



# Purchasing Handbook

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# Foreword

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Spending the taxpayers' money to purchase goods, materials, and services for the use of local governments has become a complicated process. Public purchasing has been the occasion for graft, corruption, and bribery in earlier times. Corrective legislation has attempted to minimize such happenings. More legislation directed at specific economic or social goals affects the purchasing process. The result is a purchasing process hedged by numerous laws and regulations not collected in any one place.

Contracting and purchasing are subjects not taken lightly by local government officials. An important word to remember is surcharge. Any elected official who by vote, act, or neglect causes financial loss to their municipality in a manner prohibited or not authorized by law may be surcharged the amount of the actual financial loss.

Please note that material in the *Purchasing Handbook for Local Governments* is for information purposes only. It does not constitute legal opinion and should not be construed as such. The Department of Community and Economic Development is prohibited by law from rendering legal opinions for local governments. Any legal question or uncertainty regarding purchasing should be brought to the attention of the municipal solicitor.

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# I. Goals of the Local Government Purchasing Process

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Municipal purchasing has many important similarities to purchasing by any large organization which must adhere to a budget. Because public funds are being spent and because the public has a right to know how the government's business is being conducted, controls are needed:

- to ensure that purchasing is carried out according to the priorities of the governing body and the government's administrator, and
- so that budget limits are not exceeded.

To ensure that taxpayers are served by a local government that runs efficiently and effectively, purchasing must obtain the best value for the money spent. These two requirements, that spending be controlled while the best value is obtained, can sometimes conflict. Local officials must bear in mind the need to seek balance in pursuing the following goals.

***Only needed goods and services should be purchased.*** There should be a written statement (such as on a purchase request form, or elsewhere) by an authorized person that there is a need for the item(s) or services to be purchased. For small purchases this can be quite informal. As the amount to be spent increases, the explanation or justification must become more thorough. Large purchases are often explained and justified as part of the budgeting process.

***Purchases should be kept within budgeted limits.*** When the need for the purchase is stated, the budget account code against which the purchase is to be charged should also be given, along with a statement to the effect that funds are available for this purchase. When requested budget allocations must be reduced during the budget preparation process to balance expenditures with revenues, the administrator needs to notify operating departments of the final approved amounts, since those amounts may limit purchases.

***Competitive purchasing should be used as much as possible.*** Although competitive bidding is specified by the various local government codes, it is wise to use a competitive process even when not required. Experienced municipal officials have learned that businesses "sharpen their pencils" when they learn purchasing is competitive. The taxpayer benefits from lower prices as well. Other ways of obtaining competitive prices are discussed in Chapter IX.

***Operating departments should get the supplies and materials they need in a timely manner.*** While checks and balances are important to safeguard public funds, public services suffer when purchasing procedures become too cumbersome. Municipal employees may react by buying extra items in advance rather than go through excessive paperwork, with the danger of having parts and supplies on hand for equipment that was disposed of years ago.

***Ensure that the best value for the money is purchased.*** To accomplish this, municipal officials must learn what is available on the market to meet their needs. In fact, they may need to take extra time to learn this information. Meeting this goal may mean that one brand may be replaced by another that does the job better.

***Bills are to be paid only for value received.*** Most merchants require a signed or initialed delivery ticket before they leave merchandise with a customer. Many organizations have the employee who takes delivery prepare a similar document called a receiving report. The municipal secretary preparing bills for payment should have a receiving report or delivery ticket (or other assurance) as evidence that the item was actually received before the bill is paid.

***Purchases should be timed to fit cash flow constraints.*** While the adopted budget is the main source of information for approved expenditure levels, operating departments must be made aware that simply because an



expenditure is “in the budget” doesn’t mean that there will be cash available for the expenditure, especially if it is relatively large. The use of formal purchase orders is one way to control the process. Small municipalities need not institute them if the same result can be achieved without them.

Local government officials who want to examine their purchasing procedures should use Section IV on Purchasing of the *Standards for Effective Local Government*, which is available from the Governor’s Center for Local Government Services of the Department of Community and Economic Development.

## II. Negotiated or Nonbid Purchases

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Purchases by local governments fall into two general categories: those where competitive bidding is required by law, and those where competitive bidding is not required. In general, purchases over \$10,000 require competitive bidding.<sup>1</sup> Purchases where competitive bidding is not required fall into three general areas: those where the amount is less than the \$10,000 limit established in the municipal codes, categories of purchases specifically exempted from bidding requirements although the amount of the purchase may exceed the limit, and purchases made under emergency conditions.

### Purchases Below Bidding Limit

Negotiated contracts are permitted for small purchases. An exception in the law requiring competitive bidding permits negotiated contracts when the amount of the project does not exceed \$10,000. There are criminal penalties in the law as well as the possibility of surcharges for making purchases piecemeal to avoid competitive bidding. The entire project or purchase must be \$10,000 or less to eliminate the need for competitive bidding.

Except for cities, second class counties and some home rule municipalities all other counties and municipalities must obtain at least three written or telephone price quotations for all contracts between \$4,000 and \$10,000.<sup>2</sup> A written record of telephone price quotes must be made, including the vendor's name, the purpose of the contract, and the price. Records of informal written or telephone price quotes must be retained for three years. If fewer than three qualified vendors exist in the market area, a memo must be placed in the file explaining why it is impractical to obtain at least three price quotes. Informal price quotes are not required for purchases below \$4,000, but are a sound business practice.

### Petty Cash Purchases

From a practical standpoint, nearly every municipality needs a petty cash fund to handle small disbursements for postage, small quantities of minor office supplies, express charges on shipment of goods, and similar items. The items purchased from a petty cash fund must be accounted for and these expenditures must be reflected in the municipal books of account. A relatively simple method of petty cash control will satisfy accounting and auditing requirements, and yet not place an unduly heavy burden on the clerk or secretary.

A petty cash system should be established by authority of the governing body. Major steps to initiate a petty cash system include the following:

- Designate a petty cash custodian – usually the secretary, treasurer or clerk.
- Determine the amount needed. This varies depending on the specific municipality; however, an amount of \$100 to \$200 is usually appropriate.
- Prepare a petty cash book to record all petty cash transactions.
- Write a check from the general fund to the person responsible for the petty cash book.
- As petty cash expenditures are made, record the amounts and the account numbers. Keep vouchers and receipts.
- Periodically write further checks to the responsible person in order to replenish the fund.

Several cautions should be noted with respect to petty cash. First, it should be used only for small expenditures of an immediate nature where payments must be made on the spot. All other expenditures should be brought before the governing body for approval. Avoid buying such items as pencils, tape, paper, nuts and bolts, and

similar items from petty cash. You nearly always can obtain a better price by buying such items in quantity using the normal purchase order process. Petty cash should only be used for emergency needs, and not as a substitute for proper purchasing procedures.

## **Purchases Exempted from Bidding Requirement**

The contracts or purchases involving an expenditure of more than \$10,000, not requiring advertising, bidding, or price quotations fall in a number of categories.<sup>3</sup>

1. Maintenance, repairs, or replacements for water, electric light, or other public works of the municipality, provided they do not constitute new additions, extensions, or enlargements of existing facilities and equipment. Cleaning the masonry exterior of a county courthouse is exempt from bidding requirements as maintenance to public works; public buildings are held to be public works.<sup>4</sup> Where the project involves building an addition to an electric generating facility, bidding is required.<sup>5</sup>
2. Improvements, repairs, and maintenance of any kind, made or provided by the municipality through its own employees. All materials used for street improvement, maintenance, and/or construction in excess of \$10,000 are subject to the advertising requirements. Contracts involving equipment rental where more than 50% of the labor is expended by employees is exempt under the Second Class Township Code.<sup>6</sup>
3. Those where particular types, models, or pieces of new equipment, articles, apparatus, appliances, vehicles, or parts desired by the governing body are patented and manufactured or copyrighted products. This exemption is operable only when the type of class of article sought by the municipality is produced only by one manufacturer under patent or copyright protection and where there is absolutely no competitor manufacturing the same type or class of article.<sup>7</sup> Although a municipality can be as detailed as it desires in its specifications, the determination of whether an article is manufactured by only one company must be made only through the medium of competitive bidding, not in advance by the governing body. This exemption does not apply to automobiles, even though they may contain a number of patented and manufactured parts.<sup>8</sup> This exception also does not apply to a contract for a telecommunications system, in light of evidence that comparable systems are available elsewhere.<sup>9</sup> Under the Second Class Township Code, the purchase of repair parts or materials for use in existing equipment or facilities is exempt if it is the sole item of its kind on the market or is manufactured as a replacement for the original item of equipment being repaired.<sup>10</sup>
4. Those involving purchase of any policies of insurance or surety company bonds.<sup>11</sup>
5. Purchases of any public utility service under tariffs on file with the Pennsylvania Public Utility Commission. Townships of the second class may purchase used equipment, vehicles, etc. from a public utility without using the bidding process.<sup>12</sup>
6. Intergovernmental contracts made with another political subdivision or county, the state or federal government or any of their agencies, or any municipal authority.<sup>13</sup> Municipal purchases from state contracts under the Local Piggyback Purchasing Program are exempt from advertising and bidding requirements.<sup>14</sup>
7. Contracts for purchase of personal or professional services. This exemption includes the services of lawyers, doctors, engineers, architects, practitioners of the fine arts, and real estate appraisers.<sup>15</sup> It also includes other services where quality is a paramount concern and which require a recognized professional and special expertise. Such expertise does not necessarily require graduate studies nor state certification or licensure. It can include services requiring advanced technological capabilities where the quality is more important than the price of the service. Standardized testing services for job applicants were found to require such special skill, training, and expertise. Telephone cost management services involving data processing software to monitor county telephone lines for cost allocation was also held to require specialized skill, technology, and training to qualify for exemption from competitive bidding.<sup>16</sup> A construction management contract was likewise found exempt from the competitive bidding requirements as requiring recognized professional and special expertise. The court

found that these types of contracts created a special relationship between the public entity and the contractor who became the entity's agent, representing the entity's interests.<sup>17</sup> Contracting requirements do not apply to the appointment and compensation of statutory public officers such as the solicitor,<sup>18</sup> nor to designation of a bank depository for public funds.<sup>19</sup> This exemption was extended to include contracts for ambulance service with the municipality.<sup>20</sup> However, contracts for garbage collection must be awarded through collective bidding, even where the collector will bill households directly and no money goes through the municipal treasury.<sup>21</sup>

8. Purchases of real estate are negotiable. Competitive bidding requirements do not apply to contracts for the purchase of specific parcels of real estate.<sup>22</sup> An agreement for the use of a landfill does not constitute a lease of real estate, but is a service subject to the requirements of competitive bidding.<sup>23</sup>
9. County contracts with nonprofit cooperative hospital service associations for county homes or hospitals or those affiliated with the county in purchasing arrangements.

Local officials should be very cautious in claiming one of the exemptions from competitive bidding. Competitive bidding requirements are a public policy established to prevent fraud and favoritism and to protect public funds. Courts interpret statutory requirements for bidding in a way to broadly further this policy. Any exception to competitive bidding is narrowly construed.<sup>24</sup> This means that the benefit of any doubt applies against a claim that a particular purchase is exempted. While the municipal codes exempt certain types of purchases from the competitive bidding process, the local unit may still decide to bid the contract, or obtain competitive quotes for prices and services through a Request for Proposals (RFP) process, such as that outlined in Chapter XI. This is the customary process for evaluating the costs and services of professionals such as engineers, architects, or certified public accountants.

Once a governmental agency chooses to use the competitive bidding process in a case where it is not required, the agency must continue to follow the competitive bidding process through to the award of the contract.<sup>25</sup> The Pennsylvania Supreme Court established this doctrine in a case involving the state lottery and it has been followed in later cases. This rule was applied to local governments in a 1982 Allegheny County case involving the award of retail concessions at the Greater Pittsburgh International Airport.<sup>26</sup> The rule was again applied when Berks County advised bidders a contract for waste disposal would be awarded to the most economic bid, even though strict adherence to the statutory bidding requirements was not mandatory in this case.<sup>27</sup>

If the local government decides on competitive bidding for professional services or other exempt categories, it should formulate and adopt a written procedure to follow. The procedure should ensure equal access and treatment for all prospective bidders.

