

MODEL SNOW & ICE MANAGEMENT CONTRACT

EXPLANATORY MEMORANDUM

November 1, 2018

Updated November 15, 2018

Introduction and Summary

The City of Edina convened a diverse advisory committee of service providers, property managers, and other interested representatives to develop a model contract for snow and ice management services. The main focus of this work is to offer a model contract that embraces best practices to minimize environmental impacts from sand, chlorides and other chemicals, while also maintaining safety and addressing liability risk allocation. The City of Edina retained Fortin Consulting and the Smith Partners PLLP law firm to form and facilitate this advisory committee and provide legal counsel to create the model contract and related materials.

Advisory committee members included representatives from the Snow and Ice Management Association (SIMA), Minnesota Nursery and Landscape Association (MNLA), the Minnesota Pollution Control Agency, State of Minnesota Department of Administration, Metropolitan Council, City of Edina, services contractors, property managers, and active citizens. A complete list of Advisory Committee members follows this memorandum. The committee held three meetings at Edina City Hall, on August 28, September 27 and November 1, 2018.

The model contract highlights certain terms in **bold type** to allow for a contractor to use best practices to limit the movement of chlorides, nutrients, and sand/sediments into public stormwater systems and surface waters. The principal purpose of these terms is to protect both contractor and property owner from legal risk in the event of an injury or accident that is claimed to be the result of elevating environmental and materials protection over safety.

The framework has the following components:

- Owner and contractor express mutual intent to utilize best practices.
- Best practices are defined.
- Owner and contractor state their intent that the use of best practices not reduce effectiveness or safety.
- The contract recites the basis for owner and operator to conclude that best practices will not reduce effectiveness or safety.
- Contractor is required to be trained and certified in use of best practices, to document that to owner, and to use that training so that best practices are properly applied under site-specific circumstances.
- Owner is responsible for certain matters within its control that are relevant to achieving a safe site.
- Contractor documents its use of best practices.
- Contractor is responsible for site outcomes, except where owner has not fulfilled its duties.

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Contractors are encouraged to adapt and modify the model contract as appropriate to their business with guidance from their respective attorneys.

Background and Key Elements of Approach

A cursory review of snow and ice management service contracts generally reveals that very few contracts address the use of best practices and concerns for environmental impacts. Most contracts take a relatively imbalanced approach to allocating risks, based upon whichever party perceives that it has the most leverage over these terms. The advisory committee discussed the wide variety of contractor and property owner resources, education, and philosophy that indicate the challenge in seeking to develop a single model contract that can serve these multiple scales and settings. Nevertheless, the advisory committee found that there are several key elements that counsel a smart and sound approach to safety and environmental stewardship:

Environmental Impacts are Well Known

Materials to maintain or improve surface traction contribute pollutants such as sand and chlorides to surface waters and to stormwater basins and other facilities, which in turn can increase the cost of maintaining those facilities. It is important not to use an excess of these materials. Chloride harms fish and other freshwater aquatic life and also negatively affects infrastructure, vehicles, plants, soil, pets, and wildlife, as well as impairs groundwater and drinking water supplies. Once in the water, chloride becomes a permanent pollutant and continues to accumulate in the environment over time. The data show that salt concentrations are increasing impairments to both surface waters and groundwater across the state. The Advisory Committee noted that salt is not the only snow and ice management tool that poses environmental concerns, and opted for the term “negative environmental impacts” rather than just “chloride” to describe the variety of techniques, nutrients, and pollutants that can create negative impacts on the environment.

Best Practices are Well Established and Do Not Compromise Safety

The Minnesota Pollution Control Agency’s Smart Salting training and Road Salt Education Program, the Minnesota Pollution Control Agency’s Smart Salting Assessment Tool (SSAt), the Minnesota Pollution Control Agency’s Winter Parking Lot and Sidewalk Maintenance Manual, the Minnesota Department of Transportation’s Minnesota Snow and Ice Control Field Handbook for Snowplow Operators, and the Snow and Ice Management Association’s Best Practices Checklist are sound guidance resources in the field. A critical premise in each of these resources is that it is possible to adopt smart practices while still providing a level of service that maintains safety. It is important also to recognize that these manuals offer a menu of considerations that should be adapted to each site and circumstance.

