



## INFORMATION MEMO

# Intergovernmental Cooperative Agreements

*Understand different forms of cooperation such as mutual aid agreements, joint powers contracts, service contracts, and contracts for shared resources or personnel. Read about common pitfalls and learn recommended provisions for minimizing claims and managing your liability risks. This memo includes sample hold-harmless contract language and links to model agreements.*

### RELEVANT LINKS:

See Appendix A: Examples of cooperative intergovernmental arrangements.

Fire department mergers have special considerations. See LMC information memo [Fire Department Management and Liability Issues](#), Section VI, Considerations in fire department consolidation.

Minnesota State Auditor Best Practices Report, ["Cooperative Efforts in Public Service Delivery"](#), December 13, 2004.

## I. Different forms of cooperation

Cities often look for more effective and efficient ways to provide services to citizens. There is increasing political and financial pressure to reduce spending and taxes; and at the same time, maintain or increase services. Intergovernmental cooperation is an effective strategy to accomplish this, but it must be done right. If not, the result can be conflict among the parties and complicated, contentious, and expensive litigation.

It is important to be clear what form of cooperation you intend. The most common types of cooperative arrangements are:

- Joint powers entity. The joint operation is governed by a joint powers board, which has the power to receive and expend funds, enter contracts, etc. A new legal entity is created.
- Service contract. One governmental unit purchases a service from another.
- Mutual aid. Two or more governmental units agree to assist each other when needed, often in emergency situations.
- Shared resources. Two or more governmental units share the use and ownership of facilities or equipment.
- Shared personnel. Two or more governmental units share an employee.

## II. Drafting tips for all forms of cooperative agreements

In all intergovernmental cooperation situations, there should be a written agreement spelling out the rights and responsibilities of each party. The agreement must be clear and unambiguous as to who is responsible for what. Be sure to address how the arrangement can be terminated, including when a city may withdraw, how much notice is required, and how assets and liabilities will be allocated. Finally, the agreement should address risk allocation.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

## RELEVANT LINKS:

See, for example, LMC and Township Assn. sample City/Town Fire Contract., in LMC information memo, [Fire Department Management and Liability](#), Section IV-B, Contracting out city fire services.

See Appendix B for sample indemnification (hold harmless) language.

See Information memo [Making and Managing City Contracts](#) Section IV-B-1-b, Additional insured provisions, for information on additional insureds.

[Law Enforcement Services Agreement Between Two Cities](#), LMC Model Contract.

See Appendix B for sample indemnification (hold harmless) language.

[Equipment Loan Agreement Between Two Cities](#), LMC model contract.

[Purchase and Sharing of Equipment Between Two Cities \(Street Sweeper\)](#), LMC model contract.

The goal in most cases is to minimize costs by minimizing conflicts and litigation among parties and allowing for a common defense. How you do this varies based on the type of agreement. Sample language is linked in the margin opposite each discussion.

### III. Managing risk in cooperative agreements

#### A. Service contracts

In service contract agreements, the service provider should indemnify the service purchaser. Since the service provider is the party that can control the service and the risk, it makes sense for the service provider to accept liability. Use the “limited form” indemnification to avoid creating an uninsured liability (i.e., the provider’s indemnification responsibility is limited to the amount of its negligence). In addition, the service provider should carry liability insurance and the city, as the service purchaser, should be named as an additional insured in most contracts.

#### B. Shared resource agreements

Shared resource agreements should clarify the parties’ respective responsibilities. In particular, note who is responsible for the maintenance, care, and control of facilities and equipment.

In this type of agreement, use mutual indemnification provisions. That is, each party indemnifies the other for claims arising from that party’s responsibilities. Use the “limited form” indemnification approach.

## RELEVANT LINKS:

See also Section III-D-2-e-(4), *Employment matters*, as it applies to joint powers agreements.

See Appendix B for sample indemnification (hold harmless) language.

[Minn. Stat. § 471.59.](#)

[Reimer v. City of Crookston, 326 F. 3d 957 \(8<sup>th</sup> Cir. 2003\).](#)

[Minn. Stat. § 471.59, subd. 1a.](#)

### C. Shared personnel agreements

Agreements for sharing personnel should clarify the type of relationship being created, that is, whether the personnel are employees or independent contractors. Also, state clearly who is responsible for wages, benefits, workers' compensation coverage, and liability related to the employee's actions. Decide and state clearly how the employee's time will be allocated to each governmental unit. Use mutual indemnification provisions and the "limited form" indemnification approach.

### D. Mutual aid and joint powers agreements

While mutual aid arrangements and joint powers entities give way to some different tactics for managing risk, the overall risk management objectives are the same in both scenarios. These objectives include:

- Making sure the governmental entities involved have coverage for activities carried out under the agreement.
- Minimizing the potential for courtroom conflicts between the governmental units that have entered into the agreement.
- Minimizing the amount of resources necessary to defend the governmental units in the event of a third-party claim.