## **Purchases under Emergency Conditions**

Under the authority of the Emergency Management Services Code,<sup>28</sup> political subdivisions included within disaster emergencies declared by the Governor may carry out disaster emergency management, response, and recovery activities without regard to statutory procedures governing making contracts and purchasing supplies and materials. The governing body of a political subdivision may authorize the mayor or other chief executive to declare a local disaster emergency subject to ratification by the governing body. Purchases made under emergency conditions without competitive bidding must be directly related to emergency response and recovery activities. Local declaration of a disaster emergency cannot exceed seven days except by consent of the governing body.<sup>29</sup>

Emergencies declared by the State may continue for 90 days unless renewed by the Governor. The General Assembly, by concurrent resolution, may terminate a state of disaster emergency at any time.<sup>30</sup>

Other authorizations for local officials to declare an emergency and suspend bidding requirements appear in the Third Class City and County Codes. The mayor or chief executive for cities by proclamation, or the county commissioners by resolution, may declare an emergency canceling the need for bids.<sup>31</sup>

The other municipal codes do not expressly provide for bypassing competitive bidding requirements in cases of emergency. However, Pennsylvania courts have held that municipal officials may bypass bidding requirements where immediate action is necessary to correct a dangerous situation and there is not sufficient time to advertise for bids.<sup>32</sup> An emergency is defined as a sudden or unexpected occurrence or conduct calling for immediate action. This does not include a situation where there is a potential problem not requiring instant action, nor where the condition has been ongoing for some time in the past. As defined by the act, a “Disaster Emergency” must actually or likely meet all the following criteria to:

1. affect seriously the safety, health, or welfare of a substantial number of citizens of this Commonwealth or preclude the operation or use of essential public facilities;
2. be of such magnitude or severity as to render essential State supplementation of county and local efforts or resources exerted or used in alleviating the danger, damage, suffering, or hardship faced; and
3. have been caused by forces beyond the control of man, by reason of civil disorder, riot or disturbance, or by factors not foreseen and not known to exist when appropriation bills were enacted.<sup>33</sup>

## References

1. 16 P.S. 1801 (a); County Code, Section 1801(a).  
53 P.S. 36901(b); Third Class City Code, Section 1901(b).  
53 P.S. 46402(a); Borough Code, Section 1402(a).  
53 P.S. 56802(a); First Class Township Code, Section 1802(a)  
53 P.S. 68102(a); Second Class Township Code, Section 3102(a).
2. 16 P.S. 1801(b); County Code, Section, 1801 (b).  
53 P.S. 46402(a.1); Borough Code, Section, 1402 (a.1).  
53 P.S. 56802(a.1); First Class Township Code, Section 1802(a.1).  
53 P.S. 68102(b); Second Class Township Code, Section 3102(b).
3. 16 P.S. 1802(h); County Code, Section 1802(h).  
53 P.S. 36901(d); Third Class City Code, Section 1901(d).  
53 P.S. 46402(d); Borough Code, Section 1402(d).  
53 P.S. 56802(d); First Class Township Code, Section 1802(d).  
53 P.S. 68102(h); Second Class Township Code, Section 3102(h).
4. *Heiges Masonry, Inc. v. Adams County*, 24 D.&C.3d 315, C.P. Adams Co., 1981.
5. *Gerhart v. Getz*, 45 Lanc. 314, 1936.
6. 53 P.S. 68102(h)(6); Second Class Township, Section 3102(h)(6).
7. *Knapp v. Miller*, 34 D.&C.2d 380, at 385, C.P. Allegheny Co., 1963.
8. *Coleman v. Stevenson*, 72 D.&C.2d 499, C.P. Mercer Co., 1974.
9. *In re 1985 Washington County Annual Financial Report Surcharge*, 601 A.2d 1223, 529 Pa.81, 1992.
10. 53 P.S. 68102(h)(7); Second Class Township Code, Section 3102(h)(7).
11. *Johnson v. Horsham Township*, 54 Mun. 265, C.P. Montgomery Co., 1962; *Downing v. City of Erie*, 32 Erie 211, 1948.
12. 53 P.S. 68102(h)(8); Second Class Township Code, Section 3102(h)(8).
13. *Griffith v. McCandless Township*, 77 A.2d 430, 366 Pa. 309, at 313, 1951.
14. 71 P.S. 633(h); Administrative Code, Section 2403; *Schaeffer v. Hilton*, 373 A. 2d 1350, 473 Pa. 237, 1977.
15. *London & Lancashire Indemnity Co. v. Upper Darby Township*, 30 Mun. 129, C.P. Delaware Co., 1937; *Doverspike v. Black*, 535 A.2d 1217, 126 Pa. Cmwlth. 11, 1988, aff'd 541 A.2d 1191.
16. *In re 1983 Audit Report of Belcastro*, 595 A.2d 15, 528 Pa. 29, 1991.
17. *Malloy v. Boyertown Area School District*, 657 A.2d 915, Pa., 1995, citing *Belcastro*, supra.
18. *Snyderwine v. Craley*, 254 A.2d 16, 434 Pa. 349, 1969.
19. *Latsnic v. Canon-McMillan School District*, 69 D.&C.2d 499, 1975, C.P. Washington Co.
20. *Emergency Care Unit v. Second Alarmers Association*, 10 D.&C.3d 472, C.P. Montgomery Co., 1979.
21. *Yohe v. Lower Burrell*, 208 A.2d 847, 418 Pa. 23, at 29, 1965.
22. *Gladwyne Colony, Inc. v. Lower Merion Township*, 187 A.2d 549, 409 Pa. 441, at 445, 1963; *Sheets v. Armstrong*, 161 Atl. 359, 307 Pa. 385, 1932.
23. *Fassman v. Whitehall Township*, 60 Mun. 47, C.P. Lehigh Co., 1968.

24. *Doverspike*, supra.
25. *American Totalisator v. Seligman*, 384 A.2d 242, 34 Pa. Cmwlth. 391, 1977, aff'd 414 A.2d 568, 489 Pa. 568, 1980.
26. *Lasday v. Allegheny County*, 453 A.2d 949, 499 Pa. 434, 1982.
27. *Stapleton v. Berks County*, 593 A.2d 1323, 140 Pa. Cmwlth. 523, 1991, appeal denied, 604 A.2d 251, 529 Pa. 660.
28. 35 Pa.C.S.A. 7501(d); Emergency Management Services Code, Section 7501(d).
29. 35 Pa.C.S.A. 7501(b); Emergency Management Services Code, Section 7501(b).
30. 35 Pa.C.S.A. 7301(c); Emergency Management Services Code, Section 7301(c).
31. 16 P.S. 1802(b); County Code, Section 1802(b).  
53 P.S. 36203; Third Class City Code, Section 1203(b)
32. *Appeal of Lasky*, 475 A.2d 966, 82 Pa. Cmwlth. 516, 1984; *In re Muhlenberg Township Supervisors' Appeal*, 45 Berks 241, 1953; *Upper Darby Township v. Ramsdell Construction Co.*, 51 D.&C. 246, at 251, C.P. Delaware Co., 1943.
33. 35 Pa.C.S.A. 7102; Emergency Management Services Code, Section 7102 definitions.

### III. Bidding Procedures

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Most large projects and purchases by municipalities require formal advertising for bids and subsequent invitation for bids. Normally the advertisement and invitation to bid are prepared by the municipal consultant or solicitor; however, it is advisable for the elected officials to take part in the review process. They should be sure their particular requirements are interpreted and incorporated.

#### Advertising for Bids

The Newspaper Advertising Act prescribes a uniform set of qualifications for publications where legal advertisements and publication can be made.<sup>1</sup> The Act requires publications to fix and establish rates for official, legal, and all other kinds of advertising for publication.<sup>2</sup> All publications, upon request, shall furnish detailed schedules of its rates and charges in effect at the time.<sup>3</sup> Publications are required to give notice when rates and charges for advertising increase prior to the publication receiving payment for such advertising.<sup>4</sup>

While all four municipal codes require a notice to be published in one newspaper, it must be one of general circulation both printed and circulating within the municipality. If there is no newspaper meeting both requirements, a newspaper circulating generally in the jurisdiction is an acceptable alternative.<sup>5</sup> The Borough Code allows notice to be placed in newspapers printed outside the borough if their circulation is greater than any paper published within the borough. If notice is required to be published in more than one newspaper, cities and townships must publish in at least one paper of general circulation printed in the municipality if there is one. The Newspaper Advertising Act requires official or legal advertising involving a road, highway, bridge, municipality or boundary to include the common, local or general usage designation so the advertising can be readily understood by the people of the area involved.<sup>6</sup>

The first step is the formal advertisement. The appropriate municipal codes specify minimum requirements for the number and timing of the advertisements and for bid opening time.<sup>7</sup> The specific advertising requirements of the contracting sections should be followed rather than any general advertising regulations.<sup>8</sup> You should allow at least two weeks for small projects and up to several months for large and complex projects. In addition to the legal requirements of advertising in local newspapers, on large projects it is often desirable to advertise in trade journals with a general readership among the contractors, manufacturers, or dealers who provide the material or services required.

All contracts or purchases in excess of \$10,000, except those specifically exempted, must be made from the lowest responsible bidder. For counties, notice for bids must appear in one newspaper of general circulation, published or circulating in the county, at least two times, at intervals of not less than three days for daily newspapers, or where weekly newspapers are employed, then the notice must be published once a week for two successive weeks. The first advertisement must be published not less than ten days prior to the date fixed for the opening of bids. For cities, notice for bids must appear two times, on a different day, in not more than two newspapers. The first advertisement must be at least ten days prior to the date set for opening of bids. A copy of the notice must be posted at the city hall. For boroughs and townships, notice must be published at least two times in daily newspapers at intervals of not less than three days, or if weekly newspapers are used, once a week for two successive weeks. The first advertisement must be published not more than 45 days and the second advertisement not less than ten days prior to the date set for bid opening. The advertisement for bids must also be posted in the municipal building. Advertisements must contain the date, time, and location for opening of bids.



The amount of the contract must in all cases (whether of straight sales price, conditional sale, lease, lease purchase, bailment lease, or otherwise) be the entire amount which the municipality pays to the successful bidder in order to obtain the services or property, or both, and must not be construed to mean only the amount which is paid to acquire the title or to receive any other particular benefit or benefits of the whole bargain.

*Separation of Bids.* When preparing for the erection, construction, and alteration of any public building, if the entire cost of the work exceeds \$10,000, separate specifications must be prepared for the plumbing, heating, ventilating, and electrical work.

The municipality receives separate bids on each of the branches of work and must award the contract to the lowest responsible bidder for each of the branches.<sup>9</sup> Separate bids are optional for boroughs, but mandatory for counties, cities, and townships.<sup>10</sup> The municipality must directly award the separate contracts for each of the branches of work. This cannot be done through a single prime contractor who then would be required to award bids for the separate branches of work to the lowest responsible bidder for each, following required procedures for municipalities.<sup>11</sup>

The advertisement should be brief and clearly written. It must contain, as a minimum, the following items:

- Name and address of the municipality requesting the services or material, and the name and address of the person authorized to receive the bids.
- The time, date, and place set for the opening of bids.
- A brief description of the desired work, its scope and location, and the completion date. This should be prepared to attract capable bidders.
- Restrictions relative to submission, change, or withdrawal of bids.
- The location and time where plans and specifications may be received by the contractors, provisions for a deposit on the plans, and recovery of the deposit when the plans are returned.
- Name and address of the engineer, architect, or other professional consultant responsible to the municipality for the project.
- Deadline for receipt of bids if this is to be before bid opening time.
- Mention if purchase price is to include allowance for trade-ins of used equipment or vehicles where applicable.
- The time limit within which bids will be considered valid. If, for some reason, the municipality has not awarded the bid within that time, new bids must be submitted.

## **Bidders Instructions**

Following advertisement of the project, a set of instructions to bidders is supplied to those firms or persons responding to the advertisement. These instructions are intended to provide each bidder with identical information to define what is expected in their bid. Bidders instructions are important documents. Where instructions are promulgated by municipal officials, and bidders are informed of conditions in the instructions, these become mandatory conditions which must be met; otherwise, the bid is void.<sup>12</sup> Violations of bid instructions constitute a legally disqualifying error and a public agency must reject a bid for such an error. Moreover, an attempt by a bidder to cure bidding defects after bids are opened may be properly refused by a municipality. A defective bid cannot be remedied once the bids are opened.<sup>13</sup> However, a municipality can reserve the right to waive defects in the bidding process. Waiving a defect is not an automatic violation of competitive bidding rules. The true test is to determine if waiving defects caused the bidding process to become noncompetitive.<sup>14</sup> Mandatory compliance with statutory procedures and bid instructions serves the goal of awarding contracts fairly and economically. Clear-cut ground rules for competition guarantee none of the contractors will gain an undue advantage through better information of the municipality's operation, and strict adherence lessens the possibility of fraud and favoritism.<sup>15</sup> This document follows the same format as the advertisement, but goes into more detail in the requirements, and includes as a part of the instructions a standard set of bid forms for each bidder. In addition, the following topics should be reviewed by the municipal governing body.



*Preparation of Proposal.* To eliminate confusion and to assure all bids are consistent, insist in the instructions that the blank forms furnished must be used and all blank spaces must be completed.

*Qualifications.* Insert a clause in the instructions stating the municipality may wish to examine qualifications of the bidder who may be asked to provide information and data the municipality requires. If there is an indication of a lack of skill, ability, or integrity of the bidder, this is a basis for rejection of the bid. Noncollusion affidavits under the Antibid-Rigging Act may be required; failure to supply them can be grounds for disqualification.<sup>16</sup>

*Withdrawal.* This deals with the right of any bidder to withdraw their bid as long as a written request is received by the municipality prior to the time and date of the bid opening.

*Bid Bond.* Specify the amount and form of the bid bond or other security and the method of its return to unsuccessful bidders.

*Performance Bond.* Specify the amount and type of performance bond or other security required as well as insurance requirements.

*Marking Bids.* Bidders should clearly mark and identify bidding documents so they are not opened inadvertently in the municipal office before the time for opening bids.

