**21. Contract**

When considering or reviewing any contract, League encourages members to consult the memo “[Making and Managing City Contracts](https://www.lmc.org/media/document/1/makingandmanagingcitycontracts.pdf?inline=true).” The form of a local improvement contract may vary considerably from case to case. The following general requirements are applicable:

1. It must be written, ideally in simple terms, and properly identifying the parties.

2. Do not make assumptions. The rights and obligations of each party should be clearly defined.

3. Separate bonds for performance and payment required as necessary and in such sums as indicated by Minn. Stat. § 574.26. The separate payment bond is to insure payment for all materials and labor. Minn. Stat. § 574.261, subd. 1a, allows an irrevocable letter of credit to be used instead of a performance bond if it is subject to the same conditions as the bond and the project is under $50,000. This statute does not provide an alternative to the payment bond requirement.

4. Right reserved to have work supervised by city engineer, and in case of improper construction or unreasonable delay to cause suspension of work and re-let contract or finish work by day labor.

5. Payment from month to month, on basis of estimate of city engineer or other competent person selected by the council, of 95 percent of the amount earned. When the work is at least 95 percent completed, upon the recommendation of the engineer, such portions of the retained price are to be released as the council determines need not be retained to protect the city’s interest in satisfactory completion of the contract. (Minn. Stat. § 429.041, subd. 6.)

6. Final payment[[1]](#endnote-2) subject to acceptance of work by city council on recommendation of engineer.

7. Contractor should agree to defend and indemnify the city for any claims.

8. Consider Alternative Dispute Resolution (e.g., mediation). Binding arbitration is generally discouraged.

9. City attorney must review contract.

The following is a sample contract:

 **CONTRACT FOR LOCAL IMPROVEMENT**

I. This Agreement is made this \_\_\_\_\_\_\_\_\_\_ day of (month) , (year) ,between the City of \_\_\_\_\_\_\_\_\_\_, Minnesota (hereinafter, the City), and \_\_\_\_\_\_\_\_\_\_ (insert name of contractor) of \_\_\_\_\_\_\_\_\_\_ (insert address of contractor) (hereinafter, the Contractor).

II. The Contractor agrees to furnish all materials, tools, equipment, and labor necessary in the construction of Improvement No. \_\_\_\_\_\_\_\_\_\_, the \_\_\_\_\_\_\_\_\_\_ (describe improvement project) (hereinafter, the Project) all in strict conformity with the Project’s plans and specifications which are incorporated into this Agreement. The Contractor agrees to comply with all federal, state, and local laws and ordinances applicable to the Project, including all safety standards. The Contractor shall be solely and completely responsible for conditions of the job site, including the safety of all persons and property during construction of the Project. The Contractor at all times shall keep the premises free from accumulation of waste materials and debris caused by the Contractor's operations. The Contractor represents and warrants that it has the requisite training, skills, and experience necessary to complete the Project and is appropriately licensed by all applicable agencies and governmental entities and will perform all services with reasonable care and skill.

III. All of the Contractor’s work and labor shall be subject to the inspection and approval of the engineer designated by the City to supervise the work. If any materials or labor are rejected by the engineer as defective or unsuitable, then the materials shall be removed and replaced with other approved materials and the labor shall be done to the satisfaction and approval of the engineer at the Contractor’s sole cost and expense.

IV. The Contractor shall replace at the Contractor’s expense any loss or damage to the Project, however caused, which occurs during the construction thereof or prior to the final delivery to and acceptance of the Project by the City. Any payment made to the Contractor, shall not be construed as operating to relieve the Contractor from responsibility for the construction and delivery of Project. Acceptance of the completed Project shall be evidenced only by a final certificate issued by the City.

V. The Contractor shall commence work on the Project not later than (month) (day) *,*  (year) . The Contractor shall proceed diligently and agrees to complete the Project to the satisfaction and approval of the City’s engineer on or before (month) (day) *,*  (year) . If the Contractor fails to complete the Project by said date, unless excused by written consent of the City, the City shall have the right to deduct from any money due or which may become due to the Contractor, the amount of \_\_\_\_\_\_\_\_\_\_ dollars ($\_\_\_\_\_\_\_\_\_\_) per day between the time stipulated for the completion and the actual date of completion. If no monies are due to the Contractor, the City shall have the right to recover such sum as liquidated damages. In addition to such liquidated damages, the Contractor agrees to pay all costs of local superintendence of the work during such delay. The Contractor agrees to notify the City in writing of any cause of delay of the Project within 24 hours after such cause of delay arises. If the Contractor fails to complete the Project by the time hereinafter specified, the City may immediately, or at any time thereafter, proceed to complete the Project at the Contractor’s expense. If the Contractor gives written notice of a delay over which the Contractor has no control, the council may at its discretion, extend the completion date, and in such case the Contractor shall become liable for liquidated damages and costs of local superintendence only after the extended completion date.