Since 2006, the state's joint powers statute has contained two liability provisions in response to a 2005 federal court case that enable joint ventures, such as mutual aid agreements, joint powers agreements, or some other type of joint venture, to carry no greater risk of liability than for a single subdivision acting alone.

The law provides that a governmental unit is liable for the acts or omissions of another governmental unit in a joint venture or joint enterprise only if it has so agreed in writing. It also says that governmental units operating together under the Joint Powers Act, and any joint boards created thereunder, are a single governmental unit. The total liability for the governmental units and any joint board may not exceed the limits on liability for a single governmental unit.

Previously, under the court's ruling, liability arising from a joint venture or a joint powers entity's activity could exceed the then-existing statutory tort limit of \$1 million. In that case, the court said that the claimant could make a claim against each political subdivision that was a member of the joint powers entity, for damages caused by the joint powers entity's activities. The court had also ruled that a claimant could "stack" the statutory liability limits of each member, effectively multiplying the statutory tort limits by the number of members in the joint powers entity. The court's ruling was negated by the changes to the joint powers statute as noted above.

## RELEVANT LINKS:

[Minn. Stat. § 12.331, subd. 1.](#)

[Minn. Stat. § 12.331, subd. 2.](#)

LMC information memo,  
[LMCIT Model Mutual Aid Agreement.](#)

## 1. Mutual aid agreements

Mutual aid agreements essentially reflect a set of promises and a plan for how different governmental entities will aid one another for their common benefit. State law authorizes cities to provide mutual aid assistance in emergencies. If the parties do not have a written agreement, the provisions of this law addressing liability, damage to property, workers' compensation, and reimbursement apply. The League's model mutual aid agreement treats these issues similarly to the statute.

There are, of course, risks inherent in any operations covered under a mutual aid agreement (e.g., police activities, fire suppression, and rescue activities). Yet there are also risks that arise from the mutual aid relationship itself. The goal in listing out these risks is not to dissuade municipalities from enjoying the benefits of mutual aid agreements; mutual aid can provide valuable and needed assistance in a cost-effective manner. Rather, the goal is to make sure these issues are considered and appropriately addressed as agreements are created and revisited.

Some of the more important issues to consider and manage include the following:

- A third party might be injured and bring a lawsuit against one or more of the entities involved in the operation. In this situation, your city could be vicariously liable for the actions of another city based on the mutual aid relationship.
- More financial resources than necessary may be spent if each entity to the agreement has to separately defend against the claim.
- Financial considerations may create an incentive for mutual aid members to assert positions adverse to one another (e.g., comparative fault).
- A judgment or verdict could exceed the amount of existing liability coverage.

### a. Third-party liability claims

There are two aspects to the financial risk presented by third-party claims. The first risk is having to pay money to the claimant as either a settlement or judgment. The second risk is using up financial resources to defend the claim.

Claims arising out of mutual aid activities pose a heightened risk of using up resources because operations carried out under a mutual aid agreement involve more than one governmental unit. When a mutual aid activity gives rise to a claim, it follows that there is greater potential for multiple governmental entities to be named as defendants. The risk is that multiple cities may have to separately defend a single claim. It is important to design agreements in a way that will help alleviate this situation.

## RELEVANT LINKS:

Some mutual aid agreements contain language along the lines of “each party will be responsible for its own liability.” Stated wryly, this is akin to saying: “we’re all in this together—until there’s a lawsuit—then it’s everyone for themselves.” This kind of language creates an incentive for the city, as well as a duty for the city’s advocate, to marshal and emphasize the evidence indicating that the other (governmental) defendants are comparatively more at fault. For the plaintiff, this ability to divide the defense creates valuable strategic advantages. Moreover, no one will know how much each party is liable until the jury returns a verdict, and most of the defense costs will already be incurred by that time. Inter-city disputes over which one is more at fault is an especially unnecessary use of resources when all the losses are being paid out of the same League of Minnesota Cities Insurance Trust (LMCIT) risk pool.

Rather than leaving each party to fend for itself (and potentially setting up an expensive fight between the parties), LMCIT recommends the inclusion of defense and indemnity provisions in mutual aid agreements. When the agreement places responsibility for all defense costs and damage awards with one of the parties to the agreement, the financial incentive to shift fault to other governmental co-defendants may be reduced or entirely eliminated. It is also far more likely that one attorney can defend all involved cities and their employees, thereby minimizing defense costs.

Which party should agree to provide the defense and indemnity? There is no law or rule—only a theory that seems to make sense when applied to most mutual aid circumstances. The party in the best position to control the risks should probably be the one to carry those risks. In mutual aid situations, it is very common to see provisions establishing that the city requesting the assistance oversees the activities. Accordingly, a plausible way to allocate defense and indemnification responsibilities is to place them with the party requesting assistance. One can also invoke the principle of reciprocation and arrive at the same result, i.e., it seems fair that the party who receives help should also bear the risk that something bad might happen.