*Naming of Subcontractors.* To avoid unforeseen changes, it is advisable to require every bidder to identify their principal subcontractors, and to prohibit changing without approval of the municipality's consulting engineer or architect. The municipality is to maintain a list of persons ineligible for participation in contracts or subcontracts under the Antibid-Rigging Act and furnish a copy upon request to prospective bidders.<sup>17</sup>

*Interpretations.* All bidders must be treated as equally as possible. The instructions should contain a clause indicating any questions or interpretations of the plans, specifications or other documents must be given to the municipality's consultant in writing prior to a specified date. Written responses to the questions should be provided to all bidders in addition to the bidder making the request.

*Bidders Obligations.* The instructions should state the bidder is presumed to have investigated and examined the plans and all other contract documents, as well as the site, and it is assumed their bid is made with full knowledge and understanding of the conditions of the work. The municipality should also state that previous test data, core borings, or similar information is only for that purpose and the municipality is not responsible for the correctness or the completeness of the data.

*Lowest Qualified Bidder.* The municipality should specify the lowest qualified bidder will be awarded the contract. The municipality can reserve the right to reject all bids in the advertisement or bidders instructions, so that contractors have written notice that this right has been reserved.

*Bid Changes.* Describe methods and restrictions for making changes to bidding documents. Material changes in specification should be advertised in order to provide an opportunity to prospective bidders who may have chosen not to bid under the original specifications.<sup>18</sup> All specification changes must be mailed to all bidders who have already picked up the bidders instructions and specifications.

## **Specifications**

The specifications provide the common standard used to measure the bids received. They must be made available to all wishing to compete for the contract. The municipality cannot change the specifications without readvertising.<sup>19</sup> Municipal officials cannot reject the lowest bid on grounds that in effect amount to a change in the proposal where the lowest bidder meets the specifications, nor can they award a bid to a party submitting something other than the specified product.<sup>20</sup> A wide departure from the specifications in the terms of the contract can invalidate it.<sup>21</sup>

In the preparation of plans and specifications for contracted work or materials, there are two basic problems. The specifications may be so loosely drawn the municipality fails to receive the desired results, or they may be so unnecessarily restrictive all contractors will bid high in order to protect themselves at the expense of the municipality.

The purpose of good specifications and standards is to provide the bidders directions to enable the successful contractor to complete the project as desired by the municipality at a reasonable cost. The only basis contractors have for judgment is through their reading and interpretation of the plans and specifications. There are several characteristics of good specifications municipal officials should look for and expect from the person who prepares the plans and specifications.

*Clarity.* The contractor must be able to understand what you want. When a project is underway, inspectors are responsible for fulfilling the letter of the contract. If the requirements are not clear to the inspector, you can expect disagreements and friction with the contractor, requiring excessive consulting engineer's time in clearing up disputes over details.

*Definite Requirements.* Once in a while it is necessary to include a statement that some portion of the labor and materials in a project are to be furnished "as the engineer shall direct." However, such a statement gives contractors little or no basis for making a bid, and can only increase the cost of a project. Sometimes specifications may appear to be definite requirements when, in fact, they are not. Consider, for example, a specification of 100 cubic yards of earth fill. The amount of earth involved varies greatly, depending on whether the fill is measured before or after compaction at the delivery site, or measured by computations made at the burrow area.

*Standard Specifications.* The use of standard specifications is encouraged whenever possible. The American Society for Testing Materials (ASTM) publishes a multivolume set of standards for nearly every category of construction materials. There are also various trade groups such as the Asphalt Institute, Cast Iron Pipe Research Association, Portland Cement Association, and the National Corrugated Steel Pipe Association which provide a standard set of specifications for their particular products.

The specifications produced by trade associations and technical societies have generally been well thought out after years of testing and experience. Because of their technical quality and the fact bidders are familiar with them, the use of standard specifications usually benefits a project by reducing uncertainties and generating a more favorable set of bids. Another convenience of using widely known standard specifications is you can refer to them rather than reprint them in a bidding document.

In addition to the associations mentioned, nearly all large manufacturers have developed and are willing to supply standard specifications for their products. If you wish to use them, you should request specifications from several of them and combine the best features from each. It will usually be necessary to broaden the specifications so a minor but unique feature of one particular product will not eliminate all competition. For example, a specification received from a manufacturer for a lighting standard may specify "the arm shall be fastened to the pole by means of hex head bolts and nylon insert lock nuts." Including this statement in the specifications might eliminate all competition, thus a better specification in this example might state the required strength and vibration resistance of the mounting rather than the specific nuts and bolts to be used.

*Brand Names.* You may wish to include one or more preferred brand names in the specifications; these should be accompanied by an "or equal" clause. This type of specification has been upheld as not unduly stifling competition.<sup>22</sup> It is unlikely you or your consultant will be aware of all appropriate items for a particular job. Permitting contractors an opportunity to express their own ideas is good practice and could improve the overall project. However, the specifications should state contractors must name in their bids the brands they intend to use. This becomes a commitment on their part which cannot be changed after the contract is signed. This procedure has the effect of causing the contractor to get the best prices beforehand and incorporate them into the bid. If able to shop around after the contract award, the contractor, rather than the municipality benefits from the shopping.

*Local Preference.* Any stipulation of a local source of supply should be avoided, unless it is clearly relevant, such as contracts involving service to equipment. In one case, a stipulation in the specifications for preference to be given to local materials and labor whenever possible was found to be proper only because the provision was not absolute and unconditional and did not improperly restrict the prospective contractors.<sup>23</sup> In another case, specifications limiting the source of labor were held to conflict with the requirement the contract be let to the lowest responsible bidder if the limit would increase the cost of the project.<sup>24</sup>

## **Awarding Bids**

The award of contracts must only be made by public announcement at the meeting at which bids are received, or at a subsequent meeting, the time and place of which must be publicly announced when bids are received.<sup>25</sup> If for any reason one or both of the meetings are not held, the same business may be transacted at subsequent meetings, if at least five days notice is published in the newspaper in boroughs and second class townships and six days notice in first class townships. The deadline for receiving bids may be set a few hours prior to the bid opening to allow preparation of a bidders list or tabulation sheet.

In 1995, the borough and township codes were amended to permit the borough council or township board to direct a committee of the governing body, member of the governing body or a municipal staff person to receive, open, and review bids during normal business hours. The information then would be forwarded to the entire borough council or township board for subsequent award at a public meeting. When this option is chosen, municipalities must notify bidders and other interested parties of the date, time, and location of the bid opening. Bidders and other interested persons have the right to be present when bids are opened.<sup>26</sup>

All public works contracts exceeding \$50,000 must be awarded within 60 days of the date of the bid opening.<sup>27</sup> Where approval is required by another governmental agency, bonds must be sold or a grant must be received, the limit becomes 120 days. Thirty-day extensions of the deadline may be made by mutual consent of the municipality and the lowest responsible bidder.

*Bid Evaluations.* Remembering competitive bid contracts must be awarded to the lowest responsible bidder, you will find it advisable to define the word responsible. The definition should include consideration of the quality of previous work, record of completing projects on time, history of payments to subcontractors and suppliers, maintenance of a permanent place of business, adequacy of equipment and plant to do the work, technical experience and finally, whether the bidder has a solid financial base to guarantee contract completion. If the outcome of the bid opening is not satisfactory in terms of price, bidders' characteristics, or for other reasons, it may become desirable to change the contract specifications and rebid the project. Before taking this action, your legal, financial, and technical advisors should be consulted. Changes in equipment specifications, bonding requirements, schedules, or timing and other project requirements may be made to obtain a more suitable set of bids.

*Lowest Responsible Bidder.* When evaluating bids, one of the duties of the governing body is to determine who is the lowest responsible bidder. Courts have defined "lowest responsible bidder" to mean more than the bidder being pecuniarily responsible to carry on the work. It includes other things such as promptness, faithfulness, and the capacity and ability to do the work according to the plans and specifications.<sup>28</sup> It does not necessarily mean the bid lowest in dollars, but includes factors such as financial responsibility, integrity, efficiency, industry, experience, promptness, and ability to successfully carry out the particular undertaking. Determining the lowest responsible bidder is a matter for the sound discretion of the municipal officials. To award the contract without a full and careful investigation constitutes an abuse of discretion. However, where a full investigation discloses a substantial reason for exercising discretion, the municipality may award the contract to a higher bidder. Discretion must be based upon a knowledge of the real situation gained by a careful investigation.<sup>29</sup>

All other things being equal, the municipality must award the contract to the lowest bidder. The contracting provisions do not prevent municipalities from accepting a higher bid when satisfied the work or product of the higher bidder will better satisfy the needs of the municipality, so the community gets more for its money. The test is not acting wisely, but acting without caprice and after a full investigation.<sup>30</sup> Where the lowest bidder has been bypassed without any investigation, the courts have upheld surcharges against municipal officers.<sup>31</sup>

Clearly to qualify as the lowest bidder, the bidder must meet the municipality's specifications. The municipality does not have to award the bid to the lowest bidder who fails to meet the specifications,<sup>32</sup> but it also cannot reject the lowest bid on grounds that in effect amount to a change in the proposal where the lowest bidder met the original specifications.<sup>33</sup> The municipality can legitimately include the availability of service in its specifications for a vehicle and refuse to award the bid to the lowest monetary bidder who fails to offer adequate service.<sup>34</sup>

*Bid Negotiations.* Once the competitive bidding process has begun, a local government may not negotiate privately with a successful bidder to effectively change the terms and conditions of the competitive bids.<sup>35</sup> This practice violates competitive bidding rules and voids the contract whose terms and conditions were changed subsequent to the award of the contract. Likewise, private meetings and negotiations with some bidders to the exclusion of others after bids were opened and before a contract was awarded constitutes favoritism and gives an unfair advantage.<sup>36</sup> However, a municipality did not engage in prohibited postbid negotiations by merely correctly adding together itemized prices to generate an accurate bid base and confirming with a bidder the lower figure was accurate.<sup>37</sup> If the local government decides it wants to change its original proposal, it must readvertise for bids.

## Unsatisfactory Bid Outcomes

*Rejecting All Bids.* A municipality can reject all bids when the right to do so is reserved in the advertisement or specifications.<sup>38</sup> However, there should be a good reason for this action.

*Lack of Bids.* When a political subdivision advertises for bids on an item and no bids are received, the municipality must rebid the item. If no bids are received within 45 days of the second advertisement, the municipality may negotiate the purchase price of the item.<sup>39</sup>

## Challenges to Bid Award

In legal disputes stemming from purchasing actions by local governments, Pennsylvania courts have ruled disappointed bidders have no standing to challenge the bidding process.<sup>40</sup> However, a taxpayer has standing if certain criteria are met.<sup>41</sup> The courts have established the following guidelines:

- The governmental action would otherwise go unchallenged.
- Those directly and immediately affected by the expenditures in question are beneficially affected and not inclined to challenge the action.
- Judicial relief is appropriate.
- Redress through other channels is unavailable.
- No other persons are better situated to assert the claim.

A taxpayer has standing to enjoin the award of a public contract to anyone other than the lowest responsible bidder, even if the taxpayer is also a disappointed bidder who seeks to have the contract awarded to itself.<sup>42</sup>

