CONTRACTING WITH A POLITICAL SUBDIVISION

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WHAT ARE WE TALKING ABOUT?
Scope of the presentation

- Intended to be a general overview of the necessary elements of contracting with political subdivisions.
- Will not include detailed discussions of bidding issues or construction contract law

Definition of “political subdivision”

- **Fair v. School Emp. Retirement System of Ohio (1975), 44 Ohio App.2d 115.**
- [A] ‘political subdivision of the state’ is a geographic or territorial portion of the state to which there has been delegated certain local governmental functions to perform within such geographic area

- R.C. § 2744.01(F) “Political subdivision” or “subdivision” means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than the state.

- R.C. § R.C. 9.82(B) “Political subdivision” means county, city, village, township, park district, or school district

DO WE HAVE A DEAL?
Elements of contract for subdivisions

1. Offer, acceptance, consideration, capacity, legality

2. Authority for the subject of the contract

DO WE HAVE A DEAL?
Capacity

- 1. Which entity is the proper party
- 2. Departments or department heads generally have no power to contract.
  (Road, police, and fire departments, zoning departments)
- 3. Public officials, unless expressly authorized, have no power to contract.
- a. Auditor (REAF); treasurer (DETAC), prosecutor (FOJ, DETAC), sheriff (FOJ)
- b. Recorder, coroner, engineer, individual township trustees, township fiscal officers, generally have no power to contract

Capacity Continued

- The county administrator, Township Fiscal Officer or Administrator, Village Mayor or Manager, etc. if authorized by resolution of the council or board, may bind the board
- Contract on behalf of the board or council within limits provided by a resolution of the board or council
- Administrator Fiscal Officer or manager may be allowed to pay claims for goods received and services rendered within limits provided by a previous resolution of the board or council

Constitutional limitations

- **O Const VIII Sec. 6** Political subdivisions to avoid financial involvement with private enterprise; mutual insurance exception

- No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state, or doing any insurance business in this state for profit.

Ohio Water Service Co. v. Board of Com'rs of Lake County (1968), 25 Ohio Misc. 19.

- This court has previously held (June 1965) that the contract was invalid as being ultra vires. . . . [I]n addition, the court is of the opinion that the contract is in violation of Section 6, Article VIII of the Constitution. Alter v. Cincinnati, 56 Ohio St. 47, 46 N.E. 69. The contract not only mingles the board's property with the plaintiff but requires the board to expend funds in order to obtain possession of the property entrusted to the plaintiff.

O Const XVIII Sec. 3 Municipal powers of local self-government

- Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws

- **City of Cleveland v. Village of Cuyahoga Heights (1947), 81 Ohio App. 191 -** It is well settled that a municipal corporation has the power to make and enter into contracts with are necessary or proper to enable it to perform its functions.

Creatures of statute

- **State ex rel. Schramm v. Ayres (1952), 158 Ohio St. 30.**

  > [T]he question is not whether townships are prohibited from exercising such authority. Rather it is whether townships have such authority conferred on them by law.

Subdivision Contracts

- Counties and Townships are creatures of statute and therefore may only exercise powers specifically granted to them
- The question is “are they authorized” rather than “are they prohibited”

Express powers

- **Geauga Cty. Bd. of Commrs. v. Munn Rd. Sand & Gravel, 67 Ohio St.3d 579, 1993-Ohio-55.**

  Counties, on the other hand, may exercise only those powers affirmatively granted by the General Assembly

This would apply generally to townships and other political sub-divisions as well

Implied powers

- **Browning-Ferris Industries of Ohio, Inc. v. Mahoning Cty. Bd. of Health (1990), 69 Ohio App.3d 96.**

[T]he limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant.

Expenditures

- **State ex rel. Locher v. Menning (1916), 95 Ohio St. 97.**

The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county.

Writing requirement
What constitutes writing, formalities

- Generally, if a contract is not memorialized in some writing, whether bid or not, by a purchase order or written contract with proper execution and certification, it is not enforceable. But see, **White Hat Mgt. L.L.C. v. Ohio Farmers Ins. Co., 167 Ohio App.3d 663, 2006-Ohio-3280.**
- No contract entered into by the board, or order made by it, shall be valid unless it has been assented to at a regular or special session of the board, **and entered in the minutes of its proceedings** by the clerk of the board

Contract Execution

- Each Subdivision has designated officials that may execute contracts binding on the subdivision
  - Municipalities – Safety / Service Director, Manager, Mayor
  - County – Administrator, Board Majority
  - Township – Administrator, Board Majority
  - School or Park District – President & Treasurer

Special terms / Conditions

- Length – Binding on Successors
  - There is no rule that Public Bodies cannot bind the subdivision beyond the current term of office
- Automatic renewals
  - Rule of thumb is a three year maximum length
- Indemnification
  - Only in specific circumstances
    - There must be a maximum of the indemnification and that amount must be appropriated and certified as available just like a purchase
    - The Subdivision must be provided sufficient consideration to support the obligation assumed by the indemnification

Possible Alternatives to Indemnification

- Covenants not to sue
- Specific Insurance requirements

Requirements to pay the contract

- Money has to be appropriated
- There must be a proper warrant drawn against the proper fund
- Fiscal Officer must certify that the money required to meet the obligation has been lawfully appropriated for the purpose and is in the treasury or in the process of collection free from any previous encumbrances

Failure to Certify

- No payment or expenditure for material or services may be made prior to the date of certification by the fiscal officer

- R.C. 5705.41 declares any expenditure of funds void unless there is an attached certificate of the fiscal officer that the funds are appropriated in the treasury. If a contract exists without an auditor or fiscal officer’s certificate it is void.

Moral Obligations

- Municipalities
  - A municipality has authority to appropriate money to pay a claim which is by law unenforceable but which it deems to be a moral obligation
  - A municipality is without authority to assume a liability for a mere gratuity without an equitable or moral obligation
  - This is primarily up to the legislative authority to determine

Moral Obligations

- Townships
  - Board of Trustees must recognize it as a moral obligation
  - Board of Trustees must adopt a resolution expressly acknowledging the moral obligation

Unauthorized Contracts

- An unauthorized contract does not create a moral obligation of the legislative body
- An Officer or official making contracts without appropriations or authority is personally liable

Conclusions

- Be sure to comply with all of the statutory contracting requirements based on your particular political subdivision
- Be sure to execute contracts with the properly authorized individuals with authority to execute and enter the contract
- Be sure authority to execute and enter the contract is authorized by the legislative body and specifically noted in the meeting minutes
- Be sure the auditor / fiscal officer certification is attached and that the funds are available and appropriated.