

CONTRACTING: BEST PRACTICES

MCCFMA Quarterly Meeting October 6, 2022

Presenters:

John L. Fossum, Rice County Attorney

Victoria Serreno, Assistant Rice County Attorney

Sean R. McCarthy, Assistant Rice County Attorney

WHY DO LAWYERS EXIST?

... AND WHY YOU SHOULD GET THEIR HELP WITH CONTRACT REVIEW



CONTRACTS ARE FUN!

(--- NOT REALLY, BUT THEY'RE NECESSARY)

- Contracts are too often drafted in a way that is difficult to understand – whether intentionally or not, the result is that customers are intimidated and just sign, rather than asking for clarification
- 400+ page contract – 3 pages missing
- THIS IS WHY LAWYERS EXIST

RICE COUNTY – 2021

- “Smith Construction” submitted the lowest bid for a project
- Principals listed in proposal as “Mary Jones” and “John Smith”
- No business address provided
- Business card listed only the name “John” with an email address of “estimator@smithconstruction.com” and a telephone number
- There is no website for “smithconstruction.com”
- Business card looked “sketchy” – cheap print quality and very little information

RICE COUNTY – 2021

- Checked the Secretary of State’s website for business listings
 - Googled the principals of the company
 - “John Smith” had written the proposal from the workhouse, where he was serving a sentence for forging bond documents for government construction projects
 - Had served prison time for fraud, aggravated forgery, drugs, theft – most charges were related to his various construction companies
 - Minnesota Statute 16C.06 subd.6(c) addresses the awarding of contracts based on a low bid process. “Awards based on a low bid process must be made to the lowest responsive and responsible bidder ...”
 - A “responsible bidder” is defined as “One who is capable financially and competent to complete the job for which he is bidding. A responsible bidder is one who is not only financially responsible, but who is possessed of a judgment, skill, ability, capacity and integrity requisite and necessary to perform a public contract according to its terms.” (*Federal Elec. Corp. v. Fasi*, 56 Haw. 57, 527 P.2d 1284, 1291)

FACILITIES SUPERVISORS ARE THE FIRST “WALL” OF CONSTRUCTION/MAINTENANCE CONTRACTS

- You know your vendors
- You know the desired timelines
- You are the ones to hear from employees when facilities are not meeting expectations
- You are the ones who talk with county leaders and department heads about their requirements for facilities
- You are the ones who have to deal with poorly-performing vendors when your termination clause doesn't allow you to cancel the agreement
- You are the ones working directly with vendors

SPECIFICS FOR YOU TO THINK ABOUT

--BEFORE YOU CONSULT WITH YOUR COUNTY ATTORNEY

- Pricing
- Scheduling
- Scope
- Termination clause
- Deliverables
- Risk Analysis
- Change Orders

CONTRACT RISK ASSESSMENT

- What is the likelihood of the risk occurring?
 - What is the impact if it does occur?
- What is the risk threshold?
 - Risk is inherent in most (if not all) contracts
 - How much risk is your county willing to accept?
- Mitigating risk
 - This is another area where your county attorney will be invaluable
 - Indemnification, insurance, warranty, termination clauses