## References

1. 53 P.S. 35109; Third Class City Code, Section 109; 53 P.S.45109; Borough Code, Section 109; 53 P.S. 55110; First Class Township Code, Section 110; 53 P.S. 65110; Second Class Township Code, Section 110.
2. 45 Pa.C.S.A. 304.
3. Ibid.
4. Ibid.
5. 45 Pa.C.S.A. 101; Newspaper Advertising Act.
6. 45 Pa.C.S.A. 309; Newspaper Advertising Act.
7. 16 P.S. 1802(b); County Code, Section 1802(b).  
53 P.S. 36901(b); Third Class City Code, Section 1901(b).  
53 P.S. 46402(a); Borough Code, Section 1402(a).  
53 P.S. 56802(a); First Class Township Code, Section 1802(a).  
53 P.S. 68102(a); Second Class Township Code, Section 3102(a).
8. *Verardi v. Sharpsburg Borough*, 180 A.2d 6, 407 Pa. 246, 1962.
9. *Petition of Commissioners of Somerset County*, 21 Som. 130, 1962.
10. 16 P.S. 2317; County Code, Section 2317.  
53 P.S. 36909; Third Class City Code, Section 1909.  
53 P.S. 46405; Borough Code, Section 1405.  
53 P.S. 56805; First Class Township Code, Section 1805.  
53 P.S. 68107; Second Class Township Code, Section 3107; *Tragesser v. Cooper*, 169 Atl. 359, 313 Pa. 10, 1933.
11. *Mechanical Contractors Association of Eastern Pennsylvania v. Southeastern Pennsylvania Transportation Authority*, 654 A.2d 119, Pa.Cmwlt., 1995.
12. *Fleming v. Montgomery County Board of Commissioners*, 95 Montg. 100, 1971.
13. *Rainey v. Borough of Derry*, 641 A.2d 698, 163 Pa.Cmwlt. 606, 1994.
14. *Kimmel and Hornung v. Lower Paxton Township*, 633 A.2d 1271, Pa.Cmwlt., 1993.
15. *Hanover Area School District v. Sarkisian Brothers, Inc.*, 514 F.Supp. 697, D.C., 1981.
16. 73 P.S. 1617; Antitid-Rigging Act, Section 7.
17. 73 P.S. 1615(b); Antitid-Rigging Act, Section 5.
18. *Page v. King*, 131 A. 707, 285 Pa. 153, 1926.
19. *Manchester Borough Audit*, 42 York 97, 1928.  
*Mazet v. Pittsburgh*, 20A 693, 137 Pa. 548, 1890.
20. *Oldershaw v. Plains Township*, 26 Luz. 431, 1931; *Snyder v. Borough of Hanover*, 25 Mun. 183, C.P. York Co., 1929.
21. *Guthrie v. Armstrong*, 154 Atl. 33, 303 Pa. 11, at 17, 1931.
22. *Dalton v. Haverford Township*, 49 Dep. 304, 1961.
23. *Dunleavy v. City of Coatesville*, 4 Chest. 265, 1949.
24. *Perry v. Borough of Wyoming*, 24 Mun. 113, C.P. Luzerne Co., 1932.
25. 16 P.S. 1802(e); County Code, Section 1802(e).  
53 P.S. 36901(e); Third Class City Code, Section 1901(e).  
53 P.S. 46402(b); Borough Code, Section 1402(b).  
53 P.S. 56802(b); First Class Township Code, Section 1802(b).  
53 P.S. 65802(c); Second Class Township Code, Section 802(c).
26. 53 P.S. 46402(b)(2); Borough Code, Section 1402(b)(2).  
53 P.S. 56802(b)(2); First Class Township Code, Section 1802(b)(2).  
53 P.S. 68102(b); Second Class Township Code, Section 3102(b).
27. 73 P.S. 1622; 1982 P.L. 694, No. 200.
28. *Wilson v. City of New Castle*, 152 Atl. 102, 301 Pa. 358, at 364, 1930.
29. *Kratz v. Allentown*, 155 Atl. 16, 304 Pa. 51, at 54, 1931; *Berryhill v. Dugan*, 491 A.2d 950, 89 Pa.Cmwlt. 46, 1985.
30. *Auman v. Lehigh County*, 16 Leh.L.J. 52, 1934.
31. *Appeal from Hazle Township Audit*, 1957, 51 Luz. 207, 1958.
32. *Tri-County Motor Sales v. Robert Moore*, 415 A.2d 439, 52 Pa.Cmwlt. 62, 1980.
33. *Oldershaw*, supra.
34. *Riley v. Norristown Borough*, 64 Mun. 169, C.P. Montgomery Co., 1973.

35. *Philadelphia Warehousing and Cold Storage v. Hallowell*, 88 Pa. Cmwlth. 574, 490 A.2d 955, 1985.
36. *Stapleton v. Berks County*, 593 A.2d 1323, 140 Pa.Cmwlth. 523, 1991, appeal denied 604 A.2d 251, 529 Pa. 660.
37. *Rainey*, supra.
38. *Conduit and Foundation Corp. v. City of Philadelphia*, 401 A.2d 376, 41 Pa.Cmwlth. 641, 1979; *R.S. Noonan, Inc. v. School District of the City of York*, 162 A.2d 623, 400 Pa. 391, 1960; *American Pavement Co. v. Wagner*, 21 Atl. 160, 139 Pa. 623, 1891.
39. 73 P.S. 1641; 1979 P.L. 241, No. 78.
40. *Highway Express Lines v. Winter*, 200 A.2d 300, 414 Pa. 340, 1964; *J.P. Marscaro & Sons, Inc. v. Bristol Township*, 505 A.2d 1071, 95 Pa.Cmwlth. 376, 1986.
41. *Consumer Party of Pennsylvania v. Commonwealth*, 507 A.2d 323, 510 Pa. 158, 1986; *Application of Biester*, 409 A.2d 848, 487 Pa. 438, 1979; *Rainey*, supra.
42. *American Totalisator Co., Inc. v. Seligman*, 384 A.2d 242, 34 Pa.Cmwlth. 391, 1977, affirmed 414 A.2d 568, 489 Pa. 568, 1980; *Conduit and Foundation Corp.*, supra.

## IV. Withdrawal of Bids

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Act 4 of 1974 outlines a procedure for the withdrawal of bids on certain public contracts after the opening of bids sets forth the rights of the parties involved and provides penalties.<sup>1</sup> Any bidder who meets the requirements of the Act may withdraw their bid from consideration after the bid opening without forfeiting the security filed with the bid. A public contract is binding from the date of the award. Where the contractor failed to follow the procedures for withdrawal of bid, the public body could proceed against the bid bond when the contractor refused to undertake the work.<sup>2</sup>

The Act applies to bidders on any public works construction contract or for the provision of services to or lease of real or personal property, excepting highway work. Section 1 of the Act clearly defines “contracting body” to include any political subdivision or agency of the Commonwealth, but it doesn’t define “public improvement.” Although there is no question public buildings and related facilities fall within the Act, all municipal and authority bid specifications and regulations must state whether bids are to be made subject to this Act.

### Requirements for Withdrawal Without Forfeiture

Any bidder under this Act may withdraw their bid from consideration after bid opening without forfeiture of security if the price bid was submitted in good faith, and the bidder submits credible evidence that the reason for the price bid being substantially lower was a clerical mistake as opposed to a judgment mistake. It must be actually due to an unintentional and substantial arithmetical error or an unintentional omission of a substantial quantity of work, labor, material, or services made directly in the compilation of the bid.

There are no definitions in the Act of “substantially lower” bid, “substantial arithmetical error,” or “substantial quantity of work, labor, material or services.”

Local governments should consider adopting regulations defining these terms, using a set percentage deviation as a standard. Such regulation could be incorporated into bidding specifications.

### Method of Withdrawal

To properly withdraw a bid, the bidder must give notice of its claim of the right to withdraw the bid in writing to the municipality within two business days after the opening of bids. Also, the withdrawal is not permitted if it will result in the awarding of the contract on another bid of the same bidder, any partner, or to a corporation or business venture owned by or in which the bidder has a substantial interest. Any bidder who is permitted to withdraw a bid cannot in any way participate in the project bid upon, either as a subcontractor or material supplier, without the written approval of the municipality. In a Commonwealth Court case, a bidder had allowed four days to pass before notifying the contracting body of its intention to withdraw its bid.<sup>3</sup> The Commonwealth Court held failure to comply with the mandated two-day notice requirement precluded the bidder from its right to arbitration under Section 4 of the Act.

It would be advisable for a municipality or authority to adopt regulations setting forth precisely how the written notice of withdrawal is to be accomplished. In other words, is the notice to be mailed or personally delivered? To where? What constitutes “two business days?” What is the notice to contain? Due to the time limits set by the Act, the regulations should specify that the withdrawal notice be accompanied by the credible evidence asserted by the withdrawing bidder with appropriate affidavits.

The two-day period for notice of withdrawal assumes the municipality or authority will “consider” the bid for at least two days. What if the municipality or authority designates the successful bidder immediately when bids are opened or shortly thereafter and the successful bidder then gives notice of withdrawal as required by the Act? Technically, the bidder would be out of luck since the bid was no longer “under consideration,” and they would have to accept the contract or forfeit their security. This would be an unjust result, contrary to the intentions of the Act. It would be tempting for a municipality or authority to immediately accept a bid with an obviously substantial error in order to take advantage of the situation. Due to the time limits in this Act, municipalities and authorities should designate a successful bidder within two business days of the opening, with the award to take effect at the end of the second business day if no notice of withdrawal is received from the bidder.

## **Municipal Options Upon Withdrawal**

If a bid is withdrawn, the municipality or authority may either award the contract to the next lowest bidder or reject all bids and resubmit the project for bidding. If the municipality or authority elects to reject all bids and resubmit as a result of withdrawal (and not for other reasons), the withdrawing bidder is obliged to pay the costs of printing new contract documents, required advertising, and printing and mailing notices to prospective bidders. The withdrawing bidder is not permitted to resubmit a bid for the project.

If a municipality contests a bidder’s right to withdraw, it must hold a hearing within ten business days after the opening of the bids, and issue an order allowing or denying the claim of withdrawal within five days after the hearing. If the municipality decides it will not contest the withdrawal, being satisfied the error was clerical in nature and the withdrawal was in good faith, no hearing with the bidder who requests withdrawal is required at all.<sup>4</sup>

If the municipality waits two business days pending receipt of the withdrawal notice, that leaves eight business days to decide whether to contest the withdrawal, to go to the next lowest bidder or resubmit. If it contests, the municipality must pick a hearing time, get a stenographer, and give “timely and reasonable” notice of the hearing. Municipalities should adopt regulations specifying 24 hours notice of such hearing is “timely and reasonable.” The notice is to be made by posting, placing responsibility of reading the notice on the withdrawing bidder. Solicitors should review the municipal engineer’s bidding documents with regard to method of arbitration.

Section 4(b) provides the municipality or authority with the right to otherwise proceed with the project if the bidder elects to arbitrate. No time period to elect to arbitrate is specified. Accordingly, municipalities and authorities should consider specifying such time period (say, 20 days with written notice) if not otherwise provided in the bidding specifications. If the right to withdraw is finally determined in the negative, then the security is to be liquidated damages. A municipality or authority should make sure its security requirements are sufficient, since it appears the deposit is the limit of a bidder’s liability under the Act.

The Act prohibits a withdrawing bidder from supplying any labor or material or performing any subcontract for any person performing work on the construction project without the approval of the contracting body. Penalty for violation is a misdemeanor, carrying a fine up to \$25,000 and/or imprisonment of not less than one, or more than two years. Presumably, both the withdrawing bidder and the bidder ultimately awarded the contract, or even their subcontractors, could be charged under this provision. Accordingly, it would be good practice for any municipality or authority permitting a bidder to withdraw to advise them and all who subsequently participate in the project of this criminal liability, in order to avoid any inadvertent violation of the Act by all concerned.



## Regulations

The Act specifically provides that a municipality or authority may prepare regulations to carry out the intent and purposes of the Act. To summarize, the following are possible areas where regulations, bidding specifications, and standard operating procedures might be adopted:

- A regulation specifying contracts subject to the Act and a statement of such in bidding specifications.
- Regulations and bidding specifications defining “substantial error” based upon the percentage of the total bid without such error.
- Regulations setting forth a precise method of giving notice of withdrawal with its contents to include the bidder’s “credible evidence” and statement with affidavits.
- A regulation setting forth a precise method of giving notice of hearing and the decision resulting from the hearing.
- A regulation providing for a method of arbitration if none is contained in bidding specifications, or if another method is desired.

## References

1. 73 P.S. 1602; 1974 P.L. 9, No. 4.
2. *Muncy Area School District v. Gardner*, 497 A.2d 683, 91 Pa.Cmwlth. 406, 1985.
3. *Perry Construction, Inc. v. Palmyra Borough Authority*, 389 A.2d 255, 37 Pa.Cmwlth. 126, 1978.
4. *Myers v. Bushkill Sewer Authority*, 24 D&C.3d 573, at 587, C.P. Northampton Co., 1982.

## V. Contract Contents

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Several articles of typical construction contracts should be carefully checked before entering into a public works contract. The standard preamble and other legal material in the contract should be handled by your municipal solicitor or legal advisor. Decisions must be made on the scope of work and the degree of operational control and management to be exercised by you and your consultant through the contract document.

All contracts should be executed with written documents. This requirement is mandatory for counties, cities, and first class townships.<sup>1</sup> Language requiring written contracts no longer appears in the Borough Code and the Second Class Township Code, but reliance on oral contracts is inadvisable.

### Standard Forms

The rights, duties and responsibilities of the contractor and the municipality are defined in the contract. Standard contract forms are generally available from professional organizations. In addition to the standard form, a number of supplemental articles must be drafted and attached. There is no particular order for including these articles. The following are typical of those often contained in public works construction contracts and should be reviewed by the municipal officials.

*Statement of Work.* This article is particularly important since the contractor is bound to do only the work specifically defined and referred to in the statement of work. All desired items must be included, either by describing them or by referring to descriptions in other supplemental documents such as the plans and specifications.

*Extra Cost Claims.* An article should be included indicating the method for making changes in the scope of the work. These requests for changes should be made in writing and approved by the consultant before the change is undertaken. You may alter, add, or subtract portions of the work without invalidating the original contract as long as the contract sum is adjusted accordingly. Extra compensation on public contracts can be made where the extra work was foreseen as a possibility in the original contract and the extra work was done in strict compliance with the terms of the contract.<sup>2</sup> Here the end product remained exactly as originally planned, and the extra work was required by an unforeseen obstacle. The amount of cost changes should be limited, usually no more than fifteen percent. All changes should be executed under the conditions of the original contract. Requested extensions in construction time should be considered at the time changes are ordered.

