Joint Powers Agreement Authority and Analysis

West Central Technical Service Area
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Joint Exercise of Powers

- Efficiencies
  - Space
  - Money
  - People
  - Property/equipment
- Building for the future
Building a Strong Foundation

- Authority
- Governance
- Operating decisions
- Governing documents
- MCIT coverage

Minnesota Statutes Section 471.59

AUTHORITY
Joint Exercise of Powers —
Minnesota Statutes § 471.59

- Authorizes the joint and cooperative exercise of powers common to “governmental units”
- Provides the statutory framework for the joint exercise of powers
- Limits liability

Who Can Enter into Joint Powers Agreements?
"Governmental Units" as defined in § 471.59

- City
- County
- Town
- School district
- Other political subdivision of this or another state
- Another state
- The University of Minnesota
- Nonprofit hospitals licensed under sections 144.50 to 144.56
- Rehabilitation facilities and extended employment providers that are certified by the commissioner of employment
- Economic development, day training and habilitation services licensed under sections 245B.01 to 245B.08
- Any agency of the State of Minnesota or the United States
- Includes any instrumentality of a governmental unit
  - For the purpose of this section, an instrumentality of a governmental unit means an instrumentality having independent policymaking and appropriating authority
- Federally recognized tribal government
- Minnesota Historical Society
Who Cannot?

- For-profit enterprises
- Most not-for-profit organizations

Statutory Framework

Mandatory provisions in § 471.59 include:

- Enabling authority
- Purpose of the agreement
- Governance terms
- Strict accounting of all funds
- After the purpose of the agreement has been completed (dissolution)
  - Distribution of property acquired as the result of such joint or cooperative exercise of powers
  - The return of any surplus assets in proportion to contributions of the several contracting parties
Authority: Liability
Minn. Stat. § 471.59, Subd. 1a (b)
• For purposes of determining total liability for damages,
• the participating governmental units and the joint board,
• if one is established,
• are considered a single governmental unit
• and the total liability for the participating governmental units and the joint board, if established,
• shall not exceed the limits on governmental liability for a single governmental unit ...

This paragraph does not protect a governmental unit from liability for its own independent acts or omissions not directly related to the joint activity.

Joint Exercise of Powers

• Form as you will operate
• Operate as you are formed
Know the Difference

**JPE VERSUS JPC**

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**Joint Powers Agreement (JPA)**

**Consolidate and transfer operations to a new entity**

- Autonomous
- Give up control
- Transfer liability

**Outline how governmental units will work together**

- Advisory
- Retain control
- Retain some liability
Joint Powers Entity

- Separate and distinct public entity
  - May receive and disburse funds
  - May enter into contracts
  - May hire staff
  - May own property
- Subject to Minnesota laws
  - Open Meeting Law
  - Data Practices Act
  - Employment

Joint Powers Entity: Board

- Needed to operate
- Must be *representative* of its members
- Operates autonomously from the boards of the individual members
Joint Powers Entity: Board

- Individual members delegate control to the JPE board
- JPE board members represent the interests of the JPE
- Commissioner necessary if JPE to issue bonds or obligations (Minn. Stat. § 471.59)
  - Forming members must have authority

Joint Powers Entity: Liability

- May sue and be sued
- Can be found liable to a third party for damages caused by the JPE’s activities
- Will be obligated to provide workers’ compensation benefits if it has employees
Joint Powers Entity: Board Powers

- Make decisions to receive and disburse funds
- May enter into contracts for services
- May hire staff
- JPE may own property

Joint Powers Collaboration (JPC)

- A JPA between governmental units that agree to deliver a service/product jointly or own/manager property jointly...
  Agreement btwn
- Examples:
  - WCTSA and
  - Fiscal Agent or
  - Shared employees
JPC: Governance

- Board
  - Not needed
- No employees in a Collaborative arrangement
  - Members may assign their employees to JPC projects
  - Employee remains an employee of his or her original governmental unit
- Participating members provide the funding

Notable Differences Between JPE and JPC

- JPE is a separate, free-standing public entity that can sue and be sued
  - Liability should be transferred from the participating members to the JPE
- A JPE typically operates under its own name
- JPC does not establish a new entity
  - Liability remains with the participating members
- Joint powers agreement should establish how liability will be allocated
Notable Differences Between JPE and JPC

- Joint powers entity may apply for funding in its own name
- JPC participants fund the projects/activities
- JPC participants may apply for grant funding
  - In their own names
  - Individual participant retains all responsibility/liability

Joint Exercise of Powers

ESTABLISHING A SUCCESSFUL JOINT POWERS AGREEMENT
Decisions

- Common goals
- Plan to carry out or accomplish goals

- It is easier to have these discussions BEFORE issues arise

Common Goals and Plan

- How will this actually work
- Who is responsible for what
- Who will assume liability for what
- How will we address uncovered claims/liabilities
- Identify all enabling statutes
  - Some enabling statutes have specific requirements
Decisions to be made...