RISK ANALYSIS - INDEMNIFICATION

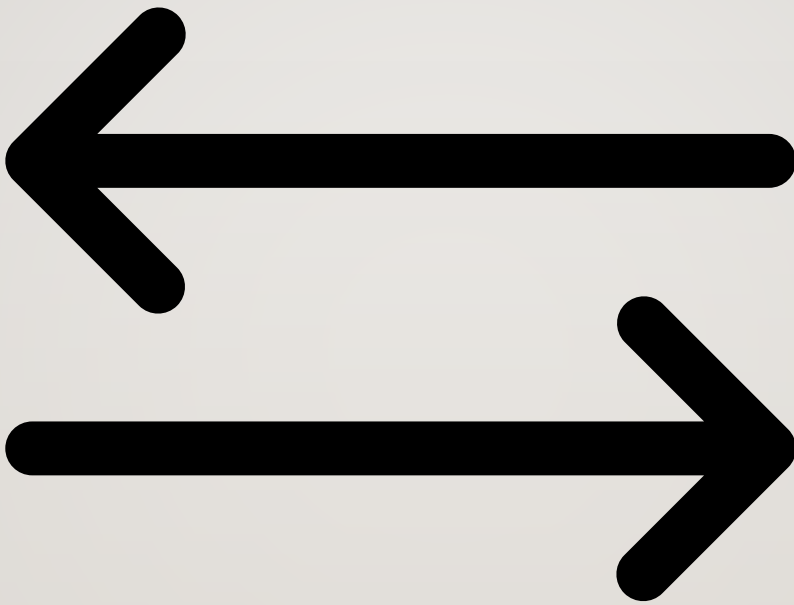
- With mutual indemnification, both parties agree to compensate the other party “for losses arising out of the agreement to the extent those losses are caused by one party’s breach of the contract”
- Watch for indemnification clauses where the vendor wants to be protected against claims from your errors, but is not willing to agree to a mutual indemnification
- Be aware of risks (financial, legal, security & brand)

RISK ANALYSIS – INSURANCE, WARRANTIES AND TERMINATION CLAUSES

- Sean will be talking about insurance in more detail
- Warranties
- Termination Clauses

CHECKLIST





DATA PRACTICES

Minnesota Government Data Practices Act (MGDPA)

Minn. Stat. §13.05, subd. 11 – Privatization

- All government entity contracts must include a Data Practices notice
- Private vendors who contract with government must comply with Data Practices Act.
- Violations of Data Practices apply to both government and contracted private vendor.
- Liability for Data Practices = \$1,000 - \$15,000 per violation.

DATA PRACTICES

SPECIAL PROJECTS: BIG \$ or CONTROVERSIAL

- Consider creating a “SPECIAL PAGE” on County Website.

BENEFITS

- Increase Public Transparency
- Reduce burden from “Data Miner” Requests

Public Safety Center construction project

RICE COUNTY project

PUBLIC SAFETY CENTER PROJECT TIMELINE

JULY 26, 2019

State Department of Corrections notifies county it's downgrading the county's main jail to a 90-day facility.

JULY 30, 2019

Board of Commissioners approves issuing an RFP for a study of the jail and improvements needed to meet DOC requirements.

APRIL 28, 2020

Board appoints task force to work with consultants Klein McCarthy Architects on jail study.

FEB. 9, 2021

Jail study presented to the board. Study looks at expanding on site adjacent to Main Jail and Jail Annex site, and building new.

APRIL 2021

Board holds two public meetings to discuss jail study and consider options presented.

APRIL 6, 2021

Board discusses partnership with Steele County on its jail. DOC officials say available Steele Co. beds misleading and it can't meet Rice Co.'s needs.

Public Safety Center construction slide show



Contractors begin preparing the site for the new Rice County Public Safety Center Monday, Aug. 15, 2022.

QUICK LINKS

Rice County

- [2019 County Jail/Facility Request for Proposal](#)
- [2021 Jail/LEC Assessment and Feasibility Study](#)
- [Cost estimates \(from 2021 study\)](#)
- [Public Safety Center design development proposal/cost estimate](#)
- [Public Safety Center site map](#)
- [Public Safety Center bid drawings](#)
- [Memorandum of Understanding for Rice County Public Safety Center Related Improvements](#) (approved April 12, 2022 by both the Rice County Board of Commissioners and Faribault City Council)
- [Public Safety Center Project Manual Vol. 1 of 4](#)
- [Public Safety Center Project Manual Vol. 2 of 4](#)
- [Public Safety Center Project Manual Vol. 3 of 4](#)
- [Public Safety Center Project Manual Vol. 4 of 4](#)
- [Public Safety Center - Addendum 1](#)
- [Public Safety Center - Addendum 2](#)
- [Public Safety Center bid tab with qualified contractors](#)
- [Public Safety Center storage facility bid tab](#)
- [Rice County Public Safety Center Storage Building plan set](#)
- [Rice County Public Safety Center Storage Building bid tab](#)
- [Rice County Public Safety Center Concrete rebid - 7-19-22](#)
- [Rice County Public Safety Center project budget - 7-15-22](#)