*Change Orders.* The contract should provide for the method of making any change orders and how the extra payment will be calculated. Change orders are permissible when they result from unforeseen contingencies or new ideas. They cannot vary so far from the original plan or be so major as to constitute a new undertaking.<sup>3</sup>

*Payment Schedule; Interest Penalties.* For public works contracts that are more than \$50,000, the law requires each payment to be made by the contracting body within 45 days after the application for payment has been submitted.<sup>4</sup> There is a grace period of 15 days, after which interest penalties apply. But the law allows the contract itself to specify a different time period for payment and a different grace period. Interest penalties do not apply where the local government has failed to receive grant funds allocated by the federal or state government for the project. The public contracting body must notify the contractor if it intends to withhold payment for deficiencies in the work within 15 days after application for payment or a different deadline specified in the contract.<sup>5</sup>

A new law enacted in 1994 requires local governments to pay an interest penalty for failure to make payment for property and services by the date specified in the contract.<sup>6</sup> Exceptions are made if the delinquency is caused by the failure of the federal or state government to pay funds designated for the specific project. The

law applies only to those invoices payable to businesses employing 100 or fewer people, and does not apply to any public works contracts that are more than \$50,000. Any business which qualifies must so state on the invoice or provide a separate statement to the local government. Interest penalties accrue if the payment is not made within 30 days of receipt of a proper invoice, unless a different period is set in the contract. There is a 15-day grace period in which payment can be made without interest. The local government must notify the contractor of any defect in supplies or services within the initial 30-day period.

*Holdback of Payments.* To protect the municipality from damages not evident during construction, include an article defining a percentage of cost (often 10 percent) to be withheld until all claims have been satisfied. It may also be used if there is some question whether or not the contractor can complete the job with the balance of payments due. Typical damages the municipality can protect itself against include failure of the contractor to pay subcontractors or pay for materials; defective work to be corrected; property damage claims by individuals; or damages to another contractor.

For public works contracts that are more than \$50,000, retainage provisions in contracts are limited by law.<sup>7</sup> Retainage cannot exceed 10 percent of the amount due the contractor until 50 percent of the contract is completed. After that, the retainage cannot exceed 5 percent. If a dispute arises over increased costs due to delays by another prime contractor, additional retainage is permitted up to 1 ½ times the amount of any possible liability.

*Authority of the Consultant.* Define in the contract the role of the consultant, engineer, architect, or landscape architect relative to the contractor. The contract should give the consultant the power to stop work, to redirect the use of labor and materials, to increase or decrease the work force, and to accept or reject materials and work not conforming to the conditions of the contract. The consultant's decision concerning technical aspects of the work should be final.

*Subcontracts.* This should require the contractor to identify all subcontractors and their competency. The contractor should be held responsible for the performance of all subcontractors. This should also prohibit the contractor from subcontracting more than a stated portion of the work.

*Nondiscrimination.* Boroughs are given the authority to include nondiscrimination provisions in their contracts covering hiring by contractors and subcontractors and imposing penalties for violation.<sup>8</sup>

*Final Cleanup.* The contractor should be required to remove, at its expense, all equipment, excess materials, rubbish, and any other materials either brought to or created at the site during construction.

*Contractor Liability.* The contractor should be required by the contract to maintain insurance to protect its firm, the municipality, and municipal officials from claims arising from workers' compensation or other damage claims arising from operations under the contract, whether they are performed by the contractor, a subcontractor, or anyone directly or indirectly employed by either of them. The amount of insurance may vary by area or contractor. However, minimum amounts must be specified, such as \$50,000 public liability and \$20,000 property damage. The company underwriting the insurance should be approved by the municipality and certificates of insurance must be filed with the municipality if requested.

*Licenses, Permits, Regulations.* The contractor should be responsible for obtaining all licenses and permits necessary for the execution of the work, such as water tap-in or state highway cut permits. The contractor should give all notices and comply with all laws, bylaws, rules, and regulations pertaining to the conduct of the work. If the contractor performs any work knowing it to be contrary to regulations or rules, and without written notice, it should be responsible for all costs arising from the violation.

*Anti Bid-rigging.* Contractors are prohibited from conspiracy and collusion to commit bid-rigging of public contracts.<sup>9</sup> Although non-collision affidavits are not required in municipal contracts it is a good practice to incorporate them into the bidding documents. Noncollision affidavit forms are available from the Pennsylvania Attorney General's Office.

## Bonds

Bonding requirements affecting purchasing are scattered throughout the municipal codes and other legislation. The three principal types of bonds in use are bid bonds, performance bonds, and payment bonds. Bid bonds accompany submitted bids as a pledge of the bidder's good faith. Performance bonds accompany the signing of a contract and pledge the contractor to carry out the terms of the contract. They are for the protection of the municipality contracting the work. Payment bonds are intended for the protection of subcontractors and other individuals furnishing labor or materials for the project to the prime contractor. A summary of bonding requirements appears below. Local officials should be guided by the advice of their solicitors in ascertaining that all required bonds are submitted. (See note on page 22)

*Bid Bonds.* Bid bonds of at least 10 percent are required for purchases and contracts for more than \$10,000 for third through eighth class counties.<sup>10</sup> In second class counties, bid bonds not exceeding 5 percent may be required by commissioners for contracts exceeding \$10,000.<sup>11</sup> For cities, bid bonds, certified checks or letters of credit may be required for advertised purchases and contracts exceeding \$10,000, but the amount is unspecified.<sup>12</sup> For boroughs, any bid bonds are at the discretion of the council.<sup>13</sup> There are no bid bond requirements for townships.

*Performance Bonds.* For public works construction or maintenance contracts exceeding \$5,000, all local governments must require a 100 percent performance bond, bank letter of credit, or restricted escrow account.<sup>14</sup> For all other contracts exceeding \$10,000, counties must require a 50 percent performance bond. Borough councils have discretion to require a 50 percent bond.<sup>15</sup> For cities, a suitable bond or letter of credit set by council is required for contracts and purchases exceeding \$10,000 with the bond amount at the discretion of the city and due 10 to 20 days from the award. In cities and counties, performance bonds are not mandatory for the purchase of motor vehicles or pieces of equipment.<sup>16</sup> All Liquid Fuels purchases require a 50 percent performance bond. When performance bonds are required by law, failure to give bond within the specified time limit invalidates the award of the contract.<sup>17</sup> A court ruled that the failure of a county to require performance bonds when requesting proposals for a waste disposal contract was not improper, since the county limited participation to firms with substantial financial resources which protected the county.<sup>18</sup> Boroughs and townships of the first class with contracts between \$4,000 and \$10,000 require 10 percent to 100 percent due between 10 and 20 days from the award.<sup>19</sup> Both the amount and time desired are at the discretion of the borough or township. In a township of the second class, the requirement of a performance bond is solely at the discretion of the township.<sup>20</sup>

*Payment Bonds.* For all local governments, 100 percent payment bonds are required for all public workers contracts exceeding \$5000.<sup>21</sup> (See note on page 22) However, cities may substitute letters of credit for payment bonds. Provision in the municipal codes and the Public Works Construction Bond Law relating to payment bonds are to be read together.<sup>22</sup> Payment bonds for up to \$10,000 contracts are set at 50 percent to 100 percent at the discretion of the third class city and<sup>23</sup> at 50 percent to 100 percent at the discretion of the borough<sup>24</sup> or township.<sup>25</sup> Townships of the Second Class are not required to set payment bonds unless required under Act 869 of 1967, the Public Workers Construction Bond Law.<sup>26</sup>

## References

1. *Patterson v. Delaware County*, 171 A.2d 47, 404 Pa. 5, 1961; *Angelotti v. Rankin Borough*, 19 A.2d 398, 341 Pa. 320, at 323, 1941; *Willis Bancroft, Inc. v. Millcreek Township*, 6 A.2d 916, 335 Pa. 529, at 536, 1939; *Daugherty v. Westmoreland County*, 29 Mun. 183, C.P. Westmoreland Co., 1938.
2. *Teodori v. Penn Hills School District Authority*, 196 A.2d 306, 413 Pa. 127, 1964.
3. *Hibbs v. Arensberg*, 119 Atl. 727, 276 Pa. 24, 1923; *Emporium Area Joint School Authority v. Arundson Construction and Building Supply Company*, 156 A.2d 554, 191 Pa.Super. 372, 1960, reversed on other grounds, 166 A.2d 269, 402 Pa. 81.
4. 73 P.S. 1626.2; Public Works Contract Regulation Act, Section 6.2.

5. 73 P.S. 1626.4; Public Works Contract Regulation Act, Section 6.4.
6. 72 P.S. 1601-C; Political Subdivision Procurement Interest Payment Act.
7. 73 P.S. 1625; 1978 P.L. 1309, No. 317.
8. 53 P.S. 46408; Borough Code, Section 1408.  
53 P.S. 56809; First Class Township Code, Section 1809.
9. 62 Pa.C.S. 4501 et seq.
10. 16 P.S. 1802(f); County Code, Section 1802(f).
11. 16 P.S. 5001(b.1); Second Class County Code, Section 2001(b.1).
12. 53 P.S. 36901(f); Third Class City Code, Section 1901(f).
13. 53 P.S. 46402(b); Borough Code, Section 1402(b).
14. 8 P.S. 193.1; Public Works Contractors Bond Law, Section 3.1.
15. 16 P.S. 1802(g); County Code, Section 1802(g).  
16 P.S. 5001(c); Second Class County Code, Section 2001(c).  
53 P.S. 46402(c); Borough Code, Section 1402(c).  
53 P.S. 56802(c); First Class Township Code, Section 1802(c).
16. 53 P.S. 36901(g); Third Class City Code, Section 1901(g).  
16 P.S. 1802(g); County Code, Section 1802(g).
17. *Gray v. Nissley*, 59 Dauph. 388, 1948.
18. *Stapleton v. Berks County*, 592 A.2d 1323, 140 Pa.Cmwlth. 523, 1991, appeal denied 604 A.2d 251, 529 Pa. 660.
19. 53 P.S. 46402 (c) for Boroughs and 53 P.S. 56802 (c) for Townships of the first class.
20. Second Class Township Code 3102 (a).
21. 16 P.S. 2318(a); County Code, Section 2318(a).  
53 P.S. 36907; Third Class City Code, Section 1907.  
53 P.S. 46406; Borough Code, Section 1406.  
53 P.S. 56804; First Class Township Code, Section 1804.  
53 P.S. 65803; Second Class Township Code, Section 803.
22. 8 P.S. 193.1; Public Works Contractors' Bond Law, Section 3.1; *Tioga County Commissioners v. C. Davis, Inc.*, 266 A.2d 749, 439 Pa. 285, at 289, 1970; *Powers Regulator Co. v. Triangle Mechanical, Inc.*, 9 D.&C.3d 647, C.P. Montgomery Co., 1978.  
*Elizabethtown Borough v. Savastio Construction, Inc.*, 44 D.&C.2d 596, C.P. Dauphin Co., 1968.
23. 53 P.S. 36907.
24. 53 P.S. 46406.
25. 53 P.S. 56804.
26. Second Class Township Code 3105.

**Note:** Requirements for Construction and Maintenance Contracts exceeding \$5,000 are based on the Public Works Bond Law of 1967 P.L. 869, (8 P.S. 191 et. seq.) and supercede requirements of municipal codes for Public Works Contracts only. Contracts for computers, office supplies, professional help, etc. are subject to the bonding requirements in their respective Municipal Codes.

The Public Works Bond Law includes "...construction, reconstruction, alteration, or repair of any public building or other public work or public improvement, including highway work," as activities covered by its bonding requirements.

## **VI. Purchasing Controls**

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Municipalities should adopt purchasing and contracting regulations that specify the duties of the purchasing agent, the procedure for obtaining competitive bids, how to purchase items which do not require bids and how and under what conditions emergency purchases may be made. These regulations should be adopted by the governing body in the form of an ordinance or resolution.

Regulations are useful in many ways and help clear up confusion. Often sales representatives fail to understand the laws governing purchasing and contracting and the restrictions placed on government officials. Operating departments and the general public benefit from having a very clear understanding of what the purchasing policies are.

### **Standardized Purchases**

An essential requirement of a good purchasing program is that goods be standardized and purchased in accordance with carefully drawn specifications. A policy such as this takes advantage of lower prices that result from buying in bulk. It also lowers the administrative costs of purchasing by reducing the number of purchases made.

Begin with a careful study of the types of materials and equipment in use and the services they support. Often different sizes and quantities of the same item are being used. For example, envelopes are items that are often not standardized. Different sizes are used in many ways - to send out tax bills, water and sewer bills, to pay suppliers, and for general correspondence. Some differences may be justified, but others are not, especially considering the unit cost reduction resulting from standardization. Other materials lending themselves to standardization include stationery, cleaning compounds, paper towels, hand tools, and office supplies. An exception would be highly specialized goods used mainly by a single department, division, or other unit within the municipality.

### **Drafting Specifications**

Specifications are a concise and complete description of qualities necessary for products to meet acceptable purchase requirements of the municipality. A vendor's goods and services should meet or even exceed specification requirements before they are considered for purchase. Specifications may be in the form of written descriptions, drawings, commercial designations, industry standards, or other descriptive references. These become an integral part of the purchase order or contract.

Well-written specifications are essential if economy and efficiency are to be achieved. They help to insure that maximum value is obtained for tax dollars spent, all qualified suppliers, large and small, are able to compete on an equal basis.

