
SNOW JOB: DRAFTING A SIMPLE SNOW REMOVAL CONTRACT FOR A COMMERCIAL PROPERTY

by William L. Nusbaum *

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 free-lancers who do the same with their pick-up truck. They often do not 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 section, 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).¹

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

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¹ Paul G. Dasso, Leslie R. Lumber, Stephen A. Sell & John Tobin, *Snow Clearing: Strategies and Tactics* (International Council of Shopping Centers Shopping Center Report, New York, N.Y.), Nov. 1980, at 3.

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, experiences equipment failures.²

Term and Assignability. Most snow removal contracts are one-season agreements, rather than multi-year contracts. Because a good snow removal contractor does not lack for business, 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 provide for the ability of the owner to assign the contract if the property is sold. However, since 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, 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.³

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!)

² *Id.* at 2.

³ *Id.* at 7.

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. The 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.⁴ 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.⁵

However, an ironclad indemnification clause is no good if the contractor will not 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), as well as 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.

⁴ *Id.* at 4.

⁵ *Id.* at 7.

SNOW REMOVAL CONTRACT

THIS SNOW REMOVAL CONTRACT (“Agreement”), is entered into this ___ day of _____, 20___, by and between _____ (“Owner”), acting by and through _____ (“Agent”), its managing agent, whose address is _____, _____, Virginia _____, and _____, a _____ (“Contractor”).

PROPERTY NAME & ADDRESS: _____
CONTRACTOR’S CONTACT NAME: _____
CONTRACTOR’S ADDRESS: _____
CONTRACTOR’S PHONE #: (____)____-____ FAX #: (____)____-____ AFTER HOURS #: (____)____-____
CONTRACTOR’S E-MAIL: _____@_____
CONTRACTOR’S TAXPAYER ID #: _____
COMMENCEMENT DATE: _____, 20____
TERMINATION DATE : _____, 20____ (subject to earlier termination as provided below).

1. *Scope of Services.* Contractor shall perform these services for Owner, automatically and without need for any request (the “Services”): **Salt all drive lanes, fire lanes, parking areas and sidewalks on the Property shown on Exhibit C attached hereto upon start of snow or ice accumulation. Rock salt shall be used in drive lanes, fire lanes and parking lots; calcium chloride shall be used on concrete sidewalks. Plow drive lanes, fire lanes and parking lots and plow or shovel sidewalks and paved courtyards once two (2) inches of snow or ice accumulate. Snow removal shall be pursuant to the Snow Removal Guidelines attached as Exhibit A. Contractor’s unit prices for materials and hourly rates for equipment are attached as Exhibit D.**

2. *Term.* The term of this Agreement starts on the Commencement Date set forth above and, unless sooner terminated, ends on the Termination Date set forth above. Owner shall have the right, in its sole discretion, to terminate this Agreement on five (5) days’ prior written notice to Contractor, and Contractor shall be paid for its Services to the effective date of termination. If the Property is sold or conveyed to a new owner, Owner may either assign this Agreement or terminate it without any penalty, fee, cost or payment.

3. *Payment.* Contractor shall submit a “time and materials” monthly invoice to Agent at the address set forth above for the amounts properly due under this Agreement. Subject to the conditions for payment and limitations on liability set forth herein, Agent shall pay Contractor, but only from funds of Owner held by Agent, within thirty (30) days after Agent’s receipt of an invoice. Invoices shall include a detailed, itemized statement of all charges for which payment is sought, specifying for each date Services were rendered the amount of materials used and the unit price charged therefor, and the start and stop times for each piece of snow removal equipment used and its applicable hourly rate. If Agent contests any invoice or portion thereof, the contested part of the invoice shall not be due until the dispute has been resolved.

4. *Performance.* Contractor shall perform all Services diligently and in a good, professional and first class manner, using good quality materials, equipment and workmanship and sufficient trained personnel (including supervisors when appropriate) to complete the Services in a safe and timely manner which does not unduly interfere with the operation of the Property, the businesses therein and their suppliers. Contractor shall obtain and maintain, at its expense and at all times during the term of this Agreement, all necessary licenses, permits, training or other authorizations which may be necessary to perform the Services.

5. *Independent Contractor.* Contractor shall be an independent contractor, and all persons working under the direction of Contractor shall be employees of Contractor and not of Owner or Agent. Contractor, and not Owner or Agent, shall be liable for the payment of their wages, benefits and all taxes with respect thereto, and Contractor shall comply with all applicable federal, state and local laws, regulations, codes,

rules and ordinances with respect to (a) the hiring, employment, compensation, health and safety of employees and (b) the environment. Contractor agrees that neither Owner nor Agent shall be liable for any loss of or damage to Contractor's materials or equipment located on the Property.

