

# Chapter Nine

## *Contracting*

### § 9-1. Overview

As with all town powers, a town’s ability to contract is based on authority granted from the Legislature and codified into statute. Because contracting is a necessary function of local government, town officers must be familiar with proper contracting procedures.

Refer to Document Number **C4000** for additional information on contracting. Refer to Document Number **C5000A** for a short form sample service contract and Document Number **C5000B** for a long form sample summer season road maintenance contract.

### § 9-2. Scope of the Municipal Contracting Law

Towns have broad contracting authority. Minn. Stat. §§ 365.02; 365.025. Such authority is needed to carry out the variety of activities expected of a local government in providing services to their residents. However, when public funds are being spent, both the Legislature and the courts are watchful. Born from distrust of public officers, strict contracting procedures were developed to limit the abuses of fraud, favoritism, extravagance, and improvidence. Courts strictly interpret and enforce contracting procedures imposed upon towns. Unfortunately, it is not always easy to locate, let alone follow, the statutory procedures the Legislature has created to protect the public’s funds.

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Central to most contracting discussions is the Municipal Contracting Law (“MCL”). Located in Minn. Stat. § 471.345, the MCL provides the basic contracting requirements to which the various other contracting requirements spread throughout the statutes are tied. Once the basic tenants of the MCL are understood, the task becomes identifying the other related contracting requirements and learning how to integrate them into the standard procedures.

It’s important to know that the MCL does not apply to all contracts. “Contract” is defined for the purposes of the MCL as any agreement entered by a municipality (including towns) for the sale or purchase of supplies, materials, equipment or the rental thereof, or the construction, alteration, repair or maintenance of real or personal property. Minn. Stat. § 471.345, subd. 2. Notice the definition refers to both purchases and sales. However, while the list of covered items is broad, it does not apply to all types of contracts or to all contracting situations. For instance, the MCL applies to maintenance of real property but does not apply to the purchase of real property. *See, e.g., Op. Atty. Gen, 622j-3, June 3, 1975.* The other major exclusion in the definition of contract relates to professional services. A contract to hire an attorney, architect, engineer, or other professional is not covered by the MCL because it is not considered a “contract” for the section.

There are also expressed exemptions to the application of the MCL. The following are some examples of expressed exemptions:

1. Governmental entities may buy and sell equipment and property among themselves without regard to the municipal contracting law. Minn. Stat. § 471.64.
2. Governmental entities may purchase road maintenance and snow plowing services directly from other governmental entities. Minn. Stat. § 160.21, subd. 1.
3. Towns may piggyback on a county contract for road construction or maintenance

services without having to follow the usual MCL procedures, provided the county followed the required procedure when entering the contract. Minn. Stat. § 471.345, subd. 19. However, the authority only speaks of the work being done on an “adjoining road” and appears not to exempt other contracting requirements, such as those found in Minn. Stat. § 160.17.

4. Towns participating in the state’s cooperative purchasing program, administered by the State’s Materials Management Division, may buy equipment under the state contract without having to undertake its own contracting process. Minn. Stat. §§ 16C.03, subd. 10; 16C.11.
5. In public emergencies, local governments may bypass many procedural requirements, including the MCL, to protect public safety.

If the proposed contract is one included under the MCL, the total amount of the contract must be estimated. The estimation is important because the procedural requirements of the MCL differ depending upon that estimation.

The procedural requirements become more stringent as the expected cost of the contract increases. For this reason, courts closely scrutinize how a local government defines the scope and cost of a proposed contract. Any attempt to artificially divide a contract into smaller parts to lower the estimate, and therefore lessen the procedural requirements, will not be tolerated by the courts. The Legislature has also done its part in this respect by closing what some might have considered loopholes in the requirements. For instance, when entering a lease-purchase agreement, a town is required to add together all the lease payments over the entire term of the lease to determine the estimated amount under the MCL. Minn. Stat. § 465.71

## § 9-3. Contracting Levels

The first level covers contracts with an estimated amount of \$0 to \$25,000. Minn. Stat. § 471.345, subd. 5. A contract at this level may be made upon quotes or by direct negotiation in the open market. If quotes are used, at least two written quotes must be obtained and must be retained in the town's files for at least one year after receipt. If, instead, the contract is made on the open market, the board is not required to follow a specific set of requirements in making the contract.

The second contracting level covers contracts with an estimated amount of between \$25,000 and \$100,000. A contract in this second level must be made either by direct negotiation by receiving two written quotes or upon sealed bids. Minn. Stat. § 471.345, subd. 4. Again, if quotes are used, they must be retained in the town's files for at least one year. Because sealed bids demand the most complicated contracting procedures, they are not usually sought at this level. However, if sealed bids are used to let a contract for any amount, all the procedural requirements of the sealed bid procedure must be followed including awarding the contract to the lowest responsible bidder.