For LMCIT members, the city’s LMCIT liability coverage includes tort liability the city has assumed by contract. That is, when the city agrees in a contract to defend and indemnify another party for tort claims, LMCIT will provide that defense and indemnification, assuming the underlying claim is a covered claim under the city’s coverage. Keep in mind that LMCIT’s standard coverage is subject to a \$2 million-per-occurrence limit for damages. Different limits may apply for some coverages, and cities have the option to carry excess coverage.

See LMC information memo, [LMCIT Liability Coverage Guide](#), Section II-D-1, LMCIT primary liability limits.

**RELEVANT LINKS:**

LMC information memo  
[LMCIT Liability Coverage Guide](#).

[Minn. Stat. ch. 466](#).

LMC information memo,  
[LMCIT Model Mutual Aid Agreement](#).

See Appendix B for sample indemnification (hold harmless) language.

In thinking about defense and indemnity provisions, it is also important to keep in mind that liabilities could exceed the amount of available coverage. A city should put a limit on the promise to defend and indemnify others. To avoid incurring uncovered exposure, limit the defense and indemnity obligations to the amount of your coverage.

Although LMCIT provides coverage in excess of the governmental tort caps set forth in state law, a city may choose to purchase excess coverage for claims not covered by the tort caps. For example, a federal civil rights claim brought under federal law is not subject to the tort caps in Chapter 466, and could exceed your city’s coverage limit.

**b. Injuries to employees and damage to equipment**

In addition to addressing third-party claims, mutual aid agreements should include provisions concerning workers’ compensation coverage and damage to city property. LMCIT recommends each entity provide workers’ compensation coverage for its own employees, and each party be responsible for any damage to or loss of its equipment. To eliminate conflicts between parties, LMCIT also recommends the parties waive any rights to recover damages from the others for workers’ compensation costs and property damage occurring during mutual aid activities. Translated to more practical terms, the parties are essentially saying, “We’re in this together, let’s just cover the risks through insurance and be done with it, and agree that we’re not going to waste public funds suing each other.” Although a city risks being liable for another city’s negligence, that city is just as likely to receive the same benefit in return. Over the long term, any competing interests are likely to balance.

**c. General risk management drafting tips**

Spell out procedures for requesting assistance. For example, state who can make the request, to whom is the request addressed, and who makes the decision regarding whether to respond. Clarify that the requesting party is in charge, and that the assisting party acts under the requesting party’s direction and control.

The requesting party should indemnify the assisting party. Use the “limited form” indemnification provision to avoid creating an uninsured liability.

Address workers’ compensation and damage to equipment in the agreement. Each party should be responsible for workers’ compensation benefits for its own employees and for damage to its own equipment, even if caused by the other party’s negligence. In addition, each party should waive subrogation against the other.

## RELEVANT LINKS:

Fire department mergers have special considerations. See LMC information memo [Fire Department Management and Liability Issues](#), Section VI, Considerations in fire department consolidation.

LMC information memo, [LMCIT Liability Coverage Guide](#), Section II-I.

## 2. Joint powers agreements

A joint powers entity agreement results in the creation of a new legal entity. The governmental units forming the entity are referred to as “constituent members” of the entity. The LMCIT liability coverage document provides that a joint powers agreement creates a “joint powers entity” if the agreement establishes a board with the effective power to do any of the following:

- Receive and expend funds.
- Enter contracts.
- Hire employees.
- Purchase or otherwise acquire and hold real or personal property.
- Sue or be sued.

For example, two cities, by agreement, could decide to merge their fire departments into a single department. The agreement might establish a joint powers board comprised of members from both cities. The board would then be responsible for running the newly merged fire department, not the city councils of the constituent members. The merged fire department would be a new legal entity, separate from the cities.

From a liability perspective, there are two key points to be aware of:

- Unless special arrangements have been made, a joint powers entity is not a covered party under the city’s coverage. This means that if a joint powers entity of which the city is a member is sued, the city’s LMCIT coverage would not respond to that suit.
- Liability arising out of the activities of a joint powers entity is specifically excluded from coverage under the LMCIT coverage document. This means that if the city or a city officer or employee is sued because of some activity of the joint powers entity, the city’s LMCIT coverage would not respond to that suit.

If a joint powers entity is created, it is important to make sure the new entity has liability coverage (and property coverage if the entity has property and workers’ compensation coverage if the entity has employees). There are two ways coverage can be provided for a joint powers entity and its members.

## RELEVANT LINKS:

See Appendix B for sample indemnification (hold harmless) language.

