

Act Today to Improve Defenses in Later Municipal Contract Litigation: Hard Lessons Learned in a Career of Municipal Litigation

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**MOOSE
AGAIN
HERO**



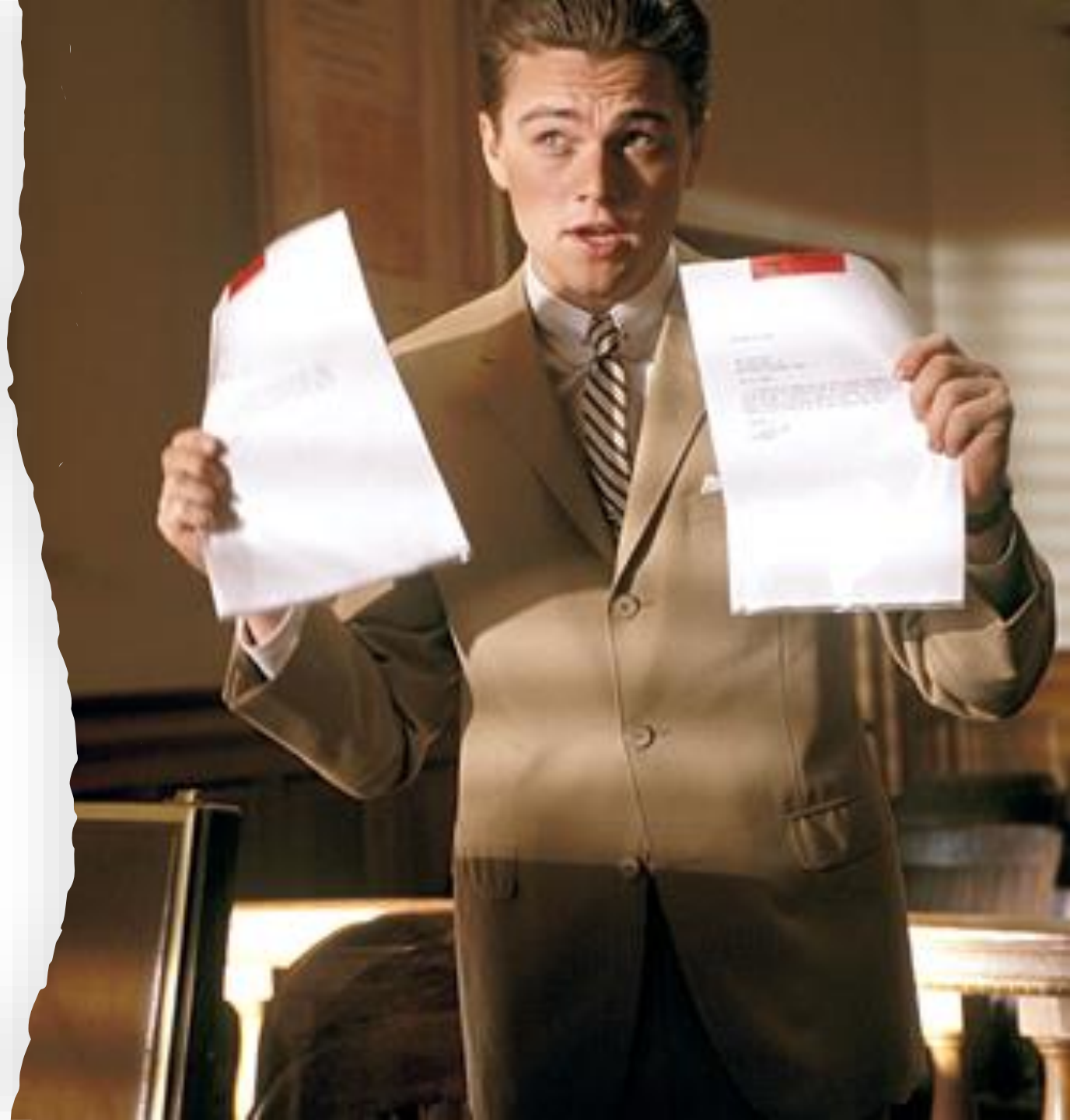
THE NEWS

**MOOSE IS
MERELY
FANTASTIC**

R&B

**FRANK
ABAGNALE BAR
REFRESHER
COURSE**

**“Catch Me If
You Can”**



Assumptions in Municipal Litigation

Judge will know *nothing* about municipal law.

