



**INFORMATION LIBRARY**

**CONTRACTS AND RFPs**

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## I. CONTRACTING AUTHORITY

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Minn. Stat. § 365.02 provides townships with the general authority to contract. Minn. Stat. § 365.025 further provides that the town board contract for anything so long as the board considers it necessary or desirable to use any town power. While this scope of authority is quite broad, the underlying subject matter of the contract must still be for something the township has authority to expend public funds. Some statutes provide specific authority to contract for specific purposes. For example, Towns may contract for fire protection services.<sup>1</sup> Other statutes provide implied authority. Before contracting, the board must be confident in its ability to explain the public purpose of the contract, the statute on which it is basing its authority.

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## II. APPLICABLE LAW

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Townships must also comply with several contracting regulations. General common-law principles of contract law (i.e. offer, consideration, acceptance, etc.) apply to local government contracts. However, the Uniform Municipal Contracting Law (MCL) serves as the primary source of statutory regulation of township contracts in Minnesota.<sup>2</sup> The statute applies to counties, cities, townships, school districts, and any other municipal corporation or political subdivision.

In addition to the MCL, some contracts are subject to State regulations designed specifically for that subject matter. For example, the town board must first seek the approval of the electors at the annual meeting before entering into a contract for the health, social, and recreational services.<sup>3</sup> Another example requires proof of compliance with workers' compensation requirements for public works contracts.<sup>4</sup> A third example requires any contract for the construction or improvement of a road, culvert, or bridge contain a provision requiring the contractor to place appropriate warning signs at road intersections.<sup>5</sup>

Federal laws can also play a role in local government contracting. The Davis-Bacon Act<sup>6</sup> for example, requires public contracts involving the use of federal funds to contain a provision related to prevailing wages.

The underlying point is that in addition to finding the authority to enter into a particular contract, the town board must make sure that it follows all other statutes that may apply to the subject matter

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<sup>1</sup> Minn. Stat. § 365.181.

<sup>2</sup> Minn. Stat. § 471.345.

<sup>3</sup> Minn. Stat. § 365.10, subd. 14.

<sup>4</sup> Minn. Stat. § 176.182.

<sup>5</sup> Minn. Stat. § 160.16, subd. 1.

<sup>6</sup> USC 3141-3148.

of that contract, as well as the rules that apply to all local government contracts, or the board may find itself holding an invalid contract and facing a myriad of legal problems. Common areas of concern include compliance with all notice requirements, the proper use of sealed bids, and requiring proof of insurance, bonds, and other regulatory requirements.

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### III. MUNICIPAL CONTRACTING LAW

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The MCL’s purpose is to “...establish for all municipalities, uniform dollar limitations upon contracts which shall or may be entered into on the basis of competitive bids, quotations or purchase or sale in the open market.”<sup>7</sup>

The courts, however, have gone further in stating the purpose of this statute. Courts find the MCL ensures local government units get the best price for purchases, thus saving taxpayers money, creating fairness in the market, and reducing the opportunity for government officials to participate in fraud or favoritism. Or, to put it simply, the law promotes honesty while seeking the most cost-effective use of public funds.<sup>8</sup> Other applicable statutes and local regulations have a similar purpose and may even have been expressly adopted for this purpose.

#### A. Scope of Authority

While clearly applicable to all townships, the MCL is not applicable to all contracts with those units of governments. The statute defines a contract to be “...an agreement entered into by a municipality 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.”<sup>9</sup>

1. **General Exclusions:** What does the definition exclude? While the list of included items is extensive, it is not exhaustive as to the types of contracts townships enter. The courts have stated that the contracting statutes are to be interpreted narrowly and are not to be extended to contracts not clearly within their respective purviews or the intent of the legislature.<sup>10</sup> Contracts that are not included for purposes of the MCL include:

#### Sales and the MCL:

Important to note, while most township officials understand the MCL applies at the time of purchase, they must recall these