- The usual practice is for LMCIT to issue a separate liability coverage document to the joint powers entity. This coverage document includes as covered parties the entity itself; its officers and employees; the governmental units who are members of the joint powers entity; and the officers and employees of those governmental units. The idea is to get all the liability coverage for the entity's activities in one place, so that everyone who might be sued because of the entity's activities is covered in the same place.
- A less common approach is to add the coverage for the joint entity, by name, to one of the individual city's coverages. This might make sense, for example, if the relationship between the member cities is such that one city is in a position to effectively control the joint entity's activities and decision-making. A city should be aware that if it adds a joint powers entity to its coverage, the city and the joint powers entity share that coverage. If there is a claim against both the city and the joint powers entity, coverage could be diluted. Also, claims against the joint powers entity will affect the city's experience rating, which may result in higher coverage premiums.

### **a. Third-party liability**

In concept, the formation of a new legal entity eliminates several of the risks inherent in mutual aid arrangements. Assuming the new entity has coverage for itself, all the constituent members share in a common source of financial protection for claims against the entity. And because an entity cannot sue itself, the incentive for constituent members to assert positions adverse to one another is reduced.

For coverage purposes, LMCIT treats joint powers entities as separate from the cities that formed them. The joint powers entity is not covered by the coverage that constituent members have obtained for themselves.

For example, a police officer from City A is doing some work for a drug task force that is a joint powers entity. If there is a claim against City A or the officer arising out of the officer's task force activities, the claim will not be covered by City A's LMCIT coverage. On the other hand, LMCIT coverage issued to a joint powers entity covers both the entity and its constituent members for claims arising out of joint powers activities. If the task force had LMCIT coverage, it would provide protection to the task force, City A, and the officer from City A. Again, this common source of coverage helps eliminate the incentive for intergovernmental disputes, and helps minimize the number of separate defenses necessary in response to a claim.

It is therefore important for the joint powers board to carry its own liability coverage or to be covered by name under one of the constituent member's liability coverage.



## RELEVANT LINKS:

See LMC information memo, [LMCIT Liability Coverage Guide](#), Section II-D-1, LMCIT primary liability limits.

[Minn. Stat., § 466.04.](#)

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### **b. Amount of coverage**

Unless a city asks for excess coverage, the standard coverage issued by LMCIT will be \$2 million per occurrence for most types of claims. Although the standard LMCIT coverage is in excess of the current municipal cap of \$1.5 million per occurrence, some claims are not subject to the tort cap. For example, federal claims are not governed by these state limits, and the functions and activities of the joint powers entity should be considered in deciding how much coverage to carry. Many joint powers entities are organized to provide law enforcement services in particularly risk-prone areas, e.g., drug task forces, gang task forces, SWAT teams. The individual rights at issue when police conduct a search, use force, or make an arrest are often traceable to federal constitutional sources, meaning that state tort limits may not apply. Entities involved in these kinds of operations should consult with their attorney, insurance agent, and LMCIT to assist in determining the amount of coverage. In view of the risk that claims could exceed available coverage, LMCIT recommends the joint powers agreement address how any additional liability exposure will be handled among the participating governmental units. You might decide to allocate the uninsured exposure equally among the responding parties, based on population or some other formula agreeable to all the parties.

#### **(1) Inadequate coverage**

Sometimes there is insufficient coverage for the risk involved in the joint powers entity's activity. Parties to the joint powers entity should make sure there are no gaps or holes in coverage. If gaps are not bridged and holes are not filled, individual members of the joint powers entity may be left holding the bag without coverage from any source.

Uninsured and underinsured exposures present the potential for conflict among constituent members. These situations could arise due to an exclusion in coverage or where liability is more than the coverage. If the agreement does not address how these uninsured/underinsured liabilities will be handled, it simply reserves the question for a later day when the stakes and emotions may all be running high.

Parties should consider including provisions in the agreement that describe how these costs will be allocated. If the agreement fails to address this issue, it really means that if there is excess liability, the cities will be left with an unresolved conflict over who was at fault and who should bear the cost.

**RELEVANT LINKS:**

[Minn. Stat. § 466.06.](#)

**(2) Too much coverage**

When the joint powers entity is named as an additional named insured on all or numerous joint powers members' policies, this fact may make the joint powers entity an "inviting, deep pocket" target for litigation. Cities and joint powers entities waive statutory liability caps to the extent they have obtained coverage.

It may be helpful for parties in a joint powers entity to either have the joint powers entity obtain coverage independently or have an agreement that the joint powers entity will be insured through one of its member's coverages. While providing insufficient coverage is not good, providing too much or overlapping coverage may be costly to joint powers entities members.

**c. Injuries to employees and damage to equipment**

Generally, a joint powers entity must provide workers' compensation coverage for its employees. If employees of the constituent members will be spending part of their work time performing joint powers activities, the agreement should specify who is responsible for providing workers' compensation. If the joint powers entity does not provide workers' compensation coverage, it generally makes sense for each governmental unit to agree to provide coverage for its own workers, even if they will be spending a portion of their time on joint powers activities.

The parties should also agree on how damage to equipment will be handled. If the joint powers entity is going to own equipment, it should have property coverage for that equipment. If constituent members will be allowing their equipment to be used for joint powers activities, the agreement should specify who will provide coverage for it. Generally, the party that owns the equipment will provide the coverage for that equipment.