Judge will *not* want to learn *anything* about municipal law.

Judge will find a municipality's attempts to teach municipal law an *annoyance*.

Judge will expect the municipality to resolve the dispute without help from the judicial system.

Judge will want to treat a *public* municipality the same as a *private* corporation.

Assumptions in Municipal Litigation

- ▶ Opposing counsel will have experience in disputes between private corporations, but no experience with municipal parties.
- ▶ Opposing counsel will encourage judge to treat municipality the same as any private corporation.
- ▶ Opposing counsel has never heard of *Trinity Broadcasting* hearing, much less participated in such a hearing.
- ▶ Opposing counsel and the Judge have little or no experience with Colorado Governmental Immunity Act (CGIA).

Premise of Presentation:

What can municipal attorneys do to make tomorrow's dispute look more like standard breach of contract disputes?

What can municipal attorneys do to infuse municipal law into public contracts so that judges do not have to learn municipal law?

How can better public contract terms discourage lawsuits when disputes arise?

Accompanying Materials

- ▶ Common contract provisions.
- ▶ Boilerplate provisions normally skipped past.
- ▶ Factual context in which provision might apply.
- ▶ Legal context for such provisions in general.
- ▶ Legal standards improve bargaining position in contract negotiation.
- ▶ Suggestions to improve the standard boilerplate.
- ▶ Common contract provisions fall within standard of care.
- ▶ Suggested improvements designed to avoid future disputes.
- ▶ Expect pushback?

Assumptions in General

1. Contract ambiguity breeds contract disputes.
2. Contract ambiguity breeds discovery and discovery disputes.
3. The greater the amount involved in the dispute, the greater the likelihood of litigation.
4. Unambiguous contracts reduce litigation.
5. Unambiguous contracts reduce discovery.
6. Unambiguous contracts breed non-trial remedies.

Desire to “upstream” the win.

Better to win than to settle and “declare” victory.

Better to win on summary judgment than at trial.

Better to win on motion to dismiss than on summary judgment.

Better to win at *Trinity Broadcasting* hearing than in motion to dismiss.

Early win allows recovery of attorneys’ fees.

Better to have a win without litigation by having unambiguous contract terms.

Assume you represent Citytown, Colorado, that plans to build a new city/town hall.

Has outgrown existing facilities.

Has held every meeting imaginable to obtain community input.

Has included construction plans in every long-term study imaginable.

Has work-shopped; studied; hired advisors; and consulted shamans, psychics, and tarot card readers.

Has settled on a name.

Has selected a property to build new facilities.

Citytown wants to avoid naming mistakes of other municipalities



Citytown wants to avoid naming mistakes of other municipalities



**“Citytown Regional Office
Complex Offering Societal
Health by Information
Technology and Training”**

**Citytown Regional Office Complex
Offering Societal Health by
Information Technology and Training
~~(hereinafter the “CROC O SHITT”)~~
(hereinafter the “Project”)**

Selection of a Site



Percent completed: 0%
(0/246)

Annexation and Development Agreements

Dedicate all ground and surface water rights to Citytown.

Build all water, sewer, storm water, and utility infrastructure.

Build all roads, bridges, curb and gutter infrastructure.

Follow all Citytown and County design criteria.

Dedicate all constructed public infrastructure to Citytown.

Pay development impact fees with each building permit.

Annexation and Development Agreement

Citytown will review Developer's contracts and plans for compliance with Agreements and design criteria.

When Citytown constructs the Project, Developer may connect its storm water retention infrastructure to storm detention infrastructure on the Project site.

