



1

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County violated state law in awarding of \$80M no-bid contract, N.J. Supreme Court rules

Updated: Apr. 29, 2022, 6:59 a.m. | Published: Apr. 28, 2022, 11:50 a.m.

BUSINESS, LAW, POLITICS, STATE GOVERNMENT

Auditor finds Johnston County sheriff violated county purchasing policy


2



Disclaimer

This is not legal advice.
Consult your Attorney.

3



Roadmap

- ◆ Contract Basics.
- ◆ Legal Considerations.
- ◆ Contract Negotiations.
- ◆ What could go wrong?

4



Contract Basics

5

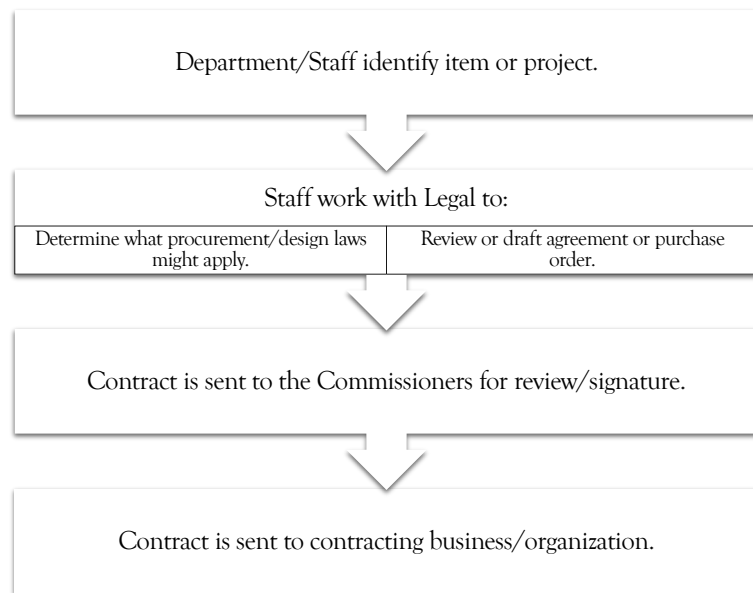
What is a contract?

- Oral or written
- Promise of the parties
- With consideration



6

Contract Process



7

Who can sign?

Idaho Code 31-602: EXERCISE OF POWERS. Its powers can only be exercised by the board of county commissioners, or by agents and officers acting under their authority, or authority of law. The purchasing power of the county, and the authority to contract for purchases, may be delegated to another elected official or an employee of the county by the board of county commissioners.

- How to delegate? What about online agreements?
- What if someone signs a county contract without the authority to do so?

8

What can the county purchase?

- ◆ Idaho Code 31-604:
 - (2) To purchase and hold lands.
 - (3) To make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers.
 - (4) To make such orders for the disposition or use of its property as the interests of its inhabitants require.
 - (6) Such other and further authority as may be necessary to effectively carry out the duties imposed on it by the provisions of the Idaho Code and constitution.
- ◆ Idaho Code 31-807: A board of county commissioners shall have the power and authority to purchase, receive by donation, or lease any real or personal property necessary for the use of the county; preserve, take care of, manage and control the county property . . .

9



10



Funding Limitations

11



Article VIII, Section 3 Idaho Constitution

No county, . . . , shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, [without a 2/3 vote], . . . Any indebtedness or liability incurred contrary to this provision shall be void: Provided, . . . This section shall not . . . apply to . . . ordinary and necessary expenses . .

12

What are “ordinary” and “necessary” expenses?



City of Boise v. Frazier, 143 Idaho 1 (2005):

- This Court has previously held an expense to be ordinary “if in the ordinary course of municipal business, or the maintenance of municipal property, it may be and is likely to become necessary.”
- Must be a necessity, not only for the expenditure, but also for making the proposed expenditure at or during such year.

13

When does an obligation extend beyond the fiscal year?