**d. Auto liability and auto physical damage considerations**

Not all joint powers agreements are written uniformly and not all joint powers entities are operated in the same manner with respect to the use of autos. Some joint powers entities own autos, but many don't - rather, the constituent members of the joint powers entity provide autos for joint powers entity activities. Many joint powers agreements are not as explicit as they could or should be with respect to auto use provisions and coverage responsibilities.

**RELEVANT LINKS:**

LMCIT recommends that joint powers agreements spell out auto use responsibilities along with auto liability and auto physical damage coverage responsibilities. The cleanest and simplest arrangement is for the coverage to follow the owner of the vehicle. That is, if a constituent member owns an auto and provides it for joint powers entity activities, the constituent member is responsible for liability arising out of the use of the auto as well as damage to the auto regardless of whether the auto is being used for the city's regular operations or for joint powers entity activities.

If a joint powers agreement specifies or requires auto coverage arrangements that conflict with LMCIT's default 'coverage-follows-the-owner' approach, it's important that the agent and member work with the underwriter to make special coverage arrangements. A special endorsement will likely be needed.

If a joint powers agreement is silent on auto liability and auto physical damage responsibilities, the LMCIT coverages of the member cities and the joint powers entity allow the following default arrangements.

**(1) Auto liability**

If the joint powers entity itself owns an auto that's used for joint powers entity activities, the joint power entity's LMCIT auto liability coverage will apply for auto liability claims arising out of joint powers entity activities. The auto should be scheduled on the joint powers entity's LMCIT auto schedule. If a constituent city owns an auto that's used for joint powers entity activities, the city's LMCIT auto liability coverage will apply for auto liability claims arising out of city activities and joint powers entity activities. The auto should be scheduled on the city's LMCIT auto schedule.

**(2) Auto physical damage**

If the joint powers entity itself owns an auto, the joint powers entity's LMCIT auto physical damage coverage will apply for damage to the auto. The auto should be scheduled on the joint powers entity's LMCIT auto schedule. If a constituent city owns an auto that's used for joint powers entity activities, the city's LMCIT auto physical damage coverage will apply for damage to the auto regardless of whether the auto is used for city or joint powers entity activities.

Note that unless special arrangements are made, there is an exclusion for autos the joint powers entity rents, leases, or borrows from a constituent member of the joint powers entity under the joint powers entity's LMCIT auto physical damage coverage. In other words, the default arrangement is: if the auto is owned by a constituent city and provided to the joint powers entity for joint powers entity activities, that auto is not considered a covered automobile under the joint powers entity's LMCIT auto physical damage coverage.

**RELEVANT LINKS:**

*Huver by Huver v. Opatz,*  
[392 N.W.2d 237, 240 \(Minn. 1986\).](#)

**e. Subrogation**

Constituent members of a joint powers entity should consider waiving their subrogation rights regarding liability, property damage, and workers' compensation claims. Subrogation is the right of an insurer to pursue a third party that caused a loss to the insured. Suppose your city owns a piece of equipment that is destroyed due to the negligence of another city. Normally you (or your insurance company) could sue the negligent city for causing destruction of your equipment. Between cities who are members of LMCIT, this sort of subrogation effort probably is not worth it. The city whose property was destroyed will have the claim covered by LMCIT and any effort to subrogate against the negligent city would amount to LMCIT paying itself for the loss. Moreover, waiving your subrogation rights helps to eliminate conflicts between constituent members who are acting together to achieve a common goal.

**f. General risk management drafting tips**

**(1) Responsible party**

Joint powers agreements should clearly set forth who is responsible for what. If the agreement calls for one member to provide coverage for the joint powers entity, all members need to make sure there is appropriate follow through (i.e., documentation of coverage and/or joint powers entity's status as an additional named insured on the appropriate policy).

Similarly, if there is no clear understanding of who does what, some things may not get done. When someone gets hurt and brings a lawsuit, this increases the likelihood of conflict between members, making it easier for a plaintiff to win and increasing the cost of litigation to all joint powers entity members. If members of the joint powers entity are pointing the finger of blame at each other, they must each hire their own attorney instead of one attorney representing the joint powers entity and all its members.

Case law suggests that when governmental entities agree to delegate responsibility for maintenance and inspection of shared infrastructure, unless there is something that says otherwise, liability follows maintenance and inspection (meaning each party is legally responsible for what it maintains).

Problems can arise when the terms of the joint powers agreement are not followed or enforced. Parties to a joint powers agreement should agree on who does what and then follow the agreement or change the agreement.

## **(2) Liability follows responsibility**

If liability does not follow responsibility, it can create several problems.