When Citytown constructs the Project, Developer may convert its storm water retention infrastructure to other uses.

Development Contracts

Developer with Homebuilder.

Developer with General Contractor.

General Contractor with Civil Engineer for public infrastructure design.

General Contractor with multiple subcontractors.

Civil Engineer with Design Engineer to produce construction plans.

Design Engineer to sign and seal construction plans as “engineer of record” for the Development.

Best laid plans



Percent completed: 24%

Best laid plans



Percent completed: 96%



Litigation Ensues

HOA files claims against Developer, Homebuilder, Civil Engineer, and Design Engineer.

Developer, Homebuilder, Civil Engineer, and Design Engineer file counterclaims against General Contractor and subcontractors.

Subcontractors file cross claims against each other.

Developer, Homebuilder, Engineers, General Contractor and Subcontractors all file third-party claims against Citytown.

Assume that you represent Citytown

Citytown has received service of process with the Civil Complaint as a third-party Defendant.

Ask yourself three questions:

Service of the Civil Complaint

- ▶ Ask Three Questions:
- ▶ 1. What relief does the complaint allege and request?
 - ▶ A. Equitable relief? Negative injunction? Affirmative injunction?
 - ▶ B. Presence of claims in tort?
 - ▶ C. Force one choice among various public policy choices?
- ▶ 2. What does the dispute resolution clause say?
 - ▶ A. Choice of venue?
 - ▶ B. Jury trial?
 - ▶ C. Arbitration?
- ▶ 3. Does the fact-finder have authority to provide the relief requested?

NEVER, NEVER, EVER AGREE TO AN ARBITRATION CLAUSE!

Citytown will have to pay arbitrator(s), but not a District Court Judge.

District Court Judge must follow Colorado law; arbitrator(s) do not.

Citytown may appeal adverse order from District Judge; but not an
adverse arbitration order.

District Court Judge will stand for retention; arbitrator(s) will not.

Persons impacted by decision reside in the judicial district in which
District Judge serves.

Judge conducts public proceedings; arbitrator(s) do not.

Arbitrators will likely not reside in Colorado.

Opposing parties will likely not reside in Colorado.

Duties after Review of Complaint

- ▶ You need to explain to Council / Board what to expect.
- ▶ You may need to get Council / Board to retain outside legal counsel to defend and to prosecute claims.
- ▶ You may need to convince Council / Board to commit its annual budget and all municipal assets to the case.
- ▶ No matter what you say, Council / Board will hear that you want a commitment of Citytown's annual budget and all municipal assets to the case.

**HOA claims against Developer,
General Contractor, Civil Engineer,
Design Engineer, and Homebuilder.**

“Breach of Contract”

Negligence

Professional Negligence

**Developer, General Contractor,
Engineers, and Homebuilder cross-claims:**
Breaches of Various Contracts and
subcontracts.

Derivative third-party claims against
Subcontractors.

Negligence and Professional Negligence by
licensed engineers.

Third-party claims against Citytown.

Third-Party claims against Citytown

Breach of Contract (Development Agreement).

Incomplete Promise to build Project and stormwater outfall.

Reimbursement / Indemnification. If Developer, or General Contractor, or Homebuilder, or Engineers are ordered to pay for new public infrastructure, then Citytown must indemnify them.

Unjust Enrichment. Citytown collected development impact fees to build public infrastructure but kept fees without building public infrastructure as promised *at the Project*.

Presumption for Municipal Contracts

“A fundamental requirement for the enforcement of a municipal contract is that the municipality must have exercised its authority to enter into the contract within the scope of the powers conferred by statute.” *Rocky Mtn. Nat. Gas, LLC v. Colo. Mtn. Jr. Coll. Dist.*, 385 P.3d 848, 852 (Colo. App. 2014); see also 10A Eugene McQuillen, *The Law of Municipal Corporations* § 29:91 (3d ed., rev. vol. 2009).