The third, and strictest, contracting level covers contracts with an estimated amount of over \$100,000. Contracts over this amount must be let by sealed bids solicited by public notice using the procedures established for the type of local government letting the bid. Minn. Stat. § 471.345, subd. 3. The sealed bid process is a mix of statutory requirements, case law, and common practice. Briefly, the process of

letting a contract by sealed bids includes soliciting bids by publishing a notice in the town's official newspaper, receiving bids from contractors or vendors sealed in an envelope that remains sealed, opening the bids at a public meeting, and awarding the contract to the lowest responsible bidder.

Another very important requirement that attaches at this level is the requirement for the board to obtain contractor bonds from the person awarded a public works contract for over \$100,000. Minn. Stat. §§ 574.26-32. When a contract is expected to exceed \$100,000, the contract is not valid unless the contractor first provides the town both a performance bond and a payment bond. *Refer to § 9-9 for a discussion of contractor bonds.*

When a contract is estimated to exceed \$25,000, a town "must consider the availability, price and quality of supplies, materials, or equipment available through the state's cooperative purchasing venture before purchasing through another source." Minn. Stat. § 471.345, subd. 15. It is not clear the level of consideration a town board must give concerning a potential purchase to satisfy the statute, but at a minimum the minutes of the meeting should reflect that the board reviewed the items available through the cooperative purchasing venture ("CPV") and why the board decided not to purchase from the state (if that is the decision). More information on the CPV can be found at:

[www.mmd.admin.state.mn.us/cpv2.htm](http://www.mmd.admin.state.mn.us/cpv2.htm).

## § 9-4. Electronic Sales and Purchases

Local governments may contract for the purchase of supplies, materials, and equipment (but not services) using an electronic purchasing process in which vendors compete in an open and interactive environment to offer the items at the lowest selling price. Minn. Stat. § 471.345, subd. 16. It is also possible to use an electronic selling process to sell surplus or unused supplies, materials, and equipment.

Minn. Stat. § 471.345, subd. 17. Finally, vendors may submit bids, quotations, and proposals electronically in a form and manner required by the local government, as well as furnish the required security bonds electronically. Minn. Stat. § 471.345, subd. 18. *§ 9-5 discusses using electronic methods for providing contract notices.*

## § 9-5. Advertising for Sealed Bids

For towns, published advertisements for sealed bids must be placed in a newspaper of general circulation in the town at least once a week for two consecutive weeks. Minn. Stat. § 365.37, subd. 3. Posted notice is also allowed to substitute for published notice, but should only be used to supplement, not replace, published notice. If the contract is for the construction or improvement of a road, the advertisement must be published once a week for two successive weeks with the last publication to be made at least ten days before the time fixed for receiving bids and letting the contract. Minn. Stat. § 160.17, subd. 2. Boards always need to refer to Minn. Stat. § 160.17 when letting road contracts to make sure they are complying with other special requirements contained in the section.

Local governments may place notices for solicitations of bids, requests for information, and requests for proposals on its web site instead of, or in addition to, traditional newspaper publication. Minn. Stat. § 331A.03, subd. 3. To use this alternative method of providing notice, it must publish in its official newspaper a description of all solicitations or requests that

are disseminated on its web site. A town adopting this alternative method of providing notice of contract solicitations must continue to publish the notices for the first six months and then can rely on the alternative method to satisfy the publication requirements.

Usually one person on the board, normally the clerk, is designated to receive the bids and safeguard them until the meeting. At the public board meeting, the bids are opened and reviewed for compliance with the specifications and other requirements imposed by the board. It is important that the town board not allow a bidder to make a material change to its bid after it is opened as doing so will render the resulting contract null and void. *Rochon Corp. v. City of Saint Paul*, 814 N.W.2d 365 (Minn. 2012). When the board believes it has sufficient information about the contractors to make a decision, it awards the contract to the “lowest responsible bidder.”

Refer to Document Number **C3000** for information on the requirements of a town to contact Gopher One Call before letting a contract involving excavation.

## § 9-6. Lowest Responsible Bidder Requirement

Anytime a contract is let by sealed bid, regardless of the amount, it must be awarded to the lowest responsible bidder. Minn. Stat. § 365.37, subd. 2. The purpose of the lowest responsible bidder requirement is to assure the best price is achieved on contracts paid for with public funds. However, it can be difficult to determine bidder is the lowest responsible one.

As a practical matter, the board must first look at the contractor that bid the lowest price. The presumption is that the low bidder will be awarded the contract unless the board articulates and records in its minutes why the contractor is not a responsible bidder. A board may consider several factors in determining responsibility such as financial responsibility,

integrity, skill, ability, and the likelihood the bidder will do faithful and satisfactory work. On the other hand, just because a board is not familiar with a contractor is not alone a sufficient basis to reject that person as irresponsible. Also, a long established working relationship with another bidder does not make a low bidder the board has not worked with in the past irresponsible. Evaluating a contractor’s responsibility is based on the person’s ability to do the job, not on how good another contractor is.

The State has also provided for minimum criteria for a contractor to be considered responsible for a construction contract over \$50,000. Those criteria are described in Minn. Stat. § 16C.285.