First, if the party doing the task does not carry the exposure for not doing it right, it may create a disincentive to act safely. This increases the likelihood of an accident and a successful claim and lawsuit. Second, the party with the liability exposure but no or limited responsibility for tasks or things contributing to that exposure may not understand or appreciate the risk. A party that does not understand or appreciate the risk may be underinsured for the risk involved. Third, if party A is responsible for doing the work, but party B is legally liable, and if party A does it wrong, party B is likely to supervise party A's work. This increases liability exposure for both A and B because now there can be claims against the joint powers entity and/or parties A and B for both negligence in doing the work and for negligent supervision.

Finally, sometimes a joint powers agreement does not address what happens to shared liability after the entity dissolves or some members leave. For example, if cities enter into a joint powers agreement to run a landfill and years later a lawsuit is brought based on groundwater contamination, it may be difficult to determine who is on a liability hook—the joint powers entity, current members, or current and past members?

## **(3) Mechanism for decision-making**

Incomplete or unclear mechanisms for joint powers entity decision-making can cause problems. The joint powers agreement should clearly set forth who has decision-making authority in what areas. If there is a joint powers board, the agreement should set forth the composition, duties, and responsibilities of that board and grant to that board the resources and authority necessary to meet its duties and fulfill its responsibilities.

Some joint powers boards are “advisory” requiring most joint powers board decisions to be ratified by the governing bodies of its members. Some boards have complete authority to make all decisions independently. Most boards have significant independent decision-making authority to run the joint powers entity day-to-day with specific areas requiring approval by joint powers members such as budget, purchase of land or facilities, location of facilities, etc.

## RELEVANT LINKS:

When the joint powers agreement has financial and/or other contribution requirements, there must also be a clear understanding of an agreed upon enforcement mechanism for not meeting one's responsibilities. The agreement should also address who owns what now, who will own property the joint powers entity purchases, and who will own what, if or when the joint powers entity dissolves. This can get especially tricky when the joint powers entity wants to build a facility, and all member cities want it located within their boundaries. Similarly, when a joint powers fire district dissolves, pension benefit issues for firefighters may be a difficult issue to resolve.

### **(4) Employment matters**

It is important for everyone to know what and whose "hat" they are wearing when acting on behalf of the joint powers entity. Important questions include: Does the joint powers entity have its own employees? Who hires, fires, and supervises joint powers entity employees? How are joint powers entity employees paid? Do city employees performing joint powers entity tasks remain city employees for liability and/or workers' compensation purposes? Whose uniform does the employee wear? How is the vehicle the employee drives marked?

In many joint powers agreements, especially mutual aid police or fire agreements, the employee remains an employee of the city for workers' compensation purposes, but is an employee or agent of the requesting city for liability purposes. In a fire situation, the responsibility for managing the fire scene and supervising firefighter activities at the scene often rests with the chief in whose city firefighters are responding. Accordingly, liability for negligent "firefighting," if any, should not be the responsibility of responding departments. Otherwise, cities may be discouraged from responding in situations with the most danger and exposure. Those are precisely the situations in which "mutual aid" is most needed.

Finally, if the joint powers entity is the employer, it is important for it to have its own employment policies, practices, and procedures, or to adopt the employment policies, practices, and procedures of one of its members.

**(5) Actual practice should follow the agreement**

Over time, circumstances, facilities, and resources change. The joint powers agreement should be changed to reflect current reality. For example, there was a joint powers agreement between a city and a county for maintenance of pavement on county roads and city streets within the city. The agreement called for the county to provide the asphalt and the city to provide personnel and equipment to fill potholes. The county stopped providing the asphalt. The city started providing the asphalt, and the county agreed that its road crews would fill potholes. The agreement needs to be changed to reflect current policies, practices, and procedures. That is one reason agreements should be reviewed on a regular basis by the parties.

**(6) Out-of-date agreements**

Joint powers agreements can get outdated for reasons other than changes in actual practices. Membership of the joint powers entity may change. The name of the entity, its responsibilities, tasks, and goals may change or evolve. The agreement may no longer accurately describe current facilities, equipment, or practices. Sometimes the agreement requires something that is no longer an acceptable practice or procedure, e.g., outdated procedure for maintaining sewer lines, hiring and promoting employees, or some practice or procedure that is no longer “legal.” In other cases, an agreement may have expired under its own terms, and the parties have forgotten to renew the agreement. It is important that the parties are operating pursuant to a valid, existing agreement.

**(7) Location**

An important consideration for saving money, decreasing liability exposure, and increasing service by providing services jointly is whether these goals can be achieved given the relative locations of joint powers participants. The importance of location may depend on the nature of the service being provided. For instance, two metro area cities have successfully run a joint parks and recreation facility for many years. This joint powers agreement works because the facility is in one city and right next to the other.

Other cities have an agreement for joint building inspection services. For this service, the cities need to be near each other but not necessarily contiguous. Because building inspection requires the builder or owner to call and schedule the inspection, one building inspector may be able to provide services for several small cities spread out throughout a county or other local area.

Agreements to share equipment and resources may allow for a greater coverage area if the equipment or resources are infrequently used, centrally located, easily transported, or easily scheduled.