Presumption Municipal Contracts

Anyone that contracts with a municipality has constructive knowledge of applicable restrictions.

Persons contracting with municipalities cannot claim justifiable reliance on representations made beyond the municipality's contractual authority.

Persons dealing with municipalities have constructive notice of the scope of authority possessed by the municipal officials with whom they are dealing.

Presumptions of Municipal Contracts

Individual inequities notwithstanding, the protection of taxpayers against improper expenditures of tax monies by public officials justifies this doctrine. *Normandy Estates Metro. Rec. Dist. v. Normandy Estates, Ltd.*, 553 P.2d 386 (Colo. 1976).

“A party contracting with a governmental entity has the duty to ‘ascertain whether the contract complies with the constitution, statutes, charters, and ordinances so far as they are applicable.’”

Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1, 2018COA92 (Colo. App. June 28, 2018).

Why not infuse those legal presumption directly into municipal contracts?

What legal limits apply?

Colorado Governmental Immunity Act (“CGIA”).
Taxpayer Bill of Rights, Colo. Const. art. X, § 20
 (“TABOR”).

Colo. Const. art. XI, § 1.

Colorado Open Records Act (“CORA”).

Formality of Board / Council official actions.

Political Question Doctrine.

Dispute resolution clause should include?

Reference that CGIA applies to the Agreement.

CGIA immunizes municipality from its *own* torts.

CGIA immunization expressly includes any claims for the *tort* of unjust enrichment.

CGIA immunizes municipality from liability arising from any torts *of others*.

CGIA immunizes municipality from claims involving negligence and professional negligence *of others*.

Unjust Enrichment Claims

Elements of unjust enrichment: (1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying. If "unjust enrichment" involves tortious conduct such as misrepresentation, the claim lies or could lie in tort for the purposes of the CGIA.

Withhold Payment Provision.

- ▶ [Municipality] may withhold any payment to Contractor for the purpose of mitigating [municipality's] damages, until such time as the exact amount of damages due to [municipality] from Contractor is determined. [Municipality] may withhold any amount that may be due Contractor as [municipality] deems necessary to protect [municipality] against loss, including loss as a result of outstanding liens, claims of former lien holders, or for the excess costs incurred in procuring similar goods or services. **[Municipality's] decision to withhold payment to investigate suspected non-performance or breach by Contractor or any Subcontractor, and such withholding of payment to investigate in good faith, does not constitute a default or breach under this Agreement.**

Assume opposing Counsel will make Discovery Requests something akin to

- ▶ Please produce the following:
- ▶ Anything impacting the geography and/or the geology of Citytown, including but not limited to,
- ▶ Tectonic plates, wave actions, sedimentary deposits, suns, planets, moons of planets, planetoids, stars, meteors, asteroids, comets, black holes, red giants, and all cosmic dust.
- ▶ Please limit the production to the galaxy known as the “Milky Way” from the “Big Bang” to the present.

Expect discovery requests akin to:

Every Citytown document related to storm water.

Every Citytown document related to the Project.

Minutes of every Citytown meeting at which someone discussed storm water.

Minutes of every Citytown meeting at which someone discussed the Project.

Every document related to Citytown's utilities.

What Opposing Counsel Wants?

Enough documents to keep associates busy indefinitely to bill to insurance company overlords.

Enough work for associates to generate funds to cover overhead costs of fancy office space and payments on a new Mercedes.

To bombard and to batter Citytown with budget-busting litigation tactics designed to secure a smaller settlement.

What Opposing Counsel Wants *to Find*?

- ▶ Anything said by anyone remotely related to Citytown about any beliefs with respect to building the stormwater outfall and the Project.
- ▶ Some comment by someone to the effect: “Citytown has an obligation to build the stormwater outfall; and it will!”
- ▶ Meeting minutes at which someone asserted Citytown’s obligations to build the outfall, and Citytown representatives in attendance did not disagree.

