



Local Government Law Section MCLE Program

Webinar

April 28, 2022

Welcome/Announcements and Introduction

Patrick J. Collins – Local Government Law Section Chair

12:00 PM – 1:00 PM

Program

Negotiating Contracts for Your Local Government Client

Brian Gorka - Chicago Transit Authority (CTA).

Brian is a Senior Attorney at the CTA. In his current role he advises internal departments like Purchasing, Capital Financing, Strategic Planning, Red Line Extension, Service Planning, and HR. His position is usually divided into contract negotiations with vendors or other governments and corporate litigation (such as breach of contract or discrimination cases). Before joining CTA, Brian was an Associate Attorney at the law firm Klein, Thorpe & Jenkins, where he represented several local government clients and an Assistant State's Attorney here in DuPage County in the Civil Bureau.

Negotiating any contract can be a difficult task depending on your client's specific needs or risk tolerance. This is especially true when your client is a local government entity and must comply with various Federal, State, or Local regulations. This program aims to educate the attendee on some of the clauses that may apply to your client's contracts, negotiation style, and how to explain complex situations to your client.

**Link to Evaluation**

The evaluation must be completed to receive CLE credit.
<https://www.surveymonkey.com/r/LocalGovt04282022>.

Next Meeting

May 26, 2022 – Joint Business Law & Practice and Local Government Law Sections CLE Program - *Laurence E. Herman* – Herman Agency, Inc. - SALT

Upcoming Events:

May 6, 2022 - [Presidents Ball](#) – Esplanade by Doubletree, Downers Grove

May 13, 2022 - [DCBA / KCBA Family Night at the Ballgame](#), Northwestern Medicine Field, Geneva

Self-Nominate for Section and Committee Leadership

If you are willing to assist with the work of planning and leading the DCBA Sections, Divisions or Programs closest to your area of practice and interests, we need to hear from you! Please complete our brief survey at <https://www.surveymonkey.com/r/DCBALeadership22> to indicate the Section(s), Division(s), or Program(s) that are of interest to you. You will also be asked to indicate if you are willing to serve as the Vice Chair for the year ahead (then Chair in the 2023-2024 year), or if you are just interested in serving on the group's leadership council, supporting the Chair and Vice Chair in their planning work throughout the year.

Sign into Your Member Profile Before Registering for a CLE Program

Free CLE-credit is a major benefit of being a DCBA member. Beginning October 1, 2021, non DCBA members attending noon-time CLE will be able to receive credit when paying a \$40 registration fee. It is important that DCBA members sign in on the DCBA website before registering for a CLE program, to avoid being charged the \$40 fee. The newly updated DCBA website allows you to save your username and password, so signing in and registering for a




CLE is easy to do. If you are not signed in, you will see a \$40 to register. When logged in, you will see your registration is free as it always has been

DCBA OnDemand CLE is Available on IICLE:

Members can find the link to The Illinois Institute for Continuing Legal Education (IICLE) catalog on the DCBA website under the menu item CLE & Events ☐ IICLE Online Library. You must be logged into your DCBA Membership Profile to view courses for free or at a reduced price.

View & Print CLE Certificates through the DCBA Website:

Members can view and print their certificates for any DCBA CLE program attended by first signing into their account on the DCBA website. Hover over the CLE & Events menu item and select Find My CLE Credits. This page will list all the CLE credits earned with DCBA. To the left of each program is an icon to print or email the Statement of Credit.



*President Kiley M. Whitty Cordially Invites
You to the*

DCBA PRESIDENTS BALL

Oh, What a Night!

FRIDAY, MAY 6, 2022
5:30 PM

Esplanade Lakes

2111 BUTTERFIELD RD.
DOWNERS GROVE, IL

PLEASE RSVP BY APRIL 28, 2022
ONLINE: WWW.DCBA.ORG/22GALA OR PHONE: 630-653-7779

Negotiating Contracts For Your Local Government Client

DCBA Local Government Committee
April 28, 2022

Brian Gorka – Senior Attorney – Chicago Transit Authority

Introduction / Background

- Brian Gorka, Senior Attorney – CTA
 - Formerly:
 - Associate Attorney – Klien, Thorpe & Jenkins
 - Assistant State's Attorney – DuPage Co. SAO Civil Bureau
 - Planning Department Staff – Westchester, IL & Oak Brook, IL
- Why this topic?

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Goals

1. What is this contract clause?
2. Why is it important?
3. Other considerations when negotiating / advising.

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Contract Term

- Length of contract
- Simple but complex
- Prior appropriations
 - 65 ILCS 5/8-1-7
 - Statutory exceptions
- Scope of services, performance, payment, term all tie together
- Amendments, option years, automatic renewal periods
- Designating multiple different periods in a contract

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Scope of Services

- Goods or services
- Your client, and their respective Board (if applicable) need to know about their commitment
- Was this procured by bid, RFP, exception?
- Important to discuss in advance with the department contact who uses the contract the most
- Consider studying up on the services offered by the vendor

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Performance Standard

- Is what you are buying 'acceptable'?
- Closely tied to scope
- Depends on the type of contract:
 - Reasonable satisfaction
 - Fiduciary
 - Industry standard
 - UCC – 810 ILCS 5/1 et seq.
 - Workmanlike manner

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Compensation

- Payment terms
- Certainty, sets expectations
- Regular schedule, per invoice, milestone payments
- Prompt Payment Act – 50 ILCS 505/1 et seq.
 - Approve/disapprove invoice
 - Within 30 days after receipt of invoice / goods (later date)
 - Payment within 30 days after date of approval
 - 1% interest, penalties
 - May agree to later dates
 - Payments to subcontractors

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Authority

- Who can bind your local government client
- Board / Local government agent must have explicit authority
- Without this authority – contract void
- Vendors charged with knowledge of authority
- Equitable estoppel discouraged

Patrick Eng'g v. City of Naperville, 2012 IL 113148

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Changes / Amendments

- Amend by a writing signed by both parties
- Criminal penalties – 720 ILCS 5/33E-9
 - Writing
 - Determination, either:
 - Circumstances said to necessitate change not reasonably foreseeable
 - Germane to original contract as signed
 - Best interest of local government
 - > \$10,000 / > 30 days

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Confidentiality / Data Security

- Access to documents, information, systems
- How can each party trust one another to keep it safe/confidential
- Treat information as they treat their own confidential information
- NDA, subpoenas, publicly available
- FOIA
- If info released – injunctions

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Ownership of Information

- Deliverables
- Processes used to prepare the deliverables
- Third party agreements
- Use of Vendor IP
 - Perpetual, royalty free, worldwide, non-exclusive license to use it solely in conjunction with the scope of services
 - 3d party copyright/patent infringement
 - Defense
 - Modify services / secure license to use / terminate + refund

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Other applicable laws

- "Shall agree to follow all applicable laws, ordinances, statutes, etc."
- Methods to drafting
- Importance to your client
 - Noise – ordinance about construction start times
 - Anti-discrimination – Title VII or Ill. Human Rights Act – 775 ILCS 5/1 et seq.
 - Public works – Davis Bacon, Prevailing Wage – 820 ILCS 130
 - Ethics – 5 ILCS 430

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Incorporation by reference

- Agreeing to be bound to terms that are not spelled out in the contract
- References may change at a later date
- Negotiating notice periods for updates

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Force majeure

- Event beyond control of parties
 - War, terrorism, riot, pandemic
- Prevents compliance
- Notice
- Increased costs possible, should receive approval
- Optional termination / payment / release

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Termination

- Methods to end a contract before the term expires
 - Termination 'for cause' / default
 - Termination 'for convenience'
- Material
- Notice, cure periods, documentation
- Transition cooperation
- Damages – replacement costs

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When Problems Arise

1. Order of Precedence
2. Dispute Resolution
3. Choice of Law, Venue, Jurisdiction
4. Notices
5. Indemnification

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1. Order of Precedence

- What term takes priority in the event of conflicting terms
- Parties agree in advance what term should be given importance/priority. *Roy Strom v. Miller-Davis Co.*, 149 Ill. App. 3d 1093 (1st Dist. 1986)
- Amendments
- Inconsistency
- Ambiguity
- Merger clauses / integration

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2. Dispute Resolution

- Methods for parties to contract to resolve problems
- From speedy and informal to lengthy and litigation
- Preserve right to litigate (in some form)
- Acknowledge to the vendor to work in good faith to resolve before resorting to litigation, etc.
- Arbitration, mediation, panels

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3. Choice of Law, Venue, Jurisdiction

- What law will apply in a dispute?
- Where will the dispute be litigated?
- Vendor is out of state?

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4. Notices

- Is this a routine communication?
- Demands – need to know that someone received the demand
- People leave, promoted, etc. – but notice has to carry over the life of the contract

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5. Indemnification

- Purest form:
 - Vendor and government are parties to a contract
 - Vendor conduct performing the contract injures 3d party
 - 3d party sues government because of that vendor conduct
 - Vendor steps in to defend government via indemnification
- Indemnify / defend / hold harmless
- Contribution
- Types of conduct

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5. Indemnification, continued

- Duties to cooperate
- Limitations of liability
- Direct damages / waivers of consequential, special damages
- Mutual indemnity
- *Kotecki* clauses

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IGAs

- Contracts between local governments
- Sharing, allocating, working together
- Illinois Constitution Art. VII, Sec. 10
- Intergovernmental Cooperation Act – 5 ILCS 220/1 et seq
- Approved by the governing bodies of each party to contract
- Cannot be prohibited by law, ordinance
- Powers / authority – *2005 Ill. Att. Gen. Op. 010*
- Home rule
- Termination without cause or penalty

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Questions / Contact Information

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