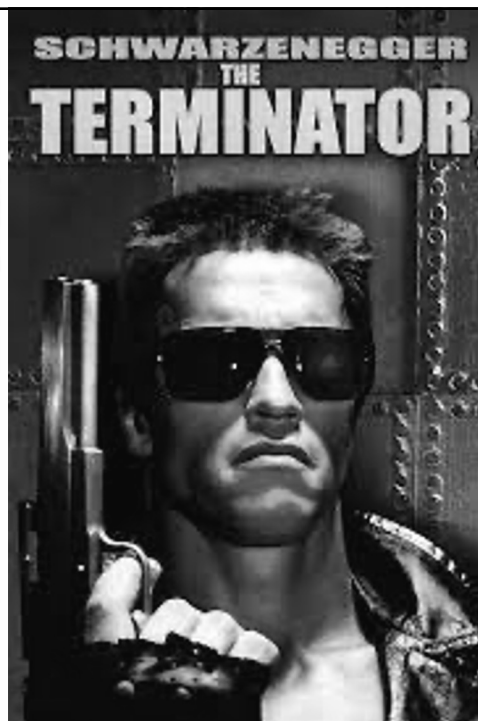
Greater Boise Auditorium District v. Frazier, 159 Idaho 266 (2015).

- ◆ “While many states have a similar constitutional provision, this Court has held that Idaho's is among the strictest, if not the strictest, in the nation.”
- ◆ Can use one year term, or one-year terms which are mutually renewed.
- ◆ Can have clause that allows termination if funds are not annually appropriated.
 - ◆ CAUTION – must not have a penalty for termination.

14

Termination Clauses

- ◆ For cause v. For convenience.
- ◆ Protect against rate hikes, changes in services, changes in competition, etc.
- ◆ What happens at termination? Who owns the property? What and when must items be returned or removed?



15

Indemnification

- ◆ What is indemnification?
 - ◆ Compensation of a loss arising in connection with the other party's actions or inactions.
- ◆ What can the County indemnify for?
 - ◆ Only for the acts of the county and our employees, limited to our constitutional immunities and protections.
- ◆ Article XII, Section 4 of the Idaho Constitution:
 - ◆ No county . . . shall . . . loan its credit to, or in aid of, any such company or association . . .

16

Damages



Limits on Damages

Direct, Consequential and Liquidated damages

Payment v. Performance

17

Insurance

- ◆ Requirements:
 - ◆ What type of project? What limits of insurance to require from contractor?
- ◆ Limits:
 - ◆ Idaho Code section 6-926: Damages limited to \$500,000 for government entity.
- ◆ Additional Insured:
 - ◆ ICRMP will not list vendor as an "additional insured." Must change term to "loss payee."



18



Choice of Law

- ◆ Idaho Code 29-110:
 - ◆ Any term in an agreement which restricts a party from enforcing their rights in the State of Idaho, or which limits the time to bring a claim, is void as against public policy.
- ◆ Ensuring choice of law and venue in Idaho is necessary for guaranteeing your constitutional and statutory limitations/protections.

19



Other Standard Clauses

- ◆ Public Records
- ◆ Use of County Name
 - ◆ Can't be used in advertising their product/service.
- ◆ Modifications
- ◆ Mediation/Arbitration
 - ◆ Must be in Idaho.
- ◆ Software Agreements
 - ◆ Uptime/downtime guarantees
 - ◆ Warranties
 - ◆ Ownership of data

20

Contract: _____	Review Date: _____
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Standard Contract Terms & Conditions

- ☐ Registered with Idaho Secretary of State? _____
- ☐ Procurement required? (I.C. § 67-2801) _____
- ☐ Term: _____
- ☐ Termination: _____
- ☐ Renewable: _____
- ☐ Non-Appropriation: _____
- ☐ Independent Contractor: _____
- ☐ Contracting Authority: _____
- ☐ Insurance: _____
- ☐ Indemnification: _____
- ☐ Notices: _____
- ☐ Choice of Law: _____
- ☐ Severability: _____
- ☐ Survival: _____
- ☐ Modifications: _____
- ☐ Performance/Warranty: _____
- ☐ Force Majeure: _____
- ☐ Successors & Assigns: _____
- ☐ 3rd Party Beneficiaries: _____
- ☐ Attorney Fees: _____
- ☐ Merge & Integration: _____