Standard Integration Clause

“This Agreement, including all attachments and exhibits hereto, represent the entire agreement between Owner and Developer and supersedes all prior negotiations, representations, or agreements. This Agreement shall not be superseded by any provisions of the documents for construction and may be amended only by written instrument signed by both Owner and Developer.”

Better Integration Clause

“This Agreement, including all attachments and exhibits hereto, represent the entire agreement between Owner and Developer and supersedes all prior negotiations, representations, or agreements. *The Owner and Developer recognize and affirm that any comments, promises, agreements, or understandings by any of their staff members, representatives, elected officials, vendors, or contractors that preceded this Agreement have become irrelevant to the enforcement of this Agreement.* This Agreement shall not be superseded by any provisions of the documents for construction and may be amended only by written instrument signed by both Owner and Developer. *The Owner and Developer recognize and affirm that the Owner may only amend this Agreement through a properly-noticed public meeting and upon an affirmative majority vote of its [Board / Council]. Accordingly, Developer recognizes and affirms that the comments of the Owner’s staff, employees, vendors, contractors, agents, or elected officials have no impact on the provisions or enforceability of the Agreement.*”

Standard Email Footers

CORA warning.

Plea to save a tree and not print.

“Only the [Board/Council] sets policy and approves contracts at properly-noticed public meetings by official votes, so nothing in this email should be considered binding on Citytown or otherwise amend, revise, or create enforceable obligations on Citytown.”

Vendor and Independent Contractor Contracts

- ▶ Add to these contracts:
- ▶ “Only the [Board/Council] sets policy and approves contracts at properly-noticed public meetings by official votes. Contractor agrees and affirms that [he/she/it] lacks any authority to create binding obligations for Citytown or otherwise to amend, revise, or create contractual obligations for Citytown.”
- ▶ Limits arguments and discovery requests in litigation.

Colorado Open Records Act

§ 24-72-204(3)(a)(XIII) (Deliberative Process);

§ 24-72-204(3)(a)(IV) (Financial data);

§ 24-72-204(2)(a)(7) (Email addresses);

§ 24-72-204(2)(a)(IV) (Appraisals);

§ 24-72-204(3)(a)(IX) (Utility customers);

§ 24-72-204(6)(a) (Contrary to public interest);

§ 24-71-204(8)(a) (Election records);

§ 24-72-204(3)(a)(I) (Medical information);

§ 24-72-204(3)(a)(II)(A) (Personnel files);

§ 24-72-204(1)(c) (Contrary to supreme court rule); *see also* Colo. R. Civ. P, 26(b)(2) (relevancy limits to discovery); Colo. R. Evid. 401 & 402 (relevancy);

Personal notes of staff, vendors, contractors, or volunteers are not “public records.”
Wick Communs. Co. v. Montrose County Comm’rs, 81 P.3d 360, 365-366, (Colo. 2003).

Justiciability / Political Question Doctrine

Courts should refrain from deciding controversies concerning policy choices constitutionally committed to the legislature.

- Political questions involve:
- [1] a demonstrable constitutional commitment of the issue to a political department; or
 - [2] lack of judicial standards for resolving the issue; or
 - [3] impossibility of deciding an issue without an initial policy determination of a kind clearly for nonjudicial discretion; or
 - [4] impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or
 - [5] unusual need for adherence to a political decision already made; or
 - [6] potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Reimbursement / Indemnity Claims

“Neither the state, nor any [municipality] shall ... become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.” Colo. Const. art. XI, § 1; *see also* 1 Code Colo. Reg. 101-1, § 5.3.1 (state contracts).

A municipality may not pledge its credit to, or become responsible for, any debt, contract, or liability in aid of a private party. *Mayor of Valverde v. Shattuck*, 19 Colo. 104, 34 P. 947 (1893); *see also Board of County Com’rs v. Hume*, 356 P.2d 910, 911 (1960).

