



# A SELECTED READING

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## Municipal Contracts

**M**unicipalities, like most independent entities, have the capacity to enter into binding contracts. This power is not without limitation, however, since municipalities derive their power totally from the state Legislature. To enter into a contract with another entity or an individual, a municipality must have some legislative authorization, either expressed or implied, allowing the agreement in question.

Despite this fact, municipalities in Alabama have broad discretion in the types of contracts they may enter. Generally, municipalities may contract for any service which they themselves have the power to offer. Similarly, separately incorporated municipal boards have the authority to enter into contracts that further the purposes for which they were created.

However, municipalities may not exceed the scope of their authority as public entities. This article is intended only as an overview of contract law. Municipal officials with questions concerning specific contracts are advised to contact their municipal attorneys.

### What is a Contract?

Black's Law Dictionary, Eleventh Edition, defines a contract as "an agreement, based on sufficient consideration, to do or not do a particular thing."

All contracts have three essential elements. First, there must be an offer either to do or to refrain from doing something that the person has a legal right to do. Second, the offer must be accepted. Third, the agreement must be based on sufficient consideration.

Consideration is simply what both parties receive from each other for entering the contract. For instance, a municipality may pay someone to perform a service. Contracts for which there is no consideration are invalid. A contract to which a municipality is a party is invalid if there is a lack of consideration or if the consideration fails. *Gadsden v. Jones*, 227 Ala. 395, 150 So. 359 (Ala. 1933). Courts generally do not inquire deeply into the sufficiency of consideration in municipal contracts. Instead, the determination of the value to the municipality is generally left to the council. For example, the Attorney General has ruled that a city may pay to have buildings demolished on land owned by a nonprofit entity in exchange for a land swap if the city determines that there is a benefit flowing to both parties and a public purpose is served. Such an arrangement should be memorialized in a contract or some other written agreement. AGO 2012-041.

Section 11-47-5, Code of Alabama 1975 states that all municipal contracts must be in writing, signed and executed by the officers authorized to make the contract. Unless some other provision is made, contracts must be executed by the mayor in the name of the municipality and attested to by the clerk. This section does not apply to purchases for the ordinary needs of the municipality.

Despite this section, oral contracts may be enforceable against a municipality if evidence shows that the municipality benefited from the contract and the contract was within the corporate powers of the municipality. *See, Bethune v. Mountain Brook*, 293 Ala. 89, 300 So.2d 350 (Ala. 1974), appeal after remand, 336 So.2d 148 (Ala. 1976).

### Authority of Municipal Officials

One of the most common questions about municipal contracts concerns who has the authority to bind the municipality. Is this the responsibility of the mayor, as chief administrator of the municipality, or does the council decide which contracts to enter?

Generally, this power is vested in the municipal council by virtue of Section 11-43-43, Code of Alabama 1975. This section states that municipal councils are to exercise all legislative powers. In *Prichard v. Moulton*, 277 Ala. 231, 168 So.2d 602 (1964), the Alabama Supreme Court held that this section gives the council authority to enter into contracts for the city.

Further, Section 11-43-56, Code of Alabama 1975 confers control over all municipal finances and property on the council. Since most municipal contracts will impact in some way the property or finances of a municipality, the decision to enter into

a contract must be made by the council.

The Alabama Supreme Court held that, absent authorization from the council, the mayor does not have the authority to enter into and execute a contract on behalf of the municipality. While the Court recognized that the mayor is authorized to enter into and to execute contracts, it determined that the authority cannot be exercised without the direction and authorization of the council. *Town of Boligee v. Greene County Water & Sewer Auth.*, 77 So.3d 1166 (Ala. 2011). Accordingly, the general rule is that the only method by which an employee or official may expend funds or be given authority to bind the municipality to a contract is by an affirmative vote of the council reflected in the minutes. An exception is the mayor's authority to contract for an annual municipal audit pursuant to Section 11-43-85, Code of Alabama 1975.

While the council has the authority to authorize contracts, the mayor has certain vital functions to perform in the contracting process. A contract must be executed by the proper municipal official in order to be valid. Section 11-43-83, Code of Alabama 1975 confers on the mayor the responsibility of executing all contracts.

Thus, municipal contracting is a two-step procedure requiring cooperation between the mayor and the council. Ordinarily, the council must decide whether the municipality should enter into the contract. After the council votes to accept a contract, the mayor must then execute the contract for the municipality.

A municipal corporation normally accepts an offer by an acceptance signed by the mayor and the clerk who have been authorized to enter into the agreement and bind the municipality. This authority to the mayor and clerk is given by an ordinance or a resolution passed by the governing body, specifically authorizing and directing them to sign the agreement on behalf of the city. In *Van Antwerp, et al. v. Board of Commissioners of Mobile, et al.*, 217 Ala. 201, 115 So. 239 (Ala. 1928), the court stated:

“Unless statutes require contracts to be authorized by ordinance, a proper resolution of the governing body identifying, approving and directing the execution of the contract is sufficient authorization.”

