



Snow Job: Drafting a Simple Snow Removal Contract for a Commercial Property

02.28.2008

02.28.2008

Editor Nusbaum, William L.

Copyright (C) 2007. The Fee Simple and William L. Nusbaum. All rights reserved. Reprinted with permission. This material is taken from volume 28, number 1 of The Fee Simple, pp. 18-27 (November 2007). The Fee Simple is published by the Real Property Section of the Virginia State Bar and is available for purchase from the Virginia State Bar, Eighth & Main Building, 707 East Main St., Suite 1500, Richmond, VA 23219-2800, (804) 775-0500, Internet www.vsb.org.

Global warming notwithstanding, winter is indeed coming, and it will not be long before shopping centers and office parks in many parts of Virginia are covered in snow. Snow removal can be a particularly critical problem for commercial property owners, as the snow and ice can scare off customers, block access to retailers' and office buildings' doors, create dangerous conditions and dramatically increase the risk of slip and fall injuries and auto accidents on the property. With so many potentially costly consequences, it is essential for retail property owners to have the snow and ice removed quickly and efficiently by a trustworthy snow removal contractor. And as a good snow removal contractor will stay booked so long as the snow is on the ground, it is important to enter into a good snow removal contract long before the first flakes fall.

One of the challenges in drafting a good snow removal contract is to cover the critical issues, without creating a contract that is so long and detailed that the contractor just says "No thanks." Many snow removal contractors are service station owners who just attach a plow to their tow-truck and hook a salt-spreader to its back; others are comparable small business owners or freelancers who do the same with their pick-up truck. They often don't have the time or care to spend their money on hiring lawyers to negotiate a contract that will only be activated a half dozen times during the year. As a result, property owners (and their attorneys) are forced into a balancing act of trying to make sure the essential provisions are included in their snow removal agreements, while keeping them short and simple enough that they can get them signed! A sample snow removal contract is attached, the body of which can be printed on the front and back of one page,

and the snow removal guidelines and insurance requirements can be printed on a second sheet. A summary of a snow removal contract's salient provisions follows.

Scope of Services. In the Scope of Services, describe in some detail what services the contractor is to perform, where they are to be performed and when. (Greater detail should be spelled out in the Snow Removal Guidelines or Specifications, attached as Exhibit A to the form contract at the end of this article.) Make sure paved areas and sidewalks get salted as soon as the snow or ice begins to accumulate, while plowing should not begin until there's been sufficient accumulation to pick up with a snowplow (generally two inches). Also attach as a contract exhibit a detailed plan of the property showing property boundaries, drive lanes, fire lanes, parking areas and sidewalks, so that there can be no mistaking what areas of which property the contractor is to clear. The owner may even want to designate on the plan of the property certain areas as priorities for the contractor to clear before tackling other, less significant areas. This plan may vary according to the time of year (e.g., a shopping mall may need more cleared parking in December than in February, and more on a Saturday than on a Monday).

Specifications and Action Plan. If the scope of services describes the general services to be performed and when, the action plan specifies in considerably greater detail how the contractor is to perform that work. The contract should include snow removal guidelines that specifically instruct the contractor what materials and equipment to use, when to start salting and plowing, where and under what circumstances to pile snow (which will vary depending on the depth of accumulation) and which areas are to be kept clear of piled snow. The guidelines should also instruct the contractor on which techniques are authorized for use in clearing the property, as well as whether the snow should be hauled offsite, pushed to the perimeter of the property, or in bad storms, windrowed around light poles and on islands. The guidelines should also make it clear that the contractor will be solely responsible for any damage to buildings, light poles, islands, parking blocks, curbs and gutters, sidewalks, landscaping, etc., which occurs in the course of the plowing. These provisions should save time in the plowing process and limit damage to the property. In regions prone to heavier or constant snow, an owner should have a contingency plan in place for emergencies, such as when the contractor cannot remove all of the snow, or during periods of prolonged and unexpected snow falls, equipment failures, etc.

Term and Assignability. Most snow removal contracts are one-season agreements, rather than multi-year contracts. As a good snow removal contractor doesn't lack for business, however, it is wise to enter into the contract during the summer or early fall, before the contractor concludes he has a full book of business. As services are only paid for if rendered, the actual "commencement date" and "termination date" of the contract are not as important as engaging the contractor early, so long as the starting and ending dates adequately bracket the months when snow is likely. The contract should allow the owner to terminate the agreement with notice to the contractor, and for the ability of the owner to assign the contract if the property is sold. However, as the snow removal contract is a personal services contract, the contractor should be prohibited from assigning the contract or subcontracting the work out without the owner's permission.