- Board
- Legal advice
- Budget and Finance
- Property
- Personnel
- Membership
- Dissolution

Legal Advice

- Identify JPE’s attorney
  - Private counsel
  - County attorney
  - City attorney
- Conflict of interest
Budget

- Identify funding sources
- Identify costs
- Allocate expenses, revenue, resources
  - Population
  - Percentage
  - Equal shares
  - Services provided on an in-kind basis

Finance

- Identify financial manager/fiscal agent
  - Employee of JPE
  - Participating member
  - Independent contractor
- Contract with fiscal agent
- Segregate JPE accounts
  - Tax identification numbers
  - Separate check stock
- Report to state auditor
Property

• JPE
  – places and maintains coverage
  – is responsible for deductibles
  – is responsible for maintenance

• JPC remains with individual parties

Personnel: How Will Services Be Delivered/Goals be Met?

• Employees
  – Minn. Stat. § 197.60 – union considerations for consolidating employees

• Delegated to participating members

• Share employee(s)
  – Employee of participating governmental unit
  – Contract

• Independent contractor: See MCIT Resources
Personnel: Employees Are Subject to Public-sector Requirements

- Veterans Preference Act
  - Hiring
  - Termination
- Performance management
- Pay equity reporting
- Loudermill hearing before termination
- Public Employees Retirement Association (PERA)
- Other requirements
  - Wage and benefit administration
  - Unemployment
  - AWAIR (a workplace accident and injury reduction program)

Personnel: Human Resources

If JPE
- Paychecks must be in the name of the JPE
- Policies and procedures must be in JPE name

IF JPC/Contract
- Paychecks issued by employer or contractor
- Employer or contractor’s policies and procedures apply.
  - Performance issues one of contract management not performance management
Membership in JPA

- Adding new members
  - Define terms
  - Financial issues

- Withdrawal
  - Minnesota Statutes Section 471.59 addresses dissolution, not withdrawal
  - Define terms
  - Financial issues

Dissolution

- Distribution of assets
  - Property
  - Money

- Distribution of liabilities
  - Outstanding bills
  - Pending lawsuits
  - Employment
    - Unemployment
Forming a JPE

GOVERNING DOCUMENTS

Governing Documents

- May include:
  - Joint Powers Agreement
  - Bylaws
  - Policies and Procedures
  - Contracts for Services
Joint Powers Agreement

- Make decisions prior to drafting the agreement
- Identify all enabling statutes
  - Include any specific requirements in JPA
- Address how JPA will be amended
  - Bylaws or policies/procedures may be more flexible

Statutory Framework

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Liability for a JPE

- Transfer liability to the JPE through a hold harmless and indemnification clause
- The JPE should protect, defend and hold the individual members harmless from liability claims arising out of the joint activities and decisions of the JPE

Example: Hold Harmless and Indemnification Clause

The [JPE] shall fully defend, indemnify and hold harmless the parties against all claims, losses, liability, suits, judgments, costs and expenses by reason of the action or inaction of the Board and/or employees and/or employees and/or the agents of the [JPE]. This Agreement to indemnify and hold harmless does not constitute a waiver by any participant of limitations on liability provided under Minnesota Statutes, Section 466.04.
Provide for Indemnification: JPCs and Contracts

- Determine which party will be responsible for damages, attorneys fees and costs if there is a lawsuit
- Think about what could go wrong with the arrangement and where the responsibility would likely lie
- Provide in writing how to hold each party accountable

Additional Considerations for JPE

- Minnesota Government Data Practices Act
  - Whose data is it?
  - What is the classification of the data?
  - What barriers and obstacles need to be addressed?
- Open Meeting Law
  - Applies to joint powers entities
Joint Powers Entity