Responsibility for preparing specifications varies depending on the particular resources of a municipality. Large municipal governments depend on purchasing departments and consultants to prepare and maintain specifications. Because small units of local government do not normally have such expertise, they rely almost exclusively on outside technical assistance from vendors, associations, and state agencies. For instance, individual companies doing business with a municipality will offer specifications. These should be regarded with suspicion because competition can sometimes be precluded or quality diminished. Large and small units of government should use the assistance of state agencies which specialize in preparing and maintaining specifications. The federal General Services Administration publishes an index of federal specifications and stan-

dards which can be used to obtain specifications. This index covers a more comprehensive number of goods than the state's list. Specifications can be obtained by contacting the federal government directly. Other organizations providing useful information include the U.S. National Bureau of Standards, the American National Standards Institute, Inc., the American Society for Testing Materials, the National Association of State Purchasing Officials, and the National Institute of Governmental Purchasing.

In preparing specifications, municipalities, both large and small, should remember these important points:

- Use specification writing assistance whenever possible.
- Keep them clear, concise, and accurate.
- Keep them updated on a regular basis to reflect changes in technology.
- Always avoid the use of unfair specifications that would preclude or reduce competition.

## **Operating Procedures**

The last necessary ingredient of a sound purchasing system is a clear, complete set of written operating procedures. These procedures should be a more detailed expansion of established regulations and outline the specific steps to be taken by those involved with the purchasing process. They should be spelled out in a purchasing manual. Forms and procedures used should be limited to only those necessary. The unique characteristics of a particular municipality should determine the degree of detail in these procedures. The purchasing manual should cover such procedural points as preparing purchase requisitions, soliciting bids, informal bidding, preparing purchase orders, inspecting and testing goods, prompt payment for these goods, and exceptions to the normal purchasing process.

As a minimum, all municipalities should have controls over their purchases that accomplish at least the following:

- Assure materials and services are ordered only by authorized employees and officials.
- Purchases exceeding \$10,000 are advertised and bids obtained in accordance with the respective municipal codes.
- Assure ordered goods are actually received prior to authorizing payment.
- Identify monies encumbered for those purchases that have been ordered, but have not been received.

Municipalities should be careful to remain within the terms of the contract when ordering goods or services from vendors. Courts have held municipalities liable for the costs of goods or services beyond the contracted amount where the materials or services were accepted voluntarily and there was no effort at rejection where there was an opportunity to do so.<sup>1</sup>

In this section, a relatively simple purchasing procedure is presented. This may be modified and adjusted to the special needs of your municipality. This should be particularly adaptable to small municipalities without a large staff or a separate purchasing department.

## **Municipal Officials' Responsibilities**

The governing body designates those municipal officials or employees who are authorized to initiate purchase orders, and notifies all who are involved in the municipal purchasing process. The municipal employee or official authorized to make purchases prepares a list of needed items on a purchase order form. With this form, a separate requisition form is not required. The person authorizing the purchase fills in only the description and number of units required and signs in the lower right above "authorized signature." The form is then forwarded to the municipal secretary or treasurer.

If the purchase amounts to more than \$10,000, bids must be obtained as required by the municipal codes. For purchases between \$4,000 and \$10,000, at least three written or telephone price quotations are required (except for cities and second class counties). Informal price quotations are desirable even for purchases below \$4,000 and can be stipulated by local regulation. On high cost items, a bid bond might be appropriate on the advice of your solicitor.

When firm prices are received or formal bids tabulated, the balance of the purchase order form is filled out to include the name of the vendor, purchase order number, and expenditure account to be charged. In addition, the treasurer or finance officer signs the form to certify that sufficient municipal funds are available to pay for the purchase.

Even though no accounting entry is made when the purchase order is sent out, the money for the amount of the purchase is actually “encumbered.” It is desirable to have a record of the amount of encumbered money at any given time so you can adjust your financial report to reflect the expenditures and the encumbrances as they affect your financial position. As each purchase order is sent out, the amount, date, and account numbers are recorded. When the goods are received, a line is drawn through the entry and the date of receipt is entered. Whenever a financial report is prepared, the secretary can refer to the record of outstanding purchases and note the encumbrances for each account and adjust the financial report accordingly.

On the basis of the purchase order form, the vendor ships the desired materials. The shipping list, the received goods, and the purchase order are compared by the employee receiving the shipment. If all materials are received as ordered, the recipient should note this information on the purchase order, sign and return the form to the secretary, treasurer, or finance officer. If the accounts of your municipality are maintained on a “modified accrual” basis, that is purchases are recorded when the invoice is received rather than when the check is written, then an entry in the purchase journal of the municipality should be made at this time. If your accounting system is maintained on a cash basis, no formal entry would be made in the books until the check is actually drawn for the purchase. The secretary or treasurer then makes out a check (without signature).

At the next regular meeting of the governing body, the invoice is presented for approval. When approved, the check is signed and the treasurer enters the expenditure in the expenditure journal. The check is signed by the treasurer and forwarded to the vendor.

## **Contract Files**

Have available a file of material relating to current and recently completed municipal contracts. This aids in determining when procedures for advertising and awarding new annual contracts should be started, and who the past qualified bidders were. It also provides you with models of past advertisements, instructions to bidders, and other contract documents. Proper files can aid in determining the current status of all municipal contractual disputes. The files should include the following.

*Revolving Contract Files.* This file provides a single source of summary information on all current municipal contracts. The file should be maintained on forms designed to show all necessary information. It must provide spaces to enter information describing the contract, whether it is an annual or a one-time project and the dollar amount of the contract. Other information concerns start and stop dates, renewal dates for annual contracts, evaluation of contractor performance, other municipalities or governmental agencies involved, and an identification of related current or completed contracts. The form should show the history of billings and payments on the contract. The forms should be updated monthly when checks are written to cover the invoices received during the month. The person posting the forms can note any annual contracts coming due, as well as remove to the completed contract file forms for contracts terminated during the period.



*Advertisements and Instructions to Bidders.* Past copies of these items should be maintained in a file to aid in the preparation of new advertising and instructions on upcoming bids. Special features giving good or bad results in past advertisements and instructions should be noted for future reference.

*Contracts.* Maintain a file for all completed municipal contracts. This file may be in addition to the official contract records, primarily to provide guidance for the solicitor and other officials in preparing new contract documents.

*List of Bidders.* This file should contain names and addresses, and kinds of services where bids have been received from vendors and contractors over the past several years. Where there have been many bidders, it may be necessary to subdivide the file into subject areas such as road construction vehicles, construction materials, snow removal materials, and similar groupings. Particularly good or bad experiences with specific bidders should be noted. The municipality is also required to maintain a list of persons ineligible for participation in contracts or subcontracts under the Antibid-Rigging Act.<sup>2</sup>

## References

1. *J.A. & W.A. Hess Inc. v. Hazle Township*, 305 A.2d 404, 9 Pa.Cmwth. 409, 1979; *Township of Ridley v. Haulaway Trash Removal, Inc.*, 448 A.2d 654, 68 Pa.Cmwlth. 16, 1982; *Ridley Township v. Pipe Maintenance Services, Inc.*, 477 A.2d 610, 83 Pa.Cmwlth. 425, 1984.
2. 73 P.S. 1615(b); Antibid-Rigging Act, Section 5.

## VII. Conflicts of Interest for Municipal Officials

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Purchasing goods and services with public funds is a very sensitive area of municipal operations. Because of abuse in the past when public purchasing was a prime source of corruption, bribery, and fraud, the purchasing process is hedged with safeguards to protect the taxpayers' funds. Important among those safeguards are restrictions on public officials involved in purchasing and contracting.

The statement of purpose in the Ethics Law declares “. . . public office is a public trust and that any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust.” The General Assembly states the people have a right to be assured the financial interests of municipal officials do not conflict with the public trust.

### Personal Interest in Purchases and Contracts

Sections of law governing personal interest in contracts and purchases appear both in the Ethics Law and in the municipal codes. The Ethics Law requirements must be read in conjunction with the provisions of the applicable municipal code. The most restrictive provision must be followed.

Under the Ethics Law, no public official or public employee can enter into a contract valued at \$500 or more with their governmental body, unless the contract is awarded through a public process, including prior public notice and subsequent public disclosure of all proposals considered and contracts awarded. This prohibition also extends to any subcontract valued at \$500 or more with any person who has been awarded a contract by the governmental body. Any public official or public employee with a personal interest cannot have any supervisory responsibility for administering the contract.<sup>1</sup>

Elected and appointed county officials are absolutely prohibited from having any interest in a county purchase or contract.<sup>2</sup> For cities, elected officials must notify council of any personal interest in a contract exceeding \$300 and refrain from voting on it. In boroughs, any personal interest is prohibited in contracts exceeding \$1,000. In townships, personal interest is prohibited in contracts exceeding \$300 in first class townships and \$500 in second class townships. Where a contract is awarded to a firm employing a borough council member, township commissioner, or township supervisor in a nonmanagement position, the official must inform the governing body of the employment status and refrain from voting on the contract.<sup>3</sup> Engineers and architects employed by the municipality to prepare plans or specifications for any public work are prohibited from bidding on the project.<sup>4</sup> Sharing fees between a contractor and any municipal officer or employee is prohibited except where there is full prior disclosure and affirmative approval by the governing body.<sup>5</sup>

To fall within the prohibition, the interest of an official must be certain, pecuniary, or proprietary and direct.<sup>6</sup> Sentimental or general interest is not enough. A township commissioner was not disqualified from voting on a contract for ambulance service simply because a member of his family was employed by one of the bidders in a nonadministrative or nonexecutive capacity.<sup>7</sup> Also, two township supervisors with remote private business dealings with a bidder on a township contract did not violate the personal interest provision.<sup>8</sup> However, other courts have held the prohibition to be broad. The officer need not be a contracting party to have a personal interest and the amounts involved are immaterial.<sup>9</sup>

The code provisions read in conjunction with the Ethics Law restrictions severely limit the opportunity of making a legal contract where an elected official has a personal interest. Penalties for violation include fines, surcharges, terms of imprisonment, and ouster from office.<sup>10</sup>

Any contract or purchase a municipality wishes to make where an official has a personal interest should be closely scrutinized as to its legality. In all cases, the appearance of honesty and impartiality is almost as important as fulfilling legal requirements.

## Evasion of Advertising Requirements

Although not directly addressing the issue of conflicts of interest, municipal officials should be aware of the penalty for evading advertising requirements.<sup>11</sup> Purchases should not be made piecemeal for sums under \$10,000 to avoid advertising for bids when, “in the exercise of reasonable discretion and prudence,” they could be made as a single purchase awarded by competitive bidding. Evasion is illegal both for a series of purchases over time and a number of simultaneous purchases. Responsible county officials are subject to surcharge for the loss sustained. City, borough, and township officials are subject to surcharge for 10 percent of the full amount of the contract or purchase. Evasion of competitive bidding requirements is also defined as a misdemeanor of the third degree. Officials convicted face criminal penalties, including imprisonment.

Because the penalties are quite steep, municipal officials should beware of piecemeal purchasing. Again, the appearance of honesty and impartiality is almost as important as the facts in the matter.

## References

1. 65 P.S. 403(c); 1989 P.L. 26, No. 9.
2. 16 P.S. 1806; County Code, Section 1806; *Kimball v. Cambria County*, 36 D.&C.2d 662, C.P. Cambria Co., 1965.
3. 53 P.S. 36905; Third Class City Code, Section 1905.  
53 P.S. 46404; Borough Code, Section 1404.  
53 P.S. 56811; First Class Township Code, Section 1811.  
53 P.S. 68102(i); Second Class Township Code, Section 3102(i).
4. 18 Pa.C.S.A. 7503.  
16 P.S. 2320; County Code, Section 2320.  
53 P.S. 36912; Third Class City Code, Section 1912.  
53 P.S. 46411; Borough Code, Section 1411.  
53 P.S. 56807; First Class Township Code, Section 1807.  
53 P.S. 68109; Second Class Township Code, Section 3109.
5. 53 P.S. 36901(1); Third Class City Code, Section 1901(l).  
53 P.S. 46402(f); Borough Code, Section 1402(f).  
53 P.S. 56802(f); First Class Township Code, Section 1802(f).  
53 P.S. 68102(m); Second Class Township Code, Section 3102(m).
6. *Wilson v. City of New Castle*, 152 Atl. 102, 302 Pa. 358, 1930.
7. *Emergency Care Unit v. Second Alarmers Association*, 10 D.&C.3d 472, C.P. Montgomery Co., 1979.
8. *Kimmel and Hornung v. Lower Paxton Township*, 633 A.2d 1271, 159 Pa.Cmwlth. 475, 1993.
9. *Commonwealth v. Midouhas*, 62 D.&C.2d 441, C.P. Bucks Co., 1974.
10. *Laskey v. Bruno*, 440 A.2d 1281, 64 Pa.Cmwlth. 509, 1982; *Appeal from Statement of Audit of Finances of Borough of Monaca*, 35 Mun. 111, C.P. Beaver Co., 1943.
11. 16 P.S. 1803; County Code, Section 1803.  
53 P.S. 36902; Third Class City Code, Section 1902.  
53 P.S. 46403; Borough Code, Section 1403.  
53 P.S. 56803; First Class Township Code, Section 1802.1.  
53 P.S. 68104; Second Class Township Code, Section 3104.

## VIII. Special Purchasing Requirements

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Various laws have added special purchasing requirements relating to use of liquid fuels funds and federal grant funds, purchase of steel products and motor vehicles and payment of prevailing wages and workers' compensation insurance for local governments.