Training and Documentation to Build a Presumption of Due Care

The Advisory Committee members agreed on the value of appropriate training in best practices, as well as the importance of solid documentation of the use of these practices in order to be able to demonstrate accurately the care taken in service delivery. The Advisory Committee discussed at length

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the challenges to training all contractor employees due to the seasonal nature of employment and the workforce retention challenges within the industry. The Committee determined that, rather than guaranteeing a trained operator always on site, it is a more appropriate objective that a trained employee will review each service delivery. Similar workforce concerns led the discussion about what information should be gathered at each site, and the Committee determined that general site condition and weather information that conforms to the business practices of contractors—for example, type of material used, size of area, total material used, and snow removal technique—will be gathered at each service site, while specific temperature and precipitation details will be recorded at the storm event level.

Example documentation forms are available in the Minnesota Pollution Control Agency Winter Parking Lot and Sidewalk Maintenance Manual (2015), pages 38-39.

Property Owners and Managers Play an Important Role

The Committee discussed the importance of training and education for property owners and managers to realize the value, and play a part in the accountability, of trained snow and ice contractors. The Advisory Committee also discussed the physical damages of salt to infrastructure and the related benefits to clients of applying less salt. Smart site design and site assessment can also play a key role in promoting best practices and reducing environmental impacts.

The following is a section-by-section review of these components in more detail.

Section-by-Section Review

Section 1 - Description of Services

This section briefly reviews the damage that chlorides and other de-icing materials can cause to the environment and to structural features. Citing to the Best Practices definition in section 5, which incorporates the authoritative resources of the Minnesota Pollution Control Agency and the Minnesota Department of Transportation, it defines “Best Practices” to limit the use, and off-site loss, of such materials. It then references these and other sources for the conclusion that the proper use of Best Practices does not compromise effectiveness or safety, and affirms the intent of owner and contractor that equivalent effectiveness and safety will be achieved. The section also states that whether Best Practices are used or not, contractor necessarily exercises judgment as to how it approaches a particular site on the basis of site and weather conditions.

This text is intended to serve several purposes, all related to demonstrating that contractor used “due care” in its work.

First, it documents that contractor and owner have made a conscious and thoughtful choice to incorporate Best Practices, and that deviation from standard overuse practices is not the result of whim or inattention. Owners and contractors are encouraged to engage in a joint site assessment of the property with Best Practices in mind.

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Second, it expresses the parties' intent that doing so not reduce the effectiveness or safety of the treatment, and the sound basis for their confidence that this will be achieved.

Third, it describes the important reasons to use Best Practices, so that if, in a given situation, there is an allegation that Best Practices did reduce effectiveness and safety, owner and contractor can point to these additional considerations and their careful weighing of all of them in making judgments about site treatment.

Fourth, in emphasizing the role of contractor judgment, it communicates that due care is shown by the contractor's exercise of judgment and is not disproven by the fact that an incident resulting in injury or damage occurred.

Section 2 - Pricing and Payment

The effect of the use of Best Practices on contractor fees may vary. Experience to date is that cost may be lower, principally due to reduced use of de-icing materials. However, it may be, for example, that contractors will incur training, recordkeeping, equipment, labor, site visits, or other costs related to introducing Best Practices into their operations that they will chose to recover through their fees.

We suggest that this section explicitly indicate the pricing impact of the use of Best Practices. Doing so helps emphasize that deviating from standard approaches is being done by mutual intent and with forethought. In addition, clarity as to the cost impact encourages the contractor to think through how Best Practices will be applied at the site and helps establish a knowledge basis in the industry for further refinement of this approach.

Although the model contract does not contain text on this subject, contractors and owners should keep in mind that approaches to pricing may create incentives supporting or detracting from Best Practice principles. For example, pricing de-icing material by quantity used may tend to encourage use of larger quantities.

Section 5 - Use of Best Practices

Section 5.a defines Best Practices by outlining a list of best practices agreed upon by the Advisory Committee and a list of explanatory resources that consolidate Best Practices principles and techniques and that are incorporated into the Best Practices referred to in the model contract. The description makes clear that Best Practices is not a set of off-the-shelf methods but is, instead, an approach to snow management and de-icing that consists of applying defined principles to the particular circumstances presented by each site. This section notes the essential role of contractor judgment, and further states that contractor will perform its work so that, in its judgment, effectiveness and safety are not reduced.