MCIT COVERAGE

JPE and Liability

- The joint powers entity
  - May sue and be sued
  - Can be found liable to a third party for damages caused by its activities
  - Will be responsible for work-related injuries and illnesses of employees
- A JPE needs its own coverage
MCIT Members

- The fact that the participating members of a JPE are members of MCIT does not mean the members’ coverage extends to the JPE

- “Member”
  - Entity named in the Declarations including any department, subdivision, committee, commission or board
  - Under the member’s jurisdiction, control and direction

NOW THAT YOU KNOW WHAT TYPE OF ARRANGEMENT YOU WANT ...
Written Agreements
Provide Control

• The terms of the arrangement should be written
• Forces discussions of:
  – How will this actually work?
  – Who is responsible for what?
  – Who will assume liability for what?
  – How will you address claims and liabilities that are not covered?

Written Agreements
Provide Control

• Discuss the "what ifs"
  – What if you are unhappy with services?
  – What if the service is no longer needed?
  – What if the other party deviates from the agreement and an accident or wrongful act occurs, etc.?
  – What if there are unexpected expenses?
• It is easier to have these discussions before issues arise
Who Has Authority to Enter Into the Agreement/Contract?

- Generally, the board must approve contracts with the chair acting as signatory
- The board may delegate the authority
  - Resolution with the delegated authority

Payment and Performance

- Be specific about payments: When, how much and to whom
- Be specific about performance of any services, such as frequency, deadlines, specific hours of work if required
- If equipment is required, specify who will provide and how it will be paid for (allocation of expenses)
Is a Professional License Required?

- If you are contracting for a professional with a license or certification, make it a condition of the contract that the professional maintain the license or certification
- Example: Certain engineering services, licensed social worker, attorney

Specify Length of Arrangement

- When does the agreement start?
- Set a specific term to the contact: Is it OK to have an automatic renewal after the first term is met?
- When will the need to share employees end?
  - When a specific goal is met or project is completed?
  - When the grant runs out?
  - What happens if the employee leaves, is suspended, etc.?
Specify Reasons for Terminating the Agreement

- May the agreement only be terminated for cause?
- May the agreement be terminated for any reason? What type of notice will be required?
- Provide for a way to terminate a contract if unexpected events occur or either party is dissatisfied with the arrangements

Amendment to Written Agreement

- Provide in the agreement a process by which the parties may make changes to the agreement
- Allows flexibility in relationship without giving up certainty of a written agreement
- Generally, amendments are allowed if made with the same formality as the original agreement, in writing and signed by the same parties
Who Is the Employer?

- An agreement for services should identify who the employer is
- A contract between two entities to share an employee should not contain a provision creating a grievance policy to govern employees’ complaints
- Dissatisfaction with performance for the contracting entity is one of contract management

Joint Powers Entity: Fiscal Agent Assignment
Note of Caution

Duties performed by the fiscal agent may look like duties performed by the employer:

- Payroll
- Supervision of programs or employees
- Policies related to personnel practices

Risk Management Recommendations

- The fiscal agent should have a contract with the JPE that spells out its fiscal duties without crossing boundaries into employment relationship
- JPE should adopt its own policies for personnel and not use those of the fiscal agent
- If human resources provides services, it should be made clear it is on behalf of JPE
Minnesota Government Data Practices Act Considerations

- Whose data is it?
- What is the classification of the data?
- What barriers and obstacles need to be addressed?

MCIT Recommendations

RISK MANAGEMENT
Risk Management Recommendations

- Have discussions about goals and outcomes prior to deciding the type of and parties to an agreement
- Provide a written agreement
- Risks are higher when entities share supervision
- To avoid joint employer liability, the characteristics of the employer should be placed in one entity

Risk Management Recommendations

- Evidence of the employment relationship:
  - Supervision
  - Training
  - Governing policies
  - Employee benefits
- Parties' actions should follow the written agreement
- Have the tough discussions up front
MCIT Resources

- “Your Employee or Mine? Avoiding Unintended Consequences of Joint Employer Ventures”
- On the MCIT website (MCIT.org/resource_library.aspx)
  - “Sharing Employees: Drafting Agreements”
  - “Sample Contract for Sharing Employees”
  - Joint Powers Resource Briefing
    - Must log in to access articles: E-mail webmaster@mcit.org to obtain log-in details
MCIT Resources

- “ABC’s of JPEs: A Joint Powers Analysis and Worksheet”
- “Model Joint Powers Agreement that Creates a Joint Powers Entity”

DISCUSSION