VI. Unless approved by the council in writing, the Contractor shall make no claim for extra work done or materials furnished, nor shall the Contractor do any work or furnish any materials not covered by the plans and specifications of this contract. Any such work or materials furnished by the Contractor without written council approval, is at the Contractor’s own risk and expense.[[2]](#endnote-3) When any extra work or materials is ordered by the council, the Contractor shall furnish the materials and do such work for the actual cost thereof plus ten percent. The Contractor shall perform any altered plans ordered by the council; if such alteration reduces the cost of doing such work, the actual amount of such reduction shall be deducted from the contract price for the work.

VII. The Contractor agrees to pay all laborers employed and all subcontractors furnishing material to the Contractor in the performance of this contract. If the Contractor fails to pay any claims and demands for labor and materials, the City may apply the monies due to the Contractor toward paying and satisfying such claims and demands. The City has the right to apply monies due to the Contractor towards paying any accrued indebtedness or any claim which may hereafter come due against the Contractor. The amount of such payments shall be deducted from the balance due to the Contractor; provided that nothing herein nor any variation from the amounts and timing of the installments shall be construed as impairing the right of the City or of those to whose benefit the bond herein agreed upon shall insure, to hold the Contractor or surety liable on the bond for any breach of the conditions of the same nor as imposing upon the City any obligation to laborers, materialmen, contractors, or sureties to pay or to retain for their benefit any monies coming to the contractor hereunder.

 Pursuant to Minnesota Statutes, Section 471.425, Subdivision 4a, the Contractor must pay any subcontractor within ten (10) days of the Contractor’s receipt of payment from the City for undisputed services provided by the subcontractor. The Contractor must pay interest of one and one-half percent (1½ %) per month or any part of a month to the subcontractor on any undisputed amount not paid on time to the subcontractor. The minimum monthly interest penalty payment for an unpaid balance of $100.00 or more is $10.00. For an unpaid balance of less than $100.00, the Contractor shall pay the actual penalty due to the subcontractor. A subcontractor who prevails in a civil action to collect interest penalties from the Contractor shall be awarded its costs and disbursements, including attorney’s fees, incurred in bringing the action.

VIII. The Contractor shall not discriminate in the hiring of labor for the performance of any work under this contract or any subcontract hereunder or in selecting a material supplier or vendor on the basis of race, creed, color, sex, or national origin; and shall not discriminate against any persons who are citizens of the United States and who are qualified and available to perform the work on the Project. The Contractor and any subcontractor, material supplier, or vendor shall not in any manner discriminate against, or intimidate, or prevent the employment of any such person from performing work under this contract or any subcontract hereunder on the basis of race, creed, color, sex, or national origin. Any violation of this paragraph shall be a misdemeanor; and this contract may be canceled or terminated by the City, and all money due, or to become due, may be forfeited, for a second or any subsequent violation of the terms or conditions of this contract.[[3]](#endnote-4)

IX. The Contractor agrees to defend, indemnify, and hold the City harmless from and against any and all claims, suits, and actions against, and all loss, damage, costs, or expense to the City arising from any infringement or claim of infringement of any letters, patent, or patent rights upon or covering any patented article furnished or installed by the Contractor under this contract for the City, of from or by reason of the use by the City of any patented article or articles furnished or installed by the Contractor for the City under this contract.

X. The Contractor guarantees and agrees to maintain the stability of all work done and materials furnished and installed under this contract for a period of one year after the date of final payment. The Contractor agrees to perform fully all other guarantees as set forth in the specifications. To secure the performance of the guarantee and of the obligation of the Contractor, the Contractor agrees to furnish a surety bond running to the City of such reasonable sum as the council may require, executed by a surety company authorized to do business in this state. The surety bond must be furnished before the final payment is made to the Contractor.

XI. To the fullest extent permitted by law, the Contractor agrees to defend, indemnify and hold the City harmless from all damages and claims for damages that may arise by reason of the Contractor’s negligence or a violation by the Contractor’s agents or employees, while engaged in the performance of this contract. The Contractor agrees to take all precautions necessary to protect the public against injury, and to keep danger signals out at night and at such other times and such places as public safety may require. In addition, Contractor agrees to keep in force statutory workers’ compensation insurance and employer’s liability with minimum limit of $\_\_\_\_\_\_\_\_. Additionally, the Contractor shall maintain commercial general liability coverage for all work covered under the contract naming the City as an additional insured in at least the amount of \_\_\_\_\_\_\_\_\_\_ per occurrence.[[4]](#endnote-5) Contractor further agrees to make, execute, and deliver to the City separate performance and payment bonds executed by a surety company authorized to do business in this state in the sum of \_\_\_\_\_\_\_\_\_\_ dollars (insert amount of bond which must equal the contract price) ($\_\_\_\_\_\_\_\_\_\_) for the use of the City and of all persons doing work or furnishing skill, tools, machinery, materials, or insurance premiums under or for the purpose of this contract, to secure the faithful performance of this contract by the Contractor and to be conditioned as required by Minn. Stat. §§ 574.26 to 574.32.