Contractor Insurance and Licensure Requirements. Owners should be sure that the contractor has all requisite business licenses and insurance required by the state and local governments. The

snow removal contract should stipulate that the contractor must deliver such certificates and evidences of insurance and business licensure to the owner before the commencement date of the contract. No one wants their snow removal contractor shut down after the first snowstorm for lack of a license, or to discover that the damage the contractor caused to the owner's property was uninsured. Standard insurance requirements are provided on Exhibit B of the attached contract.

Payment Terms. Snow clearing can be such a large portion of common area maintenance ("CAM") costs for a multi-tenant property that most landlords negotiate to exclude snow and ice removal from fixed CAM amounts, and especially from any CAM caps sought by tenants. Under those circumstances, though, an owner can expect its snow removal costs to be carefully scrutinized by any tenants who bargained for CAM audit rights. Accordingly, it is important to make sure the contractor's pricing arrangements are clear. Unless the contract calls for a flat rate or fixed price per inch scheme, an owner should require the contractor to submit detailed and itemized invoices specifying the date the work was performed, the hours worked, the materials used and the unit prices of those materials. Armed with those details, the owner can cross-check invoices against weather reports, to avoid paying for any bogus invoices, and provide the level of detail that a suspicious, auditing tenant may require.

Independent Contractor. The snow removal contract should make clear that the contractor is an independent contractor, to preclude the owner being held to be the snow removal contractor's employer and hence exposed to potential liability. An owner should pay careful attention to these provisions to ensure that it is neither liable for the contractor's taxes and employment benefits nor to the contractor's employees for their wages. It should also specify that the contractor is responsible for the health, safety and welfare of the contractor's employees. The independent contractor clause also insulates the owner against claims of respondeat superior, should an employee of the contractor injure a third party while plowing the owner's property (or even on the way there). Finally, the contractor must be required to comply with all applicable federal, state and local laws, rules, codes, regulations and ordinances, including specifically all environmental laws. (Remember those deicing chemicals!)

Indemnification. The operation of heavy equipment or vehicles in hazardous weather conditions is rife with opportunity for a claim. Ideally, the contract should require the contractor to indemnify the owner for any costs incurred by the owner in connection with contractor's damage to any part of the property, any injury to or death of a third party, and any failure to observe all applicable federal, state and local laws, rules, codes, regulations and ordinances. Contractor's obligation to indemnify should also encompass the acts of its employees, agents, subcontractors or anyone else for whose actions the contractor may be liable. The inclusion of compliance with all applicable laws can become important in jurisdictions with strict noise pollution ordinances applicable to snow removal equipment, or where maximum snow drift heights are regulated by ordinance. If the owner wishes, claims for damage by the contractor to the owner's property caused by the contractor's equipment can even be adjusted by authorizing the owner to hold back as retainage part of the contractor's compensation until an inspection by the parties at the end of the snow season.

However, an ironclad indemnification clause is no good if the contractor won't agree to it, so if the contractor reads the fine print and objects, some concessions may be in order to procure his

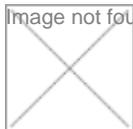
signature. Given that a blanket indemnification could require the contractor to replace expensive landscaping on a parking island damaged by his piling snow on it, in the course of a judgment call by the contractor, it is easy to understand how the contractor would object to such a provision, when its action may not have even been negligent. Thus, an owner may choose to agree that the contractor must have been negligent in the performance of its work for the indemnification provision to apply. Other, less desirable, ways to trim contractor liability include eliminating liability for failure to perform the contracted services (i.e. the contractor is liable only for services performed poorly, rather than those not performed at all), and to eliminate the contractor's liability for the acts of third parties for whom the more stringent provision would hold the contractor liable. Of course, eliminating liability for claims due to the contractor's failure to perform, of course, precludes holding the contractor responsible when someone slips and falls after the contractor has failed to show up or show up on time. Since the purpose of entering a snow removal contract is to alleviate your liability as an owner from snow-related injuries, relieving the contractor of liability for failure to perform liability can be seen by an owner as self-defeating.

Exculpation of Owner and Agent. Last, but hardly least, it is essential (from the managing agent's viewpoint) that the contract make it clear that the managing agent is strictly acting on behalf of the owner, and accordingly the managing agent is not liable for any payments due to the contractor, or for any performance or non-performance of the contract by the owner. Equally important (to the owner) will be the traditional exclusion of any personal liability on the part of the owner, wherein the contractor agrees that any claims it may have will be limited to the owner's interest in the property, and that no one managing or owning any equity in the owner will be liable for the owner's obligations under the contract.

This is not an exhaustive list of concerns in contracting with a vendor for snow and ice removal, because some commercial properties may require unique provisions. If you cover the critical topics outlined above, however, the owner should be well served and well protected.

Please click the .pdf to view a sample Snow Removal Contract

Image not found or type unknown



Snow Removal Contract

Related People

- William L. Nusbaum ? 757.629.0612 ? wnusbaum@williamsmullen.com

Related Services

- Real Estate