Department of Corrections correspondence

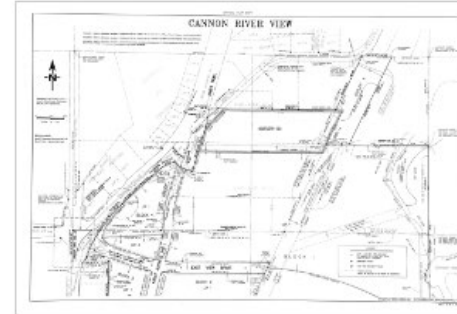
- [July 2019 Department of Corrections reclassification notification](#)
- [December 2020 DOC correspondence - reclassification extension request](#)
- [March 2022 DOC correspondence - Rice County Jail Plan Review/Approval](#)
- [June 2022 DOC correspondence - reclassification extension request](#)

Bond sale documents

- [Baker Tilly bond sale-day report - 7-18-22](#)
- [Public Safety Center bond sale bid tab](#)

Steele County

- [March 2021 Preliminary Detention Center Population Analysis & Forecast](#)
- [April 2021 Criminal Justice System Analysis & Detention Center Forecast](#)
- [April 2021 Steele County letter re: Jail Collaboration Considerations](#)
- [Joint Rice/Steele Detention Center analysis](#)



INSURANCE

MUST HAVE:

- General Liability – Minn. Stat. §466.04
- Automobile Liability - Minn. Stat. §466.04
- Worker Compensation – Minn. Ch. 176
- Professional Liability Insurance – per MCIT recommendation

INSURANCE

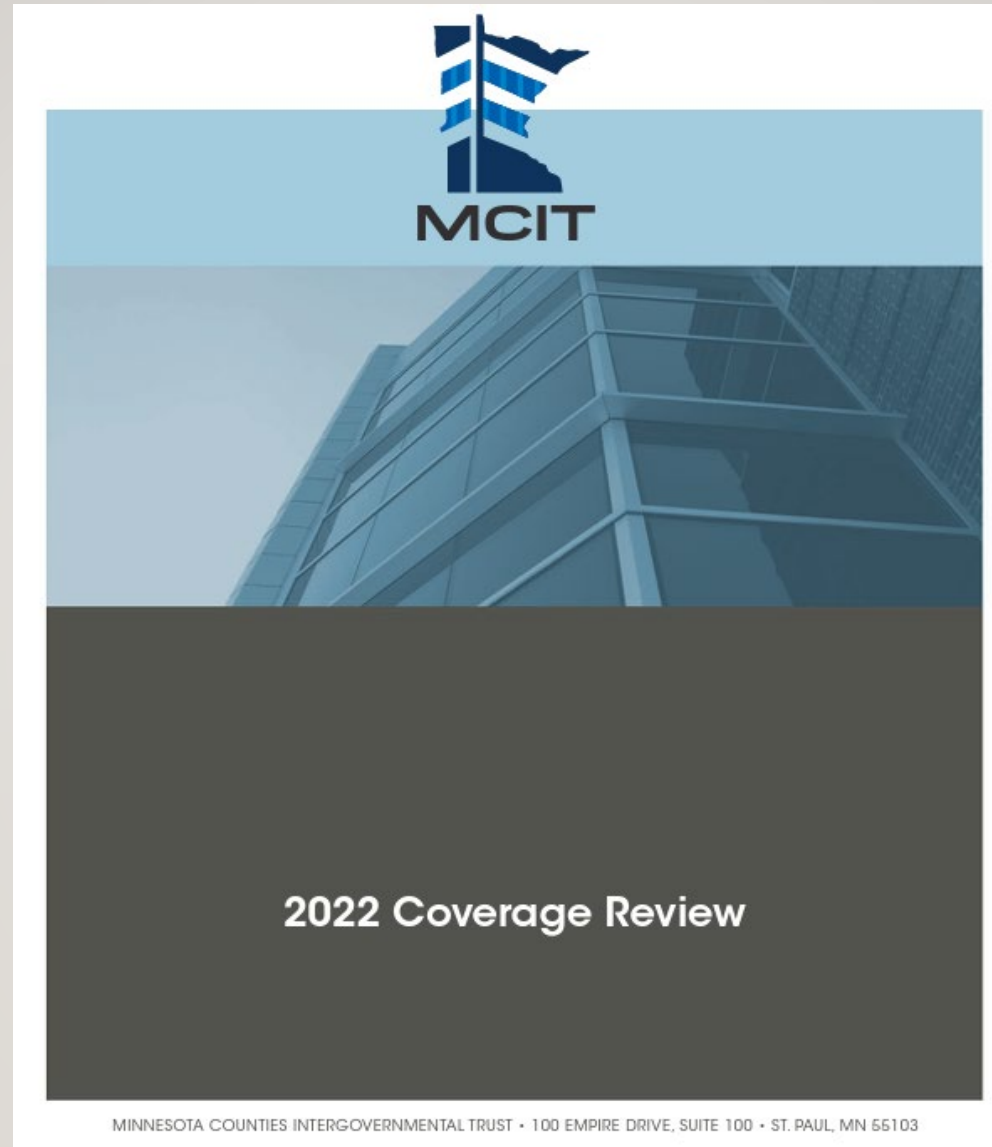
CASE-BY-CASE OPTIONS:

- Data Security / Cyber Liability / Social Media & Technology
- Pollution Liability
- Builder's Risk / Installation Floater (construction contracts)
- Fidelity Bond / Crime Insurance
- Performance Bonds & Payment Bonds – may be required by statute

Insurance:

Useful Resource
for Facility Managers
AND
Government Attorneys

MCIT Annual
“Coverage Review”



INSURANCE

MCIT Coverage Review Booklet

https://www.mcit.org/wp-content/uploads/2021/12/2022_coverage_review_booklet.pdf

ASSIGNED RISK MANAGEMENT CONSULTANT

<https://www.mcit.org/consultation-services/>

CONFLICTS OF INTEREST

Minn. Stat. §382.18

“No county official ... shall be directly or indirectly interested in any contract ... to which the county is a party.”

Minn. Stat. §471.87

“...a public officer who is authorized to take part ... in making any sale, lease or contract in his or her official capacity shall not voluntarily have a personal financial interest ... or personally benefit financially therefrom.”

VIOLATIONS = Gross Misdemeanor Crime

Minn. Stat. §471.88 – Exceptions

Bank, Newspaper, Volunteer Fire/Ambulance/Municipal Band, Utility Services, Population 1,000 or less, Rental Space, Small Cities in St. Louis County, Contracts with No Bids Required....

POLITICS

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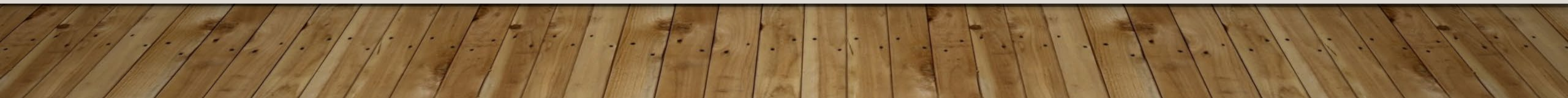


POLITICS

Legal Questions

1. Often have a definite legal answer
2. For your attorney
3. Analyzed by statutes & case law
4. Are often disliked by elected officials

Political Questions

1. Often do NOT have a definite answer
 2. For your elected/appointed persons
 3. Analyzed by personal preferences and popular opinion
 4. Are often disliked by attorneys
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QUESTION & ANSWER: PANEL DISCUSSION

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Sean R. McCarthy, Assistant County Attorney

ADDITIONAL QUESTIONS ?

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