A city council president has the authority to execute contracts and deeds where a municipal ordinance specifically requires such acts. Further, a municipal city clerk's duties of attesting documents are ministerial in nature and as such, the clerk has no discretion in carrying out such duties. AGO 2001-090.

If the other party to a contract is an individual, that fact should be indicated; if a co-partnership, that fact should be shown and a partner should execute the agreement for the partnership; and if a corporation, generally the president (or other authorized executive officer) should sign and the signature should be attested by the secretary of the corporation. In some instances, it may be desirable to have a corporate party provide the resolution setting forth the authority of the officers to execute the agreement for and on behalf of the corporation.

## **Mutuality**

Courts often mention that a contract must contain mutuality in order to be enforceable. Textbook authorities state:

“If by mutuality of obligation is meant, as some courts have suggested, that there must be an understanding on one side and a consideration on the other, the necessity for its (mutuality) existence cannot be questioned. The doctrine of mutuality of obligation appears, therefore, to be merely another mode of stating the rule of consideration that where there is no other consideration for a contract, the mutual promises must be binding on both parties, for the reason that only a binding promise is sufficient consideration for the promise of the other party.” 12 Am. Jur. 13.

For a case in which the court found a lack of mutuality, *see, Tilley v. Chicago, et al.*, 103 U.S. 155 (1880). The Court held that the city was not bound by the alleged contract due to a lack of mutuality.

## **Validity**

Apart from the general principles of contract law in determining the validity of a municipal contract, three matters should be considered.

First, does the municipal corporation have the expressed, implied or inherent power to enter into the particular contract or is it beyond the scope of power or expressly prohibited by statute? Title 11 specifies many expressed powers of Alabama municipalities; contracts designed to further these powers are within the authority of the municipality.

Regarding implied powers, Alabama courts have, from time to time, referred to the Dillon Rule. In *State Ex rel. Radcliffe v. Mobile, et al.*, 229 Ala. 93, 155 So. 872 (Ala. 1934), the court stated:

“It may be stated broadly that municipal corporations have and can exercise only such powers as are expressly granted in their charters and such as may be necessary and proper to carry such express or direct powers into effect; but these powers include those which are indispensably necessary to the declared objects and germane to the governmental purpose for which such corporations may be organized ... It would follow naturally from the foregoing statement of law that the agents, officers or the city council of a municipal corporation are without authority to enter into agreement, contract or undertaking which

is beyond the scope of the charter powers of such municipality, no matter what the objects may be, or how pressing the necessity, or what are the benefits, real or supposed, which may flow to the city, if such objects are not within the charter powers, the city and its authorities must refrain from usurping such powers.”

It is difficult, in some instances, to ascertain if a municipality has the implied power to enter into a specific contract. The facts of each case are determinative where such implied powers are questioned

Second, if a contract is within the corporate powers, it must be entered into with the proper municipal officer or agent. In *Garner v. State*, 158 So. 546 (Ala. 1934), the court observed:

“A contract with the city must be executed and authorized as directed by law to be legal. If not thus done, it is *non est factum* (A legal defense that permits a person to avoid having to honor a contract that she or he signed because of certain reasons such as a mistake as to the kind of contract).”

Persons contracting with municipal corporations are charged with notice of the extent of its powers and of the powers of the municipal officers and agents. A corporation – municipal or private – is not bound by agreements executed by an unauthorized officer or agent.

Third, the contract must have been entered into as specified by statute. If the contract was one which the municipality has power to make and it was entered into by the proper officer, it may be invalid nevertheless because certain conditions precedent were not observed or because there was no ordinance or resolution authorizing it. The rule is that if the applicable statute requires certain steps to be taken before making the contract, and it is mandatory in terms, a contract not made in conformity therewith is invalid. For example, the statutory requirements in connection with expenditures of \$15,000 or more, under the competitive bid law are prerequisites to a valid contract. Or, as another example, Section 11-47-20, Code of Alabama 1975, authorizes cities and towns to dispose of real property not needed for public or municipal purposes by ordinance. Thus, a validly adopted ordinance would be required to enter into a contract to dispose of real property.

## Notice

The general rule, discussed above, is well settled that one who makes a contract with a municipal corporation is bound to take notice of limitations on its power to contract. In *Enterprise v. Rawls*, 204, Ala. 528, 86 So. 374 (Ala. 1920), the court stated:

“Persons dealing with municipal governments or their officers or agents are bound to take notice of the powers and their limits conferred upon or exercisable by such governmental agencies and their administrators.”