The statutory requirements include items such as that the contractor has paid all required taxes, has the necessary insurance, and complies with state and federal wage laws. Each contractor, including subcontractors, is required to submit a statement under oath verifying the compliance with the statutory requirements. Without such a statement, the contractor cannot be considered a responsible bidder. These requirements are the minimum requirements that a contractor must meet to be considered for a qualified construction contract.

If the low bidder is determined not to be responsible, the board then examines the responsibility of the next lowest bidder. Failure to comply with the lowest responsible bidder requirement is a misdemeanor and the officers involved must leave office. Minn. Stat. § 365.37, subd. 5. Refer to Document Number **C1000** for additional information on the lowest responsible bidder requirement.

## § 9-7. Best Value Contracting

Towns may use an alternative contracting procedure called Best Value Contracting. Rather than awarding a contract to the lowest responsible bidder, the alternative procedure allows the town to consider which vendor offers the best value. Minn. Stat. § 365.37. Recognizing that selecting the low bidder does not always ensure the best outcome for the public, the best value contracting procedure involves reviewing the submitted proposals based upon weighted performance criteria established for the project. Minn. Stat. § 16C.02, subd. 4(a). Towns may not use the procedure until the person responsible for administering the process has received training. Minn. Stat. § 16C.28, subd. 1d.

## § 9-8. Contract Specifications

Before the board solicits bids or quotes, they must carefully consider the specifications of the work or equipment that will be the subject of the contract. Contract disputes often focus on the town's specifications for the work or equipment.

The board must find a balance between asking for exactly the things they want in the work or equipment, but not being so specific as to exclude all but one type or kind of equipment, supplies, or work methods. Minn. Stat. § 471.35.

The board must carefully draft the contract itself. A properly drafted contract can substantially reduce the likelihood of disputes. The Legislature requires certain provisions be inserted into public contracts. For instance, town road contracts must require the contractor to place any needed signs to warn of construction. Minn. Stat. § 160.16, subd. 1. It is well worth the town's money to hire an experienced attorney to help the town draft the contract and related documents for even moderately-sized projects.

One of the issues that need to be addressed when contracting is making sure the contractor is properly insured. It is generally recommended that towns require its contractors to carry at least \$1.5 million in general liability coverage, though such limits may not be practicable for small contracts. Boards should also consider requiring the town be named as an additional insured on the contractor's policy. Contractors with employees are also required to have workers' compensation insurance. Certifications of insurance showing both coverages need to be obtained from the contractor before the project or work is started. Provisions related to insurance can and should be included in the contract.

## § 9-9. Prompt Payment Requirement

Once the town enters a contract, it is obligated to pay the contractor by the terms of the contract or, if no contract terms apply, within the standard payment period unless the municipality in good faith disputes the obligation. Minn. Stat. § 471.425, subd. 2. “Standard payment period” is defined by how often the board meets. For boards that have regular meetings at least once a month the standard payment period is defined as within 35 days of the date of receipt. This requirement is referred to as the prompt payment requirement and carries with it a requirement to pay a certain amount of interest on obligations that are not paid promptly. Minn. Stat. § 471.425, subd. 4. A vendor that needs to initiate legal

action to collect amounts wrongly withheld may be awarded its collection costs and attorney’s fees.

Before a town makes final payment on a contract, it is required to obtain a certified IC-134 form from the contractor. Minn. Stat. § 270C.66. The form is called a “Withholding Affidavit for Contractors” and is used to make sure contractors and subcontractors working for public entities have satisfied the requirements of Minn. Stat. § 290.92 related to income tax withholding.

Refer to Document Number **C2000** for additional information on this requirement.

## § 9-10. Public Contractors’ Performance and Payment Bond Act

When a town enters a contract for certain public work totaling more than \$100,000, it must obtain a performance bond and a payment bond from the contractor before any work is done on the contract. Minn. Stat. § 574.26, subd. 2. The bond requirement does not apply to contracts for snow removal, ice removal, grading, or other similar routine road maintenance on town roads. Minn. Stat. § 574.26, subd. 1a(c). When bonds are required, each bond must be for at least the total estimated amount of the contract. Failure to obtain these bonds when required voids the contract.

Performance bonds are “for the use and benefit of the public body to complete the contract according to its terms, and conditioned on saving the public body harmless from all costs and charges that may accrue on account of completing the specified work ...” Minn. Stat. § 574.26, subd. 2. In other words, if the contractor fails to properly complete the con-

tract, the town can make a claim on the bond to secure the financing needed to complete the project.

Payment bonds are “for the use and benefit of all persons furnishing labor and materials engaged under, or to perform the contract, conditioned for the payment, as they become due, of all just claims for the labor and materials.” Minn. Stat. § 574.26, subd. 2. Failure of the board to obtain a valid payment bond will expose the town to suit by anyone who supplied labor or materials to the project for any losses the supplier may have incurred because the bond was not obtained.

Town boards may require bidders on a public works contract to supply the board a bid bond. The purpose of a bid bond is to pay costs incurred if a contractor is awarded the contract and fails to satisfy the requirements to enter the contract, such as failing to provide performance and payment bonds.