## RELEVANT LINKS:

### **(8) Type of service**

Mutual aid fire service agreements work well because it is unlikely that neighboring cities will have fire emergencies at the same time. In addition, the agreement can address what to do in those situations. On the other hand, snowplowing/public works agreements may be more difficult to work out since each member city is likely to get hit with the same snowfall and each city's residents think that their city should get plowed first.

Generally, services that require specialized equipment or training, services that involve a specific need or response to an emergency in one city but not in all cities at the same time, and agreements involving facilities or services in cities that are very close geographically, demographically, and politically (e.g., urban cities or cities and townships that border one another) work best. Examples of such joint powers agreements would include police or fire mutual aid, building inspection services, and sanitary sewer and water service districts.

Agreements for joint facilities or joint maintenance of member city facilities are usually heavily dependent on location. Examples of such facilities may include joint city/county library facilities, joint city school district playground or recreation facility agreements, and street, road, or traffic sign or signal maintenance agreements between adjoining cities, a city and adjoining townships, or between a city and county for city streets/county roads located within the city.

In some areas, it is more difficult, but not impossible, to consolidate delivery of services through joint powers agreements. Generally, these involve problems of location, geography, politics, or instances in which each member city needs the same services at the same time. Examples of such agreements would include agreements for joint city clerks, city administrators, snowplowing, and parks and recreation administration.

## **IV. Further assistance**

LMCIT staff is available to answer members' joint powers questions, including providing review of mutual aid and other city service contracts. In addition, LMCIT offers a Contract Review Service. This is a free program that helps guard LMCIT-member cities against common contract liability exposures by identifying defense and indemnification language that may be problematic.

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[LMC Contract Review Service.](#)



# Appendix A: Examples of Cooperative Intergovernmental Arrangements in Minnesota

## Joint Powers Agreement

- establishing seven-city drug task force
- between cities for water and wastewater operations
- between city and school for shared recreation programs
- between city and townships establishing an area emergency response district
- between cities establishing biking trails and sledding hill
- between city and school district to share facilities
- between cities to operate a dog park
- between city, county and school district for development of fiber optic network
- between cities and county establishing a violent crimes task force
- between cities to operate an ambulance service
- between city and school district for playground equipment
- between city and county for the promotion of tourism
- between city, county and school district establishing leadership program
- between city and school district to provide a community education program
- between the city and school district to operate a library
- between city and school district to operate a fitness center
- between city and school district to facilitate long-range planning
- between cities, county and school district for municipal planning

## Service Agreement

- where one city purchases building inspection services from another city
- for city to plow snow from school district's parking lots
- between city and school for fiber optic network infrastructure
- for city to manage school district's swimming pool
- between two cities for zoning services

## Mutual Aid Agreement

- between cities for fire department personnel and equipment
- between cities for public works personnel and equipment
- between city and state to provide law enforcement in area of correctional facility
- among all cities in a county for emergency assistance

## Shared Resource Agreement

- between city and school district to share equipment
- between city and county to share parking
- for state to operate food bank out of city's community center
- between city and county to share law enforcement center

### **Shared Personnel Agreement**

- city clerk
- wastewater operator
- police officer using a K-9 police dog
- building inspector

## Appendix B: Sample Indemnification (Hold Harmless) Language

**Types of indemnification.** There are three basic types of indemnification.

- **Limited.** The indemnitor (the party assuming liability/the party agreeing to indemnify the other party) agrees to hold another party harmless (the indemnitee) against claims arising from the indemnitor's own operations and negligence and that of its employees and agents. The indemnitor does not take on any of the indemnitee's liability. Limited liability is used in most contracts as most parties do not object to paying for damages caused by their own negligence.
- **Intermediate.** The indemnitor agrees to hold the indemnitee (person or organization whose liability is being assumed) harmless for negligence that is jointly caused by the indemnitee and indemnitor. Thus, even where the indemnitee is almost entirely, but not completely, at fault, the indemnitor is still responsible.
- **Broad form.** As its name suggests, broad form indemnification provides the broadest protection for an indemnitee, and requires the indemnitor to hold the indemnitee harmless from all liabilities, regardless of which party's negligence caused the liability. If the indemnitee is 100 percent negligent, the indemnitor will still be responsible for paying 100 percent of the damages. Broad form indemnification is prohibited in Minnesota in some construction contracts.

**Sample service contract language.** There is no one indemnification or hold harmless provision that fits every situation or contract. In each case, the parties will have to first determine whether a limited, intermediate, or broad form of indemnification is proper. For example, if the city is hiring a contractor, you might try to use a broad form of indemnification, i.e., transfer all liability to the contractor. If the contractor reads the agreement, it is likely the contractor will not agree to this provision. It may be that after negotiation, the parties agree to use the limited form of indemnification, i.e., each party will be responsible to the extent of its own negligence.