In *Alford v. Gadsden*, 349 So.2d 1132 (1977), the Alabama Supreme Court held that a city may be estopped from denying a contract made by one of its commissioners. This case overruled *Mobile v. Mobile Electric Co.*, 203 Ala. 574, 84 So. 816 (Ala. 1919).

A municipal corporation cannot bind itself by any contract which is beyond the scope of its powers, is forbidden by law or is against public policy. Restrictions on the power to contract are designed to protect the public rather than those who contract with the municipality.

## Length of Contracts

Although the terms of municipal contracts are largely a matter within the discretion of the council, the length of certain contracts is limited by state law. For instance, Sections 11-47-1 and 11-47-2, Code of Alabama 1975, set limits on the length of time municipalities can borrow money.

Certain other contracts are limited by the competitive bid law. Section 41-16-57 of the Code states that contracts for personal property or services that are subject to the bid law must be performed within three years. This section also states that lease-purchase agreements subject to the bid law cannot extend longer than 10 years. However, contracts that are not under the competitive bid law are not limited by this section. AGO to Hon. J. M. Breckenridge, January 5, 1968; AGO 2005-192.

**Note:** The original opinion stated the limit on lease-purchase contracts was five years. The five-year limit has been changed by the legislature to ten years.

## Section 94

Section 94, Alabama Constitution, 1901, restricts municipalities from lending credit or anything of value to private individuals or companies. Section 94 also prohibits municipalities from performing any work on private property.

This section does not bar municipalities from contracting with private persons for services. Thus, while municipalities may not give money to the chamber of commerce, they can contract to pay the chamber for adequate services which the chamber performs. AGO to Hon. T. M. Brantley, June 20, 1973; AGO 2004-067. A city may join with nonprofit organizations to finance a community center if a public purpose is served. The city should enter into a contract with these organizations

setting out the benefits to be conferred on the citizens. AGO 2009-061.

So, rather than give funds to private agencies, many municipalities contract with these agencies for services. It is important to remember, however, that the services which are performed must be adequate consideration and that they must be the type of services the municipality could itself provide, if it wished to do so.

For more information on Section 94, please see the article in this publication titled “*The Public Purpose Doctrine.*”

### **Competitive Bid Law**

Although it is outside the scope of this article, it must be mentioned that municipal contracts involving expenditures of \$15,000 or more are subject to the competitive bid law, found at Sections 41-16-50 through 41-16-63, Code of Alabama 1975. Municipalities with contracts that are subject to the bid law should read these sections or contact their municipal attorneys.

For more information on the competitive bid law, please see the article in this publication titled “*The Competitive Bid Law.*”

### **Conflicts**

Municipal officers and agents are held by the courts to a strict accountability in their dealings with or on behalf of the municipal corporation they serve. In acting for the corporation, officials are required to exercise a high degree of fidelity, care and caution in the public interest. It is well established that a municipal officer cannot be interested in a contract with the municipality he or she represents. Section 11-43-12 of the Code of Alabama 1975, prohibits a city from contracting with a close corporation in which a city employee or the employee’s spouse owns stock. AGO 2001-042.

Section 11-43-12 of the Code of Alabama 1975, prohibits a city from contracting with an unincorporated company that a city employee or the employee’s spouse owns, even if the contract was bid and the company is the lowest bidder. AGO 2001-040. A Class 7 or 8 municipality may enter into a contract with a business owned by the mayor if the provisions of Section 11-43-12.1 of the Code of Alabama 1975 are complied with requiring that such contracts be bid pursuant to the Competitive Bid Law. AGO 2006-109.

For more information on conflicts, please see the article in this publication titled “*Conflicting Offices and Interests.*”

### **Binding Successors to Contracts**

With respect to the binding effect of contracts which extend beyond the terms of officers acting for the municipality, the courts make a clear distinction between governmental or proprietary powers. The hands of successors cannot be tied by contracts relating to governmental matters. McQuillin states the rule:

“In a case holding that a municipality has no authority to bind itself to levy a certain fixed annual tax in perpetuity for the use of a water company which agrees to supply the city with water, the following language is used: ‘A contract to pay a definite sum for a specified period is binding on the successors of the municipal officials who made the contract. Such a contract is not entered into in virtue of the governmental or legislative functions of the city ... whereas the power to levy a tax belongs to the class of legislative and governmental powers. In the one case successors may be bound, in the other they cannot be.’”

In this connection, see *Birmingham v. Holt*, 239 Ala. 9, 194 So. 538 (Ala. 1940), and *Willett and Willett v. Calhoun County*, 217 Ala. 687, 117 So. 311 (Ala. 1928).