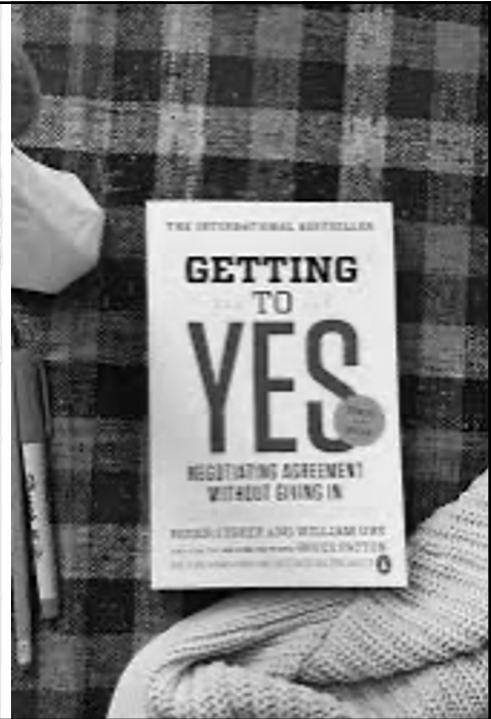
21

If you wonder whether you are
protected, talk to ICRMP!



22

Contract Negotiations




23

Bargaining Power/Positions




24


The 4 Fundamentals of Principled Negotiations




PEOPLE
*Separate People
from Problems*




INTERESTS
*Focus on Interests,
Not Positions*



OPTIONS
*Generate Options
For Mutual Benefit*



CRITERIA
*Use Objective
Criteria*

 **READINGGRAPHICS**
ACTIONABLE INSIGHTS IN ONE PAGE

25

Overcoming 3 Common Obstacles in Negotiations



*When they are
Powerful*



*When they
Won't Budge*



*When they use
Dirty Tricks*

 **READINGGRAPHICS**
ACTIONABLE INSIGHTS IN ONE PAGE

26

Our Office was asked to look at this agreement for the Sheriff's Office. Based on our review, we have a few changes we would request. I will explain them below:

First, under Article VIII, Section 3 of the Idaho Constitution, Counties are prohibited from incurring any liabilities which extend beyond our fiscal year (Oct. 1 through Sep. 30 of each year). Thus, we would request that Sections 5.1 and 5.2 be replaced with the following:

The term of this Agreement shall be from October 1, 2021 through September 30, 2022. This Agreement shall automatically renew on an annual basis. Seller understands that Customer is strictly bound by Article VIII, § 3 of the Idaho Constitution, which prohibits Customer from incurring financial liabilities beyond its current fiscal year, which is October 1 through September 30. The automatic renewal of this Agreement is wholly contingent upon the annual appropriation of funds by Customer for the rates set out in Addendum 1. Said appropriation may be made solely at the option and discretion of Customer. In the event that Customer does not appropriate funds for the fees set out in Addendum 1 for the ensuing fiscal year, for any reason, Customer may terminate this Agreement without penalty. Customer shall give prompt written notice to Seller, attesting to the non-appropriation of funds and the effective date of termination, and no financial obligations shall accrue after the effective date of said termination.

Can we update the Addendum 1 to have a certain price set for 9 renewal periods or smaller percentage increase per year?

Next, Idaho Code section 29-110(1) states that any condition in a contract in Idaho which restricts rights to enforce the agreement in the State of Idaho, or which limits the amount of time to bring a claim, is void. Per that statute, we would ask that Section 6.3 be removed. We would also ask that 7.2 be updated to apply the laws of the State of Idaho.

If these changes are acceptable to RACOM, we would be happy to make the redline updates to the agreement. Thank you for your time in reviewing these and please let me know if there are any questions or concerns.

Sincerely,

Sample email

27



Business Decision vs. Time to Walk Away

28

What could go wrong?

Officer/employee becomes personally liable.

Contract is void/voidable.

County is stuck in a bad contract.

County is sued for breach.

29

Questions?

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30