XII. In consideration of the covenants and agreements stated above, the City agrees to pay the Contractor the sum mentioned in the proposal or bid of the Contractor, which is attached hereto and made a part of this contract. If the Contractor properly performs the work, the council shall, from month to month, before completion of the work, pay Contractor 95 percent of the amount already earned under the contract, upon the estimate of the engineer or other competent person selected by the council. When the work is 95 percent or more completed, upon the recommendation of the engineer, such portions of the retained price shall be released as the council determines it need not be retained to protect the interest of the City in the satisfactory completion of the contract. The balance shall be retained by the City until the final performance and completion of this contract by the Contractor to the satisfaction, approval, and acceptance of the City council including provision by the Contractor of Minn. Dept. of Revenue Form IC-134 or other authorized proof of the Contractor’s compliance with applicable state laws. Failure to pay any amount due and payable under the terms of this contract within 30 days of a monthly estimate or within 90 days after the final estimate of the amount earned shall obligate the City to pay to the Contractor simple interest on the past due amount at an annual rate equal to the monthly index of long-term United States Government bond yields for the month prior to the month in which this obligation is incurred, plus an additional 1 percent per annum. Interest shall not be payable with respect to any amount which the City may legally withhold as a result of breach of contract or other contractual claim or if the delay is caused by the Contractor. All Contractor bonds shall be furnished by the Contractor in a form and with a surety satisfactory to the City council.

XIII. It is agreed and understood by the parties hereto that the use of said work and improvement project at any time by the City for any purposes shall not be construed to be or operate as an acceptance by the City of the work to be done by the Contractor under this contract.

XIV. Nothing in this agreement shall be construed to waive any immunities or limitations to which the City is entitled under Minn. Stat. Ch. 466 or otherwise.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed on their behalf by the proper officers thereunto duly authorized and their corporate seal to be hereto affixed, the day and year first above written.

In the presence of

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ City of\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Mayor

Witnesses

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Clerk

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 (Signature of Contractor)

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 (Signature of agent or officer

 acting for Contractor)

**END OF FORM**

1. A city may not make final payment to a contractor until he/she makes a satisfactory showing that he/she has complied with the provisions of the law requiring the withholding of state income taxes from the wages of his/her employees by providing a Withholding Affidavit for Contractors (IC-134) to the city. Withholding Affidavit forms and instructions are available from the Department of Revenue, 600 North Robert St., St. Paul, MN 55155 or at <http://www.taxes.state.mn.us/forms/ic134.pdf>. On its projects the State Department of Highways will accept a certificate of compliance from the Commissioner of Revenue, but before such a certificate will be issued the contractor must file an affidavit of compliance with the Commissioner of Revenue. [↑](#endnote-ref-2)
2. After work is commenced on an improvement done under a unit price contract, the council may, without advertising for bids, authorize changes so as to include additional units of work at the same unit price. This may be done, however, only if the additional work costs no more than 25 percent of the original contract price (determined by multiplying the estimated number of required units by the unit price). (Minn. Stat. § 429.041, subd. 7.) This provision does not limit payment when the work contracted for involves more than the estimated number of units because of incorrect data on which bids were based (as, for instance, where the contractor was given wrong information on underlying soil conditions as a result of which the number of cubic yards of fill required at a contracted unit price per cubic yard is twice as much as originally estimated). [↑](#endnote-ref-3)
3. This paragraph is based upon Minn. Stat. § 181.59, which requires that these conditions relating to discriminations based on race, creed, or color be part of the contract. The words “sex” and “national origin” have been added to reflect provisions of the federal civil rights act of 1964 and the state human rights act. Undoubtedly, these provisions would be read into the contract as a matter of law even if omitted here. As an alternative, the paragraph might be abridged by merely referring to the pertinent state and federal laws. [↑](#endnote-ref-4)
4. In setting insurance amounts, cities and their counsel should consider several factors, including statutory liability limits listed in Minn. Stat. § 466.04, subd. 1, actual risk of harm, and what amount of insurance is commercially reasonable. [↑](#endnote-ref-5)