### Liquid Fuels Funds

State funds allotted under the Liquid Fuels Act 655 and Act 32 may not be comingled with any other local funds. A separate checking account must be established for such deposits and payments, and an annual check record of this account must be submitted to the Department of Transportation (PennDOT). However, PennDOT permits municipalities to spend money for highway purposes directly from the General Fund and to reimburse the fund by transferring from the Liquid Fuels Fund during the current year. These transfers can only be made if the municipality can identify the reimbursed costs, and provided the costs are allowed under state regulations. The transfers must be made by a check drawn on the Liquid Fuels Fund and reported on the annual check record account.

That portion of the allocation budgeted for maintenance, materials, supplies, small tools, and major equipment (not to exceed 20 percent of the allocation) may be spent by the municipality without further approval of PennDOT. Contracts for maintenance amounting to \$10,000 or more, however, require the same procedures as contracts for construction.

State funds budgeted for construction, reconstruction or widening of roads, streets, bridges, and drainage structures may not be spent without prior approval of the PennDOT, regardless of whether the work is done by contract or by municipal employes. No work may be started until a Report of Investigation, Form MS 329, is approved by the PennDOT. Authorization to proceed is upon the return of a copy of the Report of Investigation to the municipality.

When work is to be done by local forces, contract Form 944 need not be executed, but the purchase of materials requires the use of the advertisement, the contractor's proposal and contract Form 963. Material bonds are also required.

During the course of construction, inspections of work are made by a representative of the District Office of Municipal Services as well as by local authorities. Approval is given by execution of a completion report Form 999.

Counties may, but are not required to, allocate all or part of their annual grant to political subdivisions within the county for road and bridge maintenance and construction. Disposition of the funds is subject to the action of the board of county commissioners.

All other legal procedures involving PennDOT in executing projects under state aid funds to the municipalities are applicable to county allocation to local subdivisions as previously described. These include PennDOT approval of plans and specifications, submission of completion form by the municipality, Department inspection of completed work, and notification of the county or Department of approval for payment. All other forms required in state aid projects are also required for county aid projects, whether the project is financed solely by county local funds, or by a combination of local, county, and state appropriations.

## **Davis-Bacon Act**

When using federal grant or loan monies for construction projects, wage rates and record-keeping procedures established by the Davis-Bacon Act must be followed. Davis-Bacon requirements apply in all cases of construction projects exceeding \$2,000 performed with contracted labor and where federal funds supply more than 25 percent of the total project costs.

For more information about the Davis-Bacon Act, visit the U.S. Department of Labor website at <http://www.dol.gov>. Use the Search tool to find Davis-Bacon and Related Acts. Any local government with a question as to their inclusion under Davis-Bacon requirements should contact the regional office of the Employment Standards Administration, located in Philadelphia, telephone (215) 861-5830.

## **Steel Products**

Under the terms of the Steel Products Procurement Act, all public works contracts, including construction, maintenance, and repair, must specify use of steel products made in the United States.<sup>1</sup> Each municipal code also contains a provision referring to the Act.<sup>2</sup> The definitions in the Act have been broadened to specifically include mass transit equipment made of steel or containing steel components. The Act requires municipal officials to obtain certification of the source of steel products used before payments are made under the contract.

## **Motor Vehicles**

Under the Motor Vehicle Procurement Act, public bodies, including municipalities, are required to purchase or lease only motor vehicles manufactured or assembled in North America.<sup>3</sup> If the vehicle is assembled, but not manufactured in North America, it qualifies where a majority of the parts have been manufactured in North America. The municipality must be satisfied that the provisions of the Act have been met before it can make payments to any contractor supplying motor vehicles.

## **Prevailing Wages**

For public works contracts exceeding \$25,000, the Pennsylvania Prevailing Wage Act requires specifications to contain a provision for the payment of the prevailing minimum wage to all workers on the project.<sup>4</sup> The purpose of the Act is to protect workers on public projects from substandard wages. Prevailing minimum wages are determined by the Department of Labor and Industry. Reference to prevailing wages must be made in the notice requesting bids on the project. They become part of the contract and cannot be altered during the contract period. For further information, contact the Bureau of Labor Law Compliance, Pennsylvania Department of Labor & Industry, 1301 Labor & Industry Building, Harrisburg, Pennsylvania 17120, (800) 932-0665.

Provisions in the municipal codes permit cities, boroughs, and first class townships to specify minimum wages for public works contracts. Such local wage specifications would be applicable for contracts below \$25,000. Above that figure, provisions of the Pennsylvania Prevailing Wage Act supersede local authority. A court ruled a nonprofit corporation established by a county to build and operate a nursing home covered by the Prevailing Wage Act. The corporation used public funds for a public purpose proposed by a county, which loaned money and leased property to the corporation.<sup>5</sup>

In 1994, a federal circuit court, reversing an earlier decision, declared the Pennsylvania Prevailing Wage Act and its regulations were not preempted by the federal Employee Retirement Income Security Act (ERISA).<sup>6</sup> A lower court had previously ruled the Prevailing Wage Act as invalid and unenforceable.

## Workers' Compensation

The municipal codes require all contracts involving the employment of labor include provisions for workers' compensation. All contractors must produce proof they accept the provisions of the Workmen's Compensation Act and have insured their liability under the Act.<sup>7</sup>

## References

1. 73 P.S. 1881; Steel Products Procurement Act; *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F. 2d 903, 1990.
2. 16 P.S. 1802(i); County Code, Section 1802(i).  
53 P.S. 36901(k); Third Class City Code, Section 1901(k).  
53 P.S. 46402(e); Borough Code, Section 1402(e).  
53 P.S. 56802(e); First Class Township Code, Section 1802(e).  
53 P.S. 68102(l); Second Class Township Code, Section 3102(g).
3. 73 P.S. 1895; Motor Vehicle Procurement Act, Section 5.
4. 43 P.S. 165; Pennsylvania Prevailing Wage Act; *A.R. Scalise Company v. Commonwealth*, 393 A.2d 1306, 38 Pa.Cmwlth. 549, 1968.
5. *Lycoming County Nursing Home Association v. Commonwealth, Department of Labor and Industry, Prevailing Wage Board*, 627 A.2d 238, 156 Pa.Cmwlth. 280, 1993.
6. *Keystone Chapter, Associated Builders and Contractors v. Foley*, 37 F.3d 945, C.A. 3, Pa., 1994.
7. 16 P.S. 2319; County Code, Section 2319.  
53 P.S. 36910; Third Class City Code, Section 1910.  
53 P.S. 46410; Borough Code, Section 1410.  
53 P.S. 56806; First Class Township Code, Section 1806.  
53 P.S. 68108; Second Class Township Code, Section 3108.

## IX. Intergovernmental Purchasing

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Local units looking for ways to reduce costs should investigate intergovernmental arrangements for purchasing. Such arrangements take advantage of economies of scale through increasing the volume of materials to be purchased.

### Joint Purchasing

When several communities (particularly small communities) get together in a joint purchasing program, they are likely to save a considerable amount of money. The basic reason is many items are simply “cheaper by the dozen.” Each time a vendor receives a request for bids, the company must prepare separate bid documents, maintain separate records, and be prepared to handle small orders individually. With a large contract, administrative costs are reduced and the vendor will often be willing to take a smaller profit per unit if assured of selling many units.

However, joint purchasing has been slow to catch on. Some municipalities fear they will lose control of their purchases, they don’t understand what joint purchasing really is, and are uncertain about how to set up a joint purchasing program. A joint purchasing program begins when representatives from two or more municipalities meet and estimate the quantities of certain items each municipality will need over the next year. If a municipality wants special, different items, the municipality is removed from the list and purchases the items separately. The end result is a list of requirements from each participating municipality and the total quantities required.

The next step is formal advertising for the quantities requested by the cooperating municipalities. Advertising costs are reduced since only a single advertisement is needed. Each municipality keeps a file copy of the specifications for materials being purchased. Instructions to bidders should specify each participating municipality will submit purchase orders, although a single bid is being requested from the vendors. Deliveries will be made to each municipality and the invoice and payments will be handled by each municipality. In this way, each municipality controls the timing.

The bids are opened at a meeting attended by representatives from all participating municipalities. They jointly determine the lowest qualified bidder. The municipalities then prepare a joint letter notifying the successful bidder.

To simplify administering a joint purchasing program, each governing body appoints one of its members to a joint purchasing committee. This committee should meet regularly to determine needs, review how the system is working and plan for streamlining the process. The committee, with the help of a solicitor, prepares the schedules, quantity estimates and the necessary bid documents.

A properly administered joint purchasing program can result in considerable savings. It can provide a joint forum for municipal officials to trade ideas on a variety of common local problems. It is likely to lead to other areas of municipal cooperation and more effective solutions to areawide problems. At the same time, each municipality retains autonomy and local control.

*County Contracts.* Counties are authorized to permit municipalities within the county to make piggyback purchases off contracts executed by the county.<sup>1</sup> Municipalities making such purchases are exempted from statutory requirements concerning competitive bidding and execution of contracts. The municipality must agree to participate by ordinance or resolution. The county establishes the regulations. Each contract that is let by the county under these provisions should specifically include the piggyback option.

*School Districts and Nonprofit Organizations.* Counties or municipalities may authorize joint purchases with private or public schools, colleges or universities and nonprofit human service agencies.<sup>2</sup> The nonprofit agency is then bound by the terms and conditions of purchasing agreements set by the county or municipality.

*General Authority to Cooperatively Purchase off Governmental Contracts.* The major revision in 1997 of the Commonwealth's procurement statute provides for a sweeping authority for local government to engage in cooperative purchasing. The Intergovernmental Relations section of the act provides that local government may enter into a cooperative purchasing agreement with another Pennsylvania public procurement entity or an external procurement unit. An external procurement is defined as any non-Pennsylvania procurement unit that would qualify if located within the Commonwealth. The authority specifically includes any federal procurement agency.

## **State-Local Cooperative Purchasing**

Political subdivisions (counties, cities, towns, townships, boroughs, school districts, community colleges, authorities, commissions, councils of government, non-profit fire and rescue, hospitals) in Pennsylvania may purchase materials, supplies, equipment and vehicles from state contracts entered into by the Department of General Services.

Governmental units seeking ways of reducing operating costs find cooperative purchasing a useful tool. Costs are reduced because the Act exempts political subdivisions from existing statutory requirements governing competitive bidding and execution of contracts with respect to the purchase of materials, supplies, and equipment under state contract.

To participate in this program, the governing body of the political subdivision must pass and file a requesting authorization to participate in cooperative purchasing. This resolution must be filed with the Department of General Services.

The participating organization may work directly with General Services for their purchasing needs. All contract information, as well as a sample resolution, is available free of charge on the departmental web page at [www.dgs.state.pa.us](http://www.dgs.state.pa.us). Organizations are also required to forward a copy of each purchase order for contracted items to the department.

The Local Piggyback Purchasing Program (L3P) is a second option available to eligible organizations. Subscriptions are available through the Pennsylvania League of Cities and Municipalities for a \$50 annual fee. Subscribing members receive a quarterly checklist of products and services available, a quarterly newsletter featuring updates on state contracts, access to details of state contracts, and answers to questions through a toll-free information number.

Orders are sent directly to the vendor, and the merchandise is delivered directly to the location specified by the participants. Neither the Commonwealth nor L3P serves as a purchasing agent.

For additional information about Cooperative Purchasing, please contact the program at the following addresses:

Department of General Services  
Bureau of Purchases  
Room 414, North Office Building  
Harrisburg, PA 17125  
717-787-5733

Local Piggyback Purchasing Program  
Pa League of Cities and Municipalities  
414 North Second Street  
Harrisburg, PA 17101  
800-438-5370



## Federal Surplus Property Program

The Department of General Services is responsible for administering the distribution of surplus federal property. Items such as motor vehicles, hand tools, office furniture, computers, electronic equipment, heavy equipment, and other usable property declared surplus by the federal government are available to local governments through the Federal Surplus Property Program.

There is no cost to apply to this program, and the property itself is donated to eligible organizations within Pennsylvania. However, a cost is incurred by the participants in the form of a service charge to cover the state's cost of administering the program. The actual service charge on each item depends on the original cost of the items, its condition and any unusual costs incurred by the Bureau.

There are some restrictions placed on federal surplus property. All property must be placed into use within one year. Property must be used for a minimum 12-month period. Higher value items have an extended utilization period. Property is restricted to organizational use only; no personal use is permitted. Property cannot be sold, loaned, leased, traded, or torn down for parts during the utilization period. Property must be used by the receiving organization only and cannot be transferred.

Eligible donees and prospective donees alike are invited to browse through the federal Distribution Centers and check the inventory list on the Internet to see what items of surplus are currently being offered. The program also operates a toll-free surplus hot line at 1-800-235-1555 to answer any questions about the program and to check availability of stock. Additionally, the department publishes a circular, the Surplus Sampler, which list some examples of equipment and supplies available to eligible organizations.

## State Surplus Property

Surplus state property, such as office furniture, typewriters, and tools, is offered for public sale at the State Surplus Property Distribution Center or at special sales held periodically throughout the state.

