc.) ➤ evidence that critical dates have been met ➤ inspection records, if applicable ➤ memos and conversations with the contractor, if applicable ➤ invoices ➤ evidence of acceptance of work ➤ reviews/approval of reports
5.	<p>Communications:</p> <ul style="list-style-type: none"> ➤ set out a straightforward notice procedure and the responsible contact person ➤ refer to contract administrator's position rather than name ➤ specify when documents are deemed to have been received
6.	<p>Timing:</p> <ul style="list-style-type: none"> ➤ address issues promptly and look for timely solutions ➤ be aware of specific timing and notice provisions
7.	<p>Ensure a timely closeout of the contract:</p> <ul style="list-style-type: none"> ➤ release security, if applicable ➤ payout interest, if applicable ➤ ensure all contract disputes have been settled