

# Legal Hodgepodge

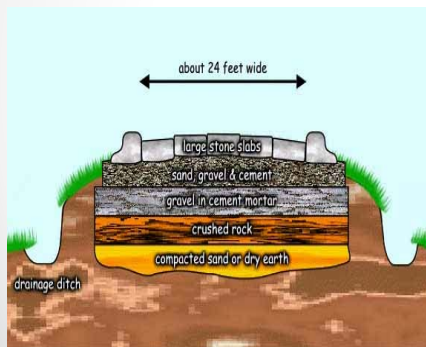
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January 26, 2018

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## First Some History!

“Way” - Traces back to Latin word - “Veho”

Veho means to carry/pass



## The “Right” to Pass

- Acquired by:
- Contract
  - Fee Simple
    - To Fee or Not to Fee – That is the question
  - Easements
    - Expressed or
    - Prescription

## Fee Simple - Cleanest

- Maybe off the table because:
- Cost
  - or
- Eminent Domain Limitations

## Eminent Domain

- The power belongs to the use not the player
- BUT ED has limitations.....
  - No transfer to the state of North Dakota or any of its political subdivisions of property for **highway purposes** shall be deemed to include any interest **greater than an easement**
  - NDCC 32-15-03 & 32-15-03.2

## Easements

- Easements are burdens on lands
- Must generally satisfy Statute of Frauds
  - i.e. must be written conveyance
- Rule of law will satisfy the Statute of Frauds
  - i.e. Section lines statutes

## Easements by Prescription

Easements by prescription

1. Continuous
2. Uninterrupted
3. Adverse use of the road by the public
4. For a set period of time. 20 years
  - o McKenzie Co. v. Reichman, 2012 ND 20,

## Easements Limitations

- R/W Easements do not convey ownership!
  - o Adjacent landowner continues to own the land subject to the easement on behalf of the public.
  - o Rutten v. Wood, 57 N.W.2d 112 (1975)
- Easements disappear when public purpose terminates!
  - o Marvin Brandt Revocable Trust v. United States 134 S.Ct 1257

# Encroachments

- Generally, ANY obstruction in the easement is prohibited
- Unless written permission by authority\*
  - Remember that is only permission for the encroachment
  - NOT permission to grant a new easement
  - THAT is the land owners RIGHT
- Or exempt by law
  - i.e. perpendicular fences with cattle guards
- Criminal Penalties
- Civil Penalties
  - To be added to the tax

# The Problems





## Drainage Issues – Encroachment???



## Contract Basics

- Contracts are Promises
- BUT Not all Promises are Enforceable!
- Promise = Gifts = Not enforceable
  - I promise to buy Genny a beer
- Promise + Consideration = Enforceable
- Consideration is generally a “Bargain”
  - Genny will buy me a beer if I mention her in the presentation©

## Contracts

- Contracts DO NOT have to be in writing!
- Fact is most "contracts" are not (Going out to eat..)
- Legislatures can require certain contracts in writing
- Statute of Frauds - Land transactions
- Written contracts advantages
- Obviously easier to prove
- But More Importantly
- Parol Evidence Rule
- Court Bound to the 4 corners of the document

## Typical Contract Issues

- Transferring of Liability
  - Watch out for hold harmless clauses or assumption of risk
  - State Statutes probably limit
- Limits on warranty work or modifications
  - ie voiding warranties



## Equipment Bidding

- Invitation to Bid – “Advertisement”
- **Offer** by Dealer
- **Acceptance** by Purchaser
- Offer + Acceptance = Enforceable Promise

## Advertisements

- Time limits vary - Statute specific.
  - Generally a few weeks.
- Always Minimum times
- Usually required publications
  - Newspapers and Trade Magazines.
  - Relevancy????
- Positive – ND Supreme Court
- Bidder cannot complain about defect in timing if they submitted a bid.
  - Baukol Builders v. County of Grand Forks,
    - 2008 ND 116

## Invitation to Bid

Road machinery.

- Couple of cautions:
  - Usually not allowed to use trademarks.
  - But you can require certain specs.
- Make sure you give yourself options in the invitation to bid!

Example:

- Option for multiple purchases.

## Lease vs Purchase

- Lease
  - Pros – No large upfront payments, No surprise costs, Warranties
  - Cons – No long term asset, statutory limitations on leases (7 years in ND 24-05-04)
- Purchase
  - Pros – long term asset
  - Cons – upfront payments and many soft costs - especially at end of life

## Lease v. Purchase

- General thoughts - Depreciation method
- Cost of equipment / life span = yearly cost
- \$150,000 motor grader / 20 yr = \$7,500 yr
  
- Lower the use - longer the life span
  
- Regardless of what you decide - you should create longer term fleet replacement schedules!

## Low Bid Not Accepted

- Frequently litigated!
  
- Frequently Dismissed!
  
- “Courts should not interfere with the determination of the authorities involved in such matters when the determination as to who was the lowest reliable and responsible bidder is made in good faith..... The exercise of discretion is provided for and expected.
  - McNichols v. City and County of Denver 274 P.2d 317

## Handling the opening

- Generally:
- Mistakes before bid opening can be corrected by withdrawing and resubmitting
- Mistakes discovered after opening but before award can be corrected if clearly evident on the face.

## The Big Day - Bid Openings

- Bid must be complete!
- Incomplete bids resealed and returned☹
- Equipment Bids generally don't require a bond
- Different then building projects
  - Those must include bonds or a cashiers check.
  - Most State's law is a percentage. - Typically 5%

## Handling the opening

- Mistake discovered after award does not relieve the seller from performing!
- Under contract law –
- Offer (i.e. bid)
- Opening (i.e. acceptance)
- Government has right to bond submitted.
  - Almost never enforced in my experience.

## Informalities vs. Bid changes

- Once bid is accepted you cannot significantly re-negotiate the bid.
- Bismarck violated the competitive bidding statutes contained in Ch. 48-02, N.D.C.C., when it revised specifications to reduce construction costs and negotiated with the four low bidders without affording other bidders an opportunity to bid on the revised project.
  - *Danzel v Bismarck*, 451 N.W.2d 127

## Minor Informalities

- Insignificant omissions or nonjudgmental mistakes
- Form rather than substance
- NDAC 4-12-10-01

## Emerging Trends

- State Statutes dictate bidding process
- BUT - Trend is State or National purchasing programs
- Laws haven't really caught up

# Any Questions?

Thank You and keep up the  
good work!

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