The state also offers off-road and bridge equipment for sale to municipalities before it is offered to the general public. Those items are listed in the Pennsylvania Bulletin as they become available and are offered to the highest responsible municipal bidder via sealed bid sale. The minimum bid is only 50% of the anticipated value at public auction. All remaining property is sold at auction.

For more information regarding the state surplus property purchasing programs, visit the Department of General Services website at [www.dgs.state.pa.us](http://www.dgs.state.pa.us). Click on "Auctions and Sale of Surplus Property." You may also call the DGS Bureau of Supplies and Surplus Operations at 717-787-9725, ext.3207.

## References

1. 53 P.S. 487.2; Intergovernmental Cooperation Act, Section 7.2.
2. 53 P.S. 487.3; Intergovernmental Cooperation Act, Section 7.3.
3. 71 P.S. 633(h); Administrative Code, Section 2403; 62 PaC.S. 1901 et seq.; *Schaefer v. Hilton*, 373 A.2d 1350, 473 Pa. 237, 1977.

## **X. Types of Purchasing Arrangements**

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Whether considering the purchase of materials, equipment, or supplies, or construction contracts, municipal officials should investigate the types of purchasing arrangements available to determine the type of contract most suitable for the intended purchase.

### **Lump Sum Contracts**

There are two basic types of competitive bid contracts. The lump sum contract obligates the contractor to perform the work or provide the item according to the plans and specifications for a specified sum of money. Its main use is in purchases or projects where the plans and specifications are complete in detail before requesting bids. This procedure allows the municipality to know the cost of the project or purchase in advance. This type of contract is not advisable when plans and specifications are incomplete because the resulting bids will generally be high. Changing orders after construction has begun can be costly and lead to disputes.

### **Unit Price Contracts**

The second competitive bid contract type is known as the unit price contract and is advantageous when the work requires quantities of relatively few types of construction or purchases and the quantities cannot be accurately identified in advance. The contract is based on an estimate of the number of units needed and a price per unit. The contract provides for compensation to the contractor for each actual unit constructed or supplied at the agreed price. The estimated quantities at the proposed unit prices submitted by bidders are used in comparing the bids. A great deal of variation is permitted in this type of contract without the need for formal change orders as long as the items remain generally the same as indicated in the initial contract. The magnitude of the project or purchases need not be delineated at the beginning. However, the detailed plans and specifications per unit must be complete before the bidding process begins.

Another type of contract that is available is a combination of lump sum and unit price contracts. There are advantages to this type of contract when a definite number of items can be covered by the lump sum feature and an indefinite quantity of items, fixed in detail, can be included in the unit price method.

### **Annual Contracts**

Many supplies and materials can be obtained through annual contracts where you request and receive bids for the approximate quantities you expect to use during the year. As the requirements develop, your municipality simply orders the needed quantities. The order may be for all or part of the annual requirements. Annual contracts should be advertised and let at a specific time of the year, usually January or February.

A listing of typical materials under annual contracts is shown below. The main advantage of annual contracts is not going through the complete advertising, bidding, and contract award procedures for each purchase. You do this only once a year. Since the contract amount over a one-year period may be quite large, quantity cost advantages are generally realized.

## *Typical Annual Contracts*

### **Roadway Construction Materials and Services**

- Emulsified Asphalt, Paving Asphalt, and Liquid Asphalt
- Construction of Asphalt Concrete Pavement
- Asphalt Concrete Discharged into Trucks
- Asphalt Concrete Furnished, Delivered and Stockpiled or Truckspread
- Rock, Sand and Crushed Aggregate Base Furnished, Delivered and Stockpiled or Truckspread
- Ready Mixed Portland Cement Concrete
- Portland Cement in Sack Containers

### **Printing and Duplicating Services**

- Printing Official Advertising
- Reproduction of Prints, Drawings, Maps, Plans and Other Documents

### **Expendable Materials for Mechanical Equipment**

- Kerosene and Cleaning Solvent
- Gasoline, Diesel Fuel and Fuel Oil
- Engine Lubricating Oils, Oil for Hydraulic Systems and Chassis Lubricants
- Lead Acid Type Storage Batteries
- Tires and Inner Tubes
- Retreading and Repairing Tire Casings

### **Miscellaneous Materials**

- Dairy Manure Fertilizer
- Reflective Coating Materials for Roadway Traffic Line Striping
- Incandescent, Fluorescent, Quartz Iodine and Mercury Vapor Lamps
- Light Standard Assemblies
- Electrical Conduit and Tubing
- Electrical Wire and Cable

In addition to advertising, a letter may be sent to all previous bidders or suppliers who have performed well in the past. The vendors specify what they will provide, the cost and other factors. The municipality accepts the bid of the lowest qualified bidder. The contract arrangement with the successful vendor provides the basis for orders during the contract period.

Orders made during the year should be made in writing. Each purchase order should include a reference to the annual contract, article being ordered, quantity, unit price and total price, place and time of delivery, and the name of the vendor and the person making the purchase order.

When the vendor's bid includes a provision for possible price changes during the year, the purchasing agent should try to time orders to avoid price increases. If there is some indication prices are tending downward, purchases should be delayed.

## Guaranteed Maintenance Purchasing

Pennsylvania's laws require municipalities to award a contract to the lowest qualified bidder. This can result in a situation where the purchased equipment has the lowest initial cost, but proves to be more expensive in the long run because of higher than average operation and maintenance costs.

Sometimes this can be remedied by requiring guaranteed maintenance/life cycle bids. Specifically, the instructions to bidders may require a price for the purchase of the equipment and a guaranteed maintenance cost for the expected useful life of the equipment. Entering into a contract of this type is usually more complex and requires a considerable amount of municipal record keeping, but in the long run this approach often results in substantial savings.

The major factors that should be considered in a guaranteed maintenance purchase are:

1. The bid should be in two parts, one bid for the equipment and the other for the guaranteed maintenance cost. The bidder with the lowest total of these two amounts is normally considered the lowest qualified bidder.
2. The bidding specifications should carefully state which repair expenses are covered by the guarantee.
3. Normally, the municipality must assume responsibility for day-to-day operational expenses such as oil, lubricants, filters, antifreeze, batteries, headlights, brake linings, and other normal wear out of items. The agreement will often specify that the equipment will be operated only by municipal employees. It might also limit the uses of equipment.
4. Any cost that is more than the guaranteed maintenance amount will be paid by the vendor to the municipality at the termination point of the contract. The cost of downtime is included in the guarantee, and if it exceeds a specified number of hours, the vendor will pay for it or supply a substitute piece of equipment.

There are negative aspects to guaranteed maintenance purchasing. A complete record of maintenance cost and downtime for the guaranteed equipment is necessary to support claims. Maintenance cost records are desirable in any case; however, the expense of developing or modifying present records systems to support a guaranteed maintenance plan should be considered. In addition, the contractor will generally insist on access to all municipal maintenance records as part of the contract agreement. A vendor may contest any large claim by the municipality. The expense and time lost in settling claims through agreement or in court can be significant.

Guaranteed maintenance purchasing should be investigated before buying large quantities of rolling equipment. It can be a method for cutting down on expensive maintenance costs which often seem to occur immediately after the warranty expires. The plan may be tailored to incorporate parts, parts and labor, a buy back clause, and various penalties for late delivery or other responsibilities of the vendor. The guarantee in this kind of purchasing plan provides firm cost projections to aid in the overall public works programming and budgeting process.

## Leasing

Leases are rental agreements between two parties. The owner of the property agrees to rent it to the municipality at a negotiated price for a specified period of time. All leases are subject to the contracting requirements of the municipal codes.

Under a true lease, the contractor retains ownership of the property and the municipality receives the right of use for a specified period of time. This type of lease is common with specialized construction machinery needed only for particular jobs of short duration. Purchases of services are also made through this type of lease.

Lease purchase contracts are conditional sales agreements. The contractor transfers conditional ownership to the municipality at the beginning of the lease term. The lease payments are counted toward the purchase price of the item. At the end of the lease period, full ownership of the property passes to the municipality, usually for a nominal sum.

## **XI. Purchasing Professional Services**

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Local governments often need to obtain professional services in fields such as accounting/auditing, engineering, insurance, law, medicine, planning/community development, or the like. All the municipal codes exempt professional services from competitive bidding requirements, so professionals need not (and normally cannot) be hired through competitive bidding. These services are exempted from competitive bidding requirements because professional qualifications, capabilities, and experience differ. Service to be provided cannot be defined by precise specifications, nor compared solely on the basis of price. Governments that use a competitive process to obtain the services of an engineer, attorney, or professional auditor, for example, feel that they receive better value for their money. Because a type of competitive purchasing *may* be used, without the requirement to award to the “lowest responsible bidder,” the local government is in a position to obtain both value and quality.

The competitive purchasing process typically proceeds as follows:

- Clearly define the service to be purchased so that professionals understand what is needed.
- Decide on the experience and qualifications the professional should have.
- Prepare a Request for Proposals (RFP) explaining the service to be purchased, the experience and qualifications needed, the timing of both the purchasing process and the provision of the services, and any other requirements that must be met.
- Review the submitted proposals. Select the one that gives the best combination of qualifications, experience, and low cost. Factors other than price must be considered at this stage, because obtaining services from a professional who submits the lowest price proposal but is not qualified in the field can create expensive problems for the government.
- Write a contract that includes the winning proposal by reference and specifies time limits or other constraints. For example, when contracting for professional auditing services, it is typical to contract for a three-year period rather than one year at a time.

While the services of most professionals and consultants can be obtained by using a competitive process, the fields of engineering, law, and auditing are the most commonly used by Pennsylvania local governments. Accordingly, they are addressed in this chapter. For the sake of simplicity, statements that refer to all three fields refer to “the consultant.”

### **Defining the Service to be Purchased**

Before a request for proposals is mailed out, a clear statement of the services that are needed should be drafted. The statement should use the terms and language that all recipients of the RFP will understand. When a local government does not provide clear and precise information about the service to be provided, the prospective consultant will be uncertain as to how much work would be needed to satisfy the prospective client. Accordingly, most proposals are priced higher than need be, and the range of prices quoted are probably much wider than need be. The common terms and phrases that are used in the three fields follow.

*Engineering.* The local government must decide whether engineering services are needed for a specific project (such as planning and rebuilding a road, bridge, or planning and constructing a building) or on a continuing retainer. If the engineer is to be hired only for a specific project, the project must be clearly defined in terms of what is to be accomplished such as time limits, government standards, requirements to be satisfied, and the like. If the local government wishes to use the engineer’s services on a continuing basis, then an annual retainer may be appropriate as long as the services to be included in the retainer are carefully specified. Expected volume of work (such as number of plans to be reviewed, meetings to be attended, and the like) are important to the professional who will respond to the RFP.

*Law.* Similar to purchasing engineering services, the local government must decide whether continuing services are needed under a retainer or whether payment will be on a case by case basis for specific work performed. Some experienced solicitors prefer to attend governing body meetings on a regular basis; billing normally encompasses this, plus typical activities associated with meetings. Others prefer not to attend unless there is a specific need (ordinance adoption, for example). If this is the case, billing is typically for specific work performed. Disagreements between the solicitor and governing body over fees are more likely to arise when there is not a clear agreement as to what services are included in the retainer and which are to be billed as extras. Some municipalities obtain specialized legal services for areas such as collective bargaining, cable television regulation, or land use control through a Request For Proposals process. The municipal solicitor can be helpful in preparing the RFP.

*Auditing.* An audit typically has two important specifications - the scope of work and the standards - plus other information the prospective auditor needs to prepare a carefully priced proposal.

- **Scope of Work.** Although private sector audits (which do not involve fund accounting) traditionally focus on the financial statements “taken as a whole,” the Government Finance Officers Association of the U.S. and Canada strongly recommends that governments request a “full scope” audit in which each fund is subjected to the audit tests and other procedures.
- **Standards.** Governmental audits usually are carried out according to Generally Accepted Auditing Standards or, particularly if a federal grant is involved, according to Generally Accepted Governmental Auditing Standards which are published by the U.S. General Accounting Office (GAO). Use of the latter standards greatly increases the cost of an audit because of the additional work involved.
- **Other information a prospective auditor will need in developing a carefully priced proposal includes:**
  - Number and type of municipal funds, by category: governmental, enterprise, and agency (including number, type and location of pension funds).
  - Size of budget, both overall and general fund.
  - Types of local tax revenues and any outside tax collectors used.
  - Number of bank accounts.
  - Dollar volume of transactions during the year.

## **Reviewing Proposals and Selecting the Best**

Since prospective consultants will vary as to experience and professional qualifications, many local governments use a proposal rating process in which several officials rate each proposal in terms of factors such as:

- Professional qualifications.
- Experience of the people who will do the work.
- Ability of the firm to do the work needed within the specified time limits.
- Price.

Since the local government will award the contract on the basis of all the factors listed, the result will be the “best,” rather than the lowest cost. Although they may be the same, this often is not the case.

## **Writing the Contract**

The municipal solicitor normally advises as to the form of the contract. As noted earlier, it should incorporate the winning proposal by reference and (at least in retaining a professional auditor) should be written for more than one year. Many accounting/auditing firms choose not to respond to RFPs that are only for a one-year engagement. The local government will be protected if it specifies that there will be three one-year contracts with renewal to be automatic providing deadlines and standards are met.







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