These, again, serve to manage risk in two ways. First, by stating clearly that Best Practices are not intended to reduce effectiveness and safety, and that the contractor, applying its judgment, determined that they did not. Second, by making the case that even if there is a claim that effectiveness or safety

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was less than it should have been due to the use of Best Practices, this did not result from a lack of due care, but from a careful consideration of other legitimate factors such as environmental and materials impacts.

This section, finally, makes clear that where there are specific requirements arising from the Americans with Disabilities Act, or from other sources, the use of Best Practices (for example, leaving certain commercial entrances unmanaged and directing traffic to other entrances) must not prevent compliance with those requirements.

Section 5.b concerns contractor training and certification. These elements are of critical importance. The overall approach to managing contractor/owner risk relies on the use of informed contractor judgment about how to achieve effectiveness and safety at a site without using techniques that contribute unnecessarily to environmental and materials damage. The basis to rely on the contractor's judgment is that the contractor has developed the knowledge of how to approach site management, and that knowledge is formally demonstrated through training and certification. Therefore, it is very important for the contract to set a framework that shows not just that the contractor will apply Best Practices, but that the specific means by which Best Practices is applied at the site will be determined by, or with the meaningful oversight of, those who have completed the training.

The text requires that the contractor make known to the owner MPCA's publicly available Smart Salting training list so that the owner may confirm the training certification claimed by the contractor. This helps show that the training requirement is not just a way for owner to wash its hands of responsibility, but is an essential part of the contract arrangement that owner will conscientiously confirm.

This section also will state specifically who doing the work must be trained and/or certified. Because approaches to work staffing vary among contractors, there is not a singular way to state this. Some contractors may find it appropriate to have all or most field employees formally trained. Others indicate that their workforce does not have a longevity such that it is practical to train widely, but that their training-derived knowledge can be brought to bear by training supervisory personnel. It may make sense to require formal training, for example, for spreader operators but not for all employees working at a site. The important thing, again, is that the contract show that the result of training is not just a certificate to be put in a file, but a route for Best Practices to be applied knowledgeably and thoughtfully at each site.

Section 5.c states documentation requirements of two types: operations and calibrations.

Operations documentation has two purposes: (a) to allow the contractor to show that it was using Best Practices, and hence fulfilling the contract (particularly if the contract price is higher due to use of Best Practices, and particularly if the use of Best Practices means that traditional indicators that service occurred, i.e., residual deposits of granular de-icer, are not available); (b) to document site conditions and the contractor's response to them, thus showing that judgment was used.

Typical operations documentation includes a qualitative description of weather conditions at the site, a regional temperature and snowfall information, and site-specific quantities of de-icing agents and other

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materials applied. In the use of Best Practices, certain other documentation is useful if practicably feasible. This includes site-specific snow conditions, pavement temperature, and quantities applied not just to the site as a whole, but to different areas that may merit different approaches. Documentation may also include notes as to special treatment or tasks (areas left unmanaged by design, collection or cleanup of unused de-icer).

Calibrations documentation refers principally to annual calibration both of de-icer delivery equipment, but also may apply to equipment used to take measurements that are important for making Best Practices judgments. This is documentation that the contractor will want to generate and keep as a standard business practice. The model contract states that these will be made available to owner on request; it is not expected that owner normally will be interested in it, but if a question arises between owner and contractor as to treatment effectiveness, or if there is a claim against owner and contractor related to an accident or injury, calibration documentation will show conscientiousness and answer questions about whether otherwise careful decisions were undermined by a faulty delivery system. At a minimum, calibration should be documented annually and include documentation of the date of calibration for each type of deicer applied by each piece of equipment.

Section 5.d lists those site management obligations that owner assumes. These concern matters that owner is better situated to know or do than the contractor, and that are important components of an overall Best Practices approach to the site.

This includes bringing forward certain information that is relevant to how owner and contractor, together, form the site approach. Thus, the model contract requires owner, in advance of the snow season, to give the contractor information as to locations of storm drains, downspout discharges, and other locations where water tends to collect. This will allow contractor and owner to reach agreement on how these locations will be managed.