6. *No Subcontracting or Assignment by Contractor.* Contractor shall not engage subcontractors to perform Services without Agent's prior written consent. This is a personal service contract with Contractor, and as such is not assignable by Contractor, but may be assigned by Owner upon the sale or conveyance of the Property. No references in this Agreement, including in its exhibits, to subcontractors shall be construed to authorize their use without Agent's prior written consent.

7. *Insurance.* Throughout the term of this Agreement, Contractor shall maintain insurance in accordance with the requirements set forth separately on **Exhibit B** attached hereto (for convenient delivery to Contractor's insurance agent). Contractor shall deliver to Agent a certificate of insurance evidencing that all such coverages are in full force and effect before starting to perform Services, and if Contractor's insurance shall expire or terminate before the Termination Date, Contractor shall deliver a new certificate of insurance evidencing the new policies of insurance not less than ten (10) days before the new policies go into effect.

8. *Indemnification.* Contractor assumes the entire responsibility and liability for, and agrees to pay, indemnify, defend and hold harmless Owner, Agent, and their respective principals, agents, affiliates, stockholders, directors, partners, members, officers, managers, employees, trustees and beneficiaries (collectively, the "Indemnified Parties") from and against any loss, expense, liability, damage or cost (including, without limitation, judgments, attorneys' fees and costs, court costs and the cost of appellate proceedings) which any of the Indemnified Parties incur because of injury to or death of any person or on account of damage to property (including, but not limited to, damage to buildings, curbs, parking blocks, islands, sidewalks, light poles, signs, landscaping, paving or striping of the Property or equipment used in connection therewith), including the loss of use thereof, or any other claim arising out of, in connection with or as a consequence of the performance of, or the failure to perform, the Services by Contractor, its agents, employees, subcontractors or any one for whose acts Contractor may be liable with respect to the Services. Contractor, for itself and its agents, employees and subcontractors, and any party claiming through any of them, also waives all right of recovery, claim, action or cause of action against the Indemnified Parties for any matters described in the preceding sentence. This indemnity shall not be limited by any limitation on amount or type of damages, compensation or benefits payable by contract or by any federal or state law.

9. *Default and Remedies.* If Contractor fails to perform the Services as required by this Agreement or otherwise defaults under this Agreement, Agent, on behalf of Owner, may, in its sole discretion and in addition to any other rights at law or in equity, (1) send notice of the default to Contractor and demand strict performance of the terms of this Agreement; (2) cancel this Agreement by notice to Contractor; or (3) cure the default, without notice to Contractor, and deduct the cost to cure and any direct and consequential damages from any payment due to Contractor at the time of default or coming due thereafter; provided, if no further payments are due to Contractor, then Contractor shall, immediately on presentation of Agent's invoice, reimburse Agent or Owner for the cost of curing Contractor's default and such direct or consequential damages.

10. *Exculpation of Agent and Owner.* Contractor acknowledges that Agent is acting solely as the managing agent for Owner and shall not be personally responsible for the payments due by Owner and/or performance by Owner of its obligations hereunder. Contractor agrees to look solely to Owner's interest in the Property for such payment and performance and further agrees that no manager, director, member, partner, shareholder, officer, trustee, employee or agent of Owner shall be liable to Contractor beyond such interest.

11. *Notices.* Any notice by Contractor to Agent or Owner shall be sent or delivered in writing to Agent at the address first set forth above, and any notice by Agent to Contractor shall be sent or delivered in writing to Contractor by fax to the "Fax #" set forth above or by overnight courier service or certified mail, return receipt requested, to the "Contractor's Address" set forth above.

12. *Time is of the Essence.* All time limits in this Agreement and any exhibits hereto are of the essence of this Agreement.

13. *Miscellaneous.* No failure of Agent or Owner to enforce the terms of this Agreement shall constitute a waiver by Agent or Owner of any contractual right under this Agreement. This Agreement may only be modified by a writing signed by Agent and Contractor. The rights and duties arising under this Agreement shall be governed by the law of the state in which the Property is located. Any action against Contractor shall be brought in the state courts of the jurisdiction where the Property is located, but any action against Agent shall be brought in the Circuit Court of the _____ of _____, Virginia. If any action is brought to enforce this Agreement, the prevailing party may recover from the other party its reasonable attorneys' fees and costs in connection with such action.