Contract provision about future events or obligations should include:

- ▶ Disclaimer that Citytown has not irrevocably pledged funds necessary for the inchoate pledge, so other party should not rely on the pledge.
- ▶ Disclaimer that Citytown's electorate has not approved by a vote any funding mechanism for the inchoate pledge, so other party should not rely on the pledge.
- ▶ Disclaimer that Citytown's current Board/Council cannot make fiscal commitments for a future Board/Council, so other party should not rely on this pledge.
- ▶ TABOR bans enforcement of the contractual pledge.

Water Law

Developer shall transfer ... to [Citytown] the rights to the water aquifers underlying the full area of the Property, together with all nontributary and nontributary water, and all rights thereto as may be contained in said aquifers or elsewhere under the Property. Developer shall grant to [Citytown] in perpetuity the sole and exclusive right to withdraw, appropriate, and put to beneficial use all groundwater and surface waters underlying or crossing the Property ...

Water Law

If Developer engages in any activity at the Property that is suspected to have altered, modified, diminished, or changed [Citytown's] ground water or surface water rights, then the Parties shall file a petition with the Water Court in _____ County to address the situation.

Worse? Ambiguity?

Water Law

[What] If Developer engages in any activity at the Property that is suspected to have altered, modified, diminished, or changed [Citytown's] ground water or surface water rights, [Who] [Citytown] shall provide Developer and the State Engineer with notice of such alteration, modification, diminution, or change [When] within ___ days after [Citytown] shall have reasonably discovered the alteration, modification, diminution, or change. If requested by [Citytown], Developer shall petition the [Where] Water Court in _____ County, at [Who pays] Developer's sole cost and expense, to seek a decree that memorializes any alteration, modification, diminution, or change to the ground water or surface water rights at the Property. [Plan B] If Developer fails or refuses to petition the Water Court for a proper decree, then [Who] [Citytown] may make such petition subject to [Who pays] repayment or reimbursement to [Citytown] from the Developer's performance bond and/or payment bond for the Project.

Third-Party Beneficiary Clauses

Prime Contract.

[Contractor/Developer] may subcontract some or all of the Work For the purposes of each Subcontract Agreement, no **direct** contractual relationship shall exist between Owner and any Subcontractor, **but the Owner shall remain an intended third-party beneficiary for any work performed under the Subcontract Agreement.** [Contractor/Developer] shall require that every Subcontract Agreement expressly include Owner as an intended third-party beneficiary. [Contractor/Developer] shall submit to Owner each of its subcontract agreements so that Owner may verify that Owner remains an intended third-party beneficiary of each subcontract. [Contractor/Developer] shall be responsible for the management of its Subcontractors in their performance of their Work.

Subcontractor Agreement.

The Owner is an intended third-party beneficiary of this [subcontract] agreement. Otherwise, nothing contained in this [subcontract] agreement will give rise or is intended to give rise to rights of any kind to any **other** third parties.

Citytown's Right to Review all Subcontracts

No arbitration clauses that might impair Citytown's rights.

Citytown remains an intended third-party beneficiary of *every* subcontract.

Citytown only *verifies* that engineers have provided services as insured and licensed professional engineers.

Citytown only *verifies* that insurance protects the municipality and its citizens.

Citytown will *not* "approve" any engineering performed by others.

Citytown will *not* conduct independent engineering.

Engineers of Record

Professional Engineer (P.E.) owes duty to the public.

Professional standards apply.

Same as professional standards for lawyers (Colo. R. Prof. Resp.) and CPAs (GAAP).

Sign and seal plans, designs, and drawings.

Must have adequate insurance.

Should work for municipality as intended beneficiary; not just subcontractor.

Should advise if design or budget is inadequate for stated public purposes.

Design vs. Construction Plans.

Insurance Clauses

Primary contract should require insurance to name Citytown as an alternate insured.

Primary contract should require insurance to cover the negligence of subcontractors.

Primary contract should require every subcontract to have insurance naming Citytown as alternate insured.

Primary contract should require Contractor to submit subcontract for verification of insurance requirements.

Primary contract should require *design* engineers and *drafting* engineers to sign and seal their work.

Questions?

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