Other obligations are tasks that are complementary to the contractor's snow removal and de-icing services, but are within owner's control. They may be appropriate elements of site management whether or not Best Practices are being used - such as regular inspection and replacement of lighting. Or they may be elements of the agreed-on Best Practices approach - such as maintaining signage to warn of localized conditions or to direct visitors away from unmanaged areas.

This section also states that owner will inform contractor of any incidents of slip and fall, vehicle accidents or other occurrences where slipperiness may have been a factor. This is a basic requirement for contractor's own liability management purposes, and will inform contractor's ongoing management of the site.

Section 6 - Duty of Care

The duty of care section is where the party delivering the services assumes the obligation to do so competently and in accordance with the applicable standards of the industry. This clause gives the party receiving the services its legal right to a remedy if the work has followed the letter of the contract but

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was poorly done. It also shifts responsibility from owner to service provider if, as a result, a third party has suffered injury or otherwise makes a claim related to the services.

The model contract adds three terms to duty of care to protect the contractor and to manage risk for both contractor and owner.

The section reaffirms that as a result of the use of Best Practices, the services may not adhere to the standard model and the result may not look exactly the same. For example, all surfaces may not be cleaned to bare pavement. The purpose of this language is to protect the contractor against an owner that signs up for Best Practices but later is dissatisfied with the services, and asserts that it did not get just the result that it expected, and therefore the contractor did not conform to industry standard or otherwise meet its duty of care. The text included here is to document in advance the “meeting of the minds.”

As an extension to this, under a second clause, owner agrees that it will not claim that contractor violated its duty of care by incorporating Best Practices. More specifically, it will not take this position in a direct claim against the contractor, nor will not do so in the context of a third-party claim, in an effort to shift all potential responsibility from itself to contractor.

The clause states that this does not apply where contractor has deviated substantially from Best Practices. A contractor cannot simply proclaim that it has applied Best Practices as a way to provide cover for substandard work. It must follow the principles and techniques in the defined reference sources, must have the training to do that properly, and must document that it has done so. But if it has done these, it has fulfilled its Best Practices obligations to owner, and owner may not later claim it was not a part of the understanding.

Finally, a clause states that the failure to achieve equivalent effectiveness and safety does not mean that contractor and owner failed to use due care. The primary basis of the contract is that Best Practices does not reduce effectiveness or safety. However, if there were a third-party injury or damage claim, the claimant might argue that while this was the intent, it was not the result in the particular case. The contractor and owner would respond that by making careful Best Practices judgments, the contractor had exercised due care and should not be held legally responsible. This is a belt-and-suspenders approach to liability management.

Sections 10 and 11 - Indemnification

An indemnification clause is standard to a contract for provision of services. Where claims and losses are subject to insurance coverage, it is sound and efficient for the contracting parties to have a common position with a single real party of interest (the insurer) than to have each seeking to shift blame to the other and potentially weakening the defense of both in the process. Typically the party that is providing the services assumes the role of the indemnifying party, for the somewhat obvious reason that it is in the better position to ensure that the work is done properly.

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When Best Practices are to be integrated into snow management services, the argument for an indemnification clause remains, and the argument for the contractor to provide indemnification is strengthened. Best Practices is a new feature and a bit of a twist on the ordinary delivery of snow management services. If there are questions as to effects on coverage or premiums, it makes good sense to place these questions in the hands of those underwriters who write policies for snow removal services, and not those who issue property owner liability policies.

Complementing contractor's obligation to indemnify owner, contractor also would be obligated to name owner as an additional insured under contractor's policy. This would ensure a consolidation of contractor/owner defense against any claim and protect owner against a subrogation action by contractor's insurer against owner, or owner's insurer.

Advisory Committee Members

Martin Tirado, Snow and Ice Management Association
Patrick McGuiness, Minnesota Nursery and Landscape Association
Ryan Foudray, Prescription Landscape
Joby Nolan, Precision Landscaping
Greg Shaughnessy, Maple Crest Landscape
Mike Bollinger, Urban Landworks
Steve Mura, Barrett Lawn Care
Zach Eliason, Frauenshuh Commercial Real Estate
Larry Johnson, Common Bond Communities
Eric Hansen, Colonial Church of Edina
Erik Hays, Wooddale Church Eden Prairie
Dustin Burns, Minnesota Department of Administration
William Hultberg, Metropolitan Council
Erica Sniegowski, Nine Mile Creek Watershed District
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