The following examples are meant to be illustrative of the types of hold harmless provisions a city might use in a contract when hiring a contractor to perform a service for the city.

- **Limited**
  - To the fullest extent permitted by law, Contractor agrees to defend and indemnify City, and its officers, employees, and volunteers, from and against all claims, damages, losses, and expenses, including attorney fees, arising out of or resulting from the performance of work under this Agreement; but only to the extent caused in whole or in part by the negligent acts, errors or omissions of Contractor, Contractor's subcontractor(s), or anyone directly or indirectly employed or hired by Contractor, or anyone for whose acts Contractor may be liable. Contractor agrees this indemnity obligation shall survive the completion or termination of this Agreement.

- **Intermediate**
  - To the fullest extent permitted by law, Contractor agrees to defend and indemnify City, and its officers, employees, and volunteers, from and against all claims, damages, losses, and expenses, including attorney fees, arising out of or resulting from the performance of work under this Agreement, even if such injury is caused in part by City's negligent acts, errors, or omissions. Contractor agrees this indemnity obligation shall survive the completion or termination of this Agreement.
  
- **Broad**
  - To the fullest extent permitted by law, Contractor agrees to defend and indemnify City, and its officers, employees, and volunteers, from and against all claims, damages, losses, and expenses, including attorney fees, arising out of or resulting from the performance of work under this Agreement, even if such injury is caused solely by City's negligent acts, errors, or omissions. Contractor agrees this indemnity obligation shall survive the completion or termination of this Agreement.

**Sample mutual aid agreement language.** In mutual aid agreements, LMCIT recommends that the party requesting assistance accept liability. See LMCIT's *Model Mutual Aid Agreement* for a discussion of the reasons for this recommendation and a complete copy of the model contract.

- For purposes of the Minnesota Municipal Tort Liability Act (Minnesota Statutes, chapter 466), the employees and officers of the Responding Party are deemed to be employees (as defined in Minnesota Statutes, section 466.01, subd. 6) of the Requesting Party.
- The Requesting Party agrees to defend and indemnify the Responding Party against any claims brought or actions filed against the Responding Party or any officer, employee, or volunteer of the Responding Party for injury to, death of, or damage to the property of any third person or persons, arising from the performance and provision of assistance in responding to a request for assistance by the Requesting Party pursuant to this agreement.
- Under no circumstances, however, shall a party be required to pay on behalf of itself and other parties, any amounts in excess of the limits on liability established in Minnesota Statutes, chapter 466, applicable to any one party. The limits of liability for some or all of the parties may not be added together to determine the maximum amount of liability for any party. The intent of this subdivision is to impose on each Requesting Party a limited duty to defend and indemnify a Responding Party for claims arising within the Requesting Party's jurisdiction subject to the limits of liability under Minnesota Statutes, chapter 466. The purpose of creating this duty to defend and indemnify is to simplify the defense of claims by eliminating conflicts among defendants, and to permit liability claims against multiple defendants from a single occurrence to be defended by a single attorney.
- No party to this agreement nor any officer of any party shall be liable to any other party or to any other person for failure of any party to furnish assistance to any other party, or for recalling assistance, both as described in this agreement.

**Sample joint powers agreement (creating a separate joint powers entity) language.** LMCIT excludes coverage for actions that arise out of a joint powers entity. Accordingly, it is necessary for the governing board of the joint powers entity to procure its own liability coverage (or be added to the coverage of one of the constituent parties). The joint powers agreement should require the joint powers entity to defend and indemnify its constituent members.

- The [Joint Powers Entity] is a separate and distinct public entity to which the parties have transferred all responsibility and control for actions taken pursuant to this Agreement.
- The [Joint Powers Entity] shall defend and indemnify the parties, and their officers, employees, and volunteers, from and against all claims, damages, losses, and expenses, including attorney fees, arising out of the acts or omissions of the Joint Powers Board in carrying out the terms of this Agreement. This Agreement does not constitute a waiver on the limitations of liability set forth in Minnesota Statutes, section 466.04.
- Nothing herein shall be construed to provide insurance coverage or indemnification to an officer, employee, or volunteer of any member for any act or omission for which the officer, employee, or volunteer is guilty of malfeasance in office, willful neglect of duty, or bad faith.
- To the fullest extent permitted by law, action by the parties to this Agreement are intended to be and shall be construed as a “cooperative activity,” and it is the intent of the parties that they shall be deemed a “single governmental unit” for the purposes of liability, as set forth in Minnesota Statutes, section 471.59, subd. 1a, and provided further that for purposes of that statute, each party to this Agreement expressly declines responsibility for the acts or omissions of another party. The parties to this Agreement are not liable for the acts or omissions of another party to this Agreement except to the extent they have agreed in writing to be responsible for the acts or omissions of the other parties.
- Any excess or uninsured liability shall be borne equally by all the members, but this does not include the liability of any individual officer, employee, or volunteer that arises from his or her own malfeasance, willful neglect of duty, or bad faith.