CONTRACTOR:

OWNER:

(print Contractor's name)

(print Owner's name)

By: _____
Name: _____
Title: _____

By: _____, its Managing Agent
(print Agent's name)

By: _____
Name: _____
Title: _____

EXHIBITS ATTACHED:

- Exhibit A: Snow Removal Guidelines
- Exhibit B: Insurance Requirements
- Exhibit C: Plan of the Property
- Exhibit D: Contractor's Unit Prices and Hourly Rates

EXHIBIT A**SNOW REMOVAL GUIDELINES**

1. Contractor shall provide its own employees, equipment, and supplies necessary to complete the Services described hereunder which include clearing all drive lanes, fire lanes, parking areas, sidewalks adjacent to buildings and public sidewalks.
2. Contractor will comply with all federal, state and local governmental laws, regulations, codes and ordinances.
3. Contractor will begin plowing at the Property as soon as the snow or ice reaches a depth of 2 inches, regardless of the time of day or night or the day of the week.
4. All work shall be completed in a workmanlike manner consistent with customary industry practices, for the amounts specified on Exhibit D.
5. Contractor shall supply and mechanically spread deicing rock salt at Contractor's own discretion. Contractor shall spread calcium chloride on concrete walkways. Calcium chloride will not harm concrete and landscaping.
6. For snowfalls of 2"-6" depth, all snow shall be plowed away from the buildings and pushed to the farthest end of the parking lot. No snow shall be piled up and stacked around light posts, or onto islands or landscaping.
7. For snowfalls of more than 6" depth, all snow shall be plowed away from the buildings. Contractor may windrow snow to each island or light post, upon request; windrows will be removed at no additional cost. Contractor will relocate snow that has accumulated during the Term, if such accumulation begins to impair access to the Property entrance, fire lanes, interior roadways or designated parking stalls.
8. Contractor shall return during the day to plow vacant parking stalls, if a majority of the parking stalls are still occupied. Contractor shall return the next day before 9 a.m. to plow as many stalls as possible.
9. All fire hydrants must be kept free from snow and easily accessible in case of emergencies.
10. When snow begins to fall with heavy and rapid accumulations shortly before or during business hours, Contractor will begin plowing the snow from the parking lot using the fastest method possible. In some cases this means windowing snow at islands or even light posts and it is understood that the snow will be removed from such places upon request. Stacking snow onto island may also be necessary, depending upon snowfall accumulation and time limitations.
11. Contractor shall not create drifts in front of dumpster enclosures, fire lanes, or entrances, on sidewalks or blocking walkways and agrees to remove Contractor-created drifts at no additional cost. If Contractor does not remove the drifts in front of the fire lanes and dumpster enclosures, Contractor agrees to pay any expenses incurred by Owner for removal of said drifts.
12. Contractor shall be responsible for damage to the Property caused by snow removal operations including, but not limited to, buildings, curbs, parking blocks, islands, sidewalks, light poles, signs, landscaping, paving or striping of the Property or equipment used in connection therewith.
13. Contractor agrees to contact the Agent's property manager if for some reason the entire Property cannot be completely plowed within four (4) hours after snow or ice has stopped falling.

14. Contractor agrees to complete the Snow Control Sheet attached for each plow and salting. To receive payment, this sheet must be attached to the invoice.
15. Contractor agrees to provide the Agent's property manager with all current after hours telephone numbers.

EXHIBIT B**INSURANCE REQUIREMENTS**

During the term of this Snow Removal Contract, Contractor shall comply with the insurance provisions set forth below. The insurance specified below shall be maintained by Contractor, at its expense, and certificates thereof shall be presented to Agent in form and content satisfactory to Agent prior to commencement of the Services. The insurance is as follows:

- a. Workers' Compensation in accordance with the laws of the state in which the Property is located;
- b. Employer's liability in an amount not less than \$1,000,000.00;
- c. Comprehensive general liability on an occurrence form for (i) bodily injury and (ii) property damage with limits of at least \$1,000,000.00 combined single limit each occurrence, including but not limited to comprehensive form, premises – operation, explosion, collapse, underground hazard, products/completed operations hazard (3 year extension beyond completion of the Services), blanket contractual coverage (including coverage for the indemnity provided under this Agreement), broad form property damage, independent vendors, personal injury (employee exclusion deleted).
- d. Comprehensive Automobile Liability, comprehensive form covering owned, hired and non-owned vehicles with limits of at least \$1,000,000.00 combined single limit each occurrence.
- e. Excess liability (umbrella) insurance with limits of at least \$2,000,000.00.

The insurance specified in c through e shall include the following:

- i. Endorsements adding the following parties as additional insureds: the Owner, the Agent and their respective partners, members, managers, directors, officers, employees, agents and representatives.
- ii. Thirty (30) days' prior written notice of cancellation to the Owner and the Agent.

Owner and Agent shall have no liability or other obligation for any of the insurance, endorsements or other protection required hereunder, including premiums and other charges. The insurance provisions specified herein shall be applicable to any contractors retained by Contractor, and Contractor shall require that such insurance be maintained by all its contractors. All insurance maintained by Contractor shall provide for a waiver of any right of subrogation of the insurers against Agent and Owner.

EXHIBIT C

[REPLACE THIS PAGE WITH A PLAN OF THE PROPERTY, MARKED AS EXHIBIT C]

EXHIBIT D

**[REPLACE THIS PAGE WITH CONTRACTOR'S UNIT PRICES AND HOURLY RATES,
MARKED AS EXHIBIT D]**