### **Alabama Governmental Leasing Act**

The Legislature enacted the Alabama Governmental Leasing Act, found at Sections 41-16A-1 through 41-16A-11, Code of Alabama 1975, to give state and local governments and their instrumentalities the flexibility to finance the acquisition, installation, equipping and/or improvement of any eligible property that such governmental entity otherwise is legally authorized to acquire through the use of lease, lease-purchase and/or installment-purchase financing.

The term “eligible property” means “any tangible personal property or any interest therein, including without limitation any goods, supplies, materials, appliances, equipment, furnishings and/or machinery, whether or not such items constitute fixtures.” An “alternative financing contract” is defined to mean “a lease, lease-purchase, lease with option to purchase, installment-sale agreement or arrangement or other similar agreement or arrangement.”

Section 41-16A-5 sets out the contract provisions that are allowed under the Alabama Governmental Leasing Act. Sections 41-16A-7 and 41-16A-9 discuss the impact of other state laws on contracts executed pursuant to this act. Such contracts are legal and authorized investments for banks, savings and loan associations, insurance companies, fiduciaries and trustees.

## **Contracts for the Joint Exercise of Power**

Sections 11-102-1 through 11-102-4 of the Code of Alabama 1975, authorize counties and municipalities to enter into contracts for the joint exercise of power or services. Basically, a municipality may enter into a written contract with any other city or county for the joint exercise of any power or service that state or local law authorizes each of the contracting entities to exercise individually. It is sufficient if each of the contracting entities has the authority to exercise or perform the power or service contracted for regardless of the manner in which the power or service is to be exercised, provided, however, that at least one of the contracting parties must have the authority to exercise the power in the manner agreed upon by contract. A joint contract under this statute may be exercised by one or more entities on behalf of the others or jointly by all contracting entities.

The Attorney General has held that Section 11-102-1, *et seq.*, Code of Alabama 1975, authorizes counties, with the consent of the sheriffs and with the sheriffs as parties, to enter into agreements whereby the sheriffs will assist each other's offices with law enforcement services across county lines. AGO 2013-106. The sheriffs and county commissions of both counties must consent and be parties to the agreement. AGO 2012-034. Both the county commission and the sheriff should be parties to any contract to house federal prisoners in the county jail. AGO 2011-020. The county sheriff and his or her deputies may enforce municipal ordinances of the town provided the contract between the town and sheriff provides for such enforcement. AGO 2016-005.

A municipality may also contract with another municipality for the performance of policing duties within its jurisdiction. The contract must comply with the specifications set forth in section 11-102-1, *et seq.*, Code of Alabama. Each municipality must adopt an ordinance approving the contract, and each municipality should adopt all ordinances, resolutions, and policies necessary to authorize law enforcement officers of one municipality to carry out policing duties within the jurisdiction of the other municipality or municipalities. AGO 2013-041.

Counties and municipalities may enter into an agreement to maintain roads in the jurisdiction of another county or municipality if the contract is executed as provided for in Sections 11-102-2 and 11-102-3 of the Code of Alabama. AGO 2008-125.

As a side note to joint contracts among municipalities, cities should be aware of Section 11-47-7.1 of the Code of Alabama 1975. This statute authorizes municipalities to contract with each other for the creation of joint municipal correctional facilities.

## **Summary**

The validity of municipal contracts is frequently a subject of judicial determination. As stated above, to be valid and enforceable, the contract must be within the scope of municipal powers, it must be made by officers or agents duly empowered and authorized to act, and it must be made as prescribed by applicable laws. Municipal contracts, like other contracts, must be based on an offer and acceptance; must be mutual and supported by a consideration; must be reasonable, definite and certain; and must be for a legal object and not against public policy. A contract forbidden by statute is void since all persons who contract with a municipal corporation are bound to know the limitations of the municipal corporation. Further, a city is not required to restore status quo or to compensate for benefits received under a void agreement.

## **Opinions and Court Decisions Involving Municipal Contracts**

- A municipality may enter into an agreement with a county for the collection and disposal of solid waste, and receive a percentage of the revenue generated, even if the municipality does not participate in the collection or disposal. The funds received must be used for solid waste disposal. AGO 2016-051.
- City employees could not be held liable for tortious interference with a city contract. *Allied Co. of Wiregrass, Inc. v. City of Dothan*, 191 So.3d 804 (Ala.Civ.App. 2015).
- A city may enter into an agreement with the YMCA of a county for the YMCA to provide services to its citizens in exchange for the use of city property. Whether the property has been dedicated as a public park is a factual determination to be made by the city. AGO 2017-024.
- A city may contract with private companies to advertise the city itself and its resources. AGO 2018-024.
- City may contract with the Etowah County Mayor's Association to facilitate an agreement with a corporation for the provision of emergency air medical transport to the municipality's residents. AGO 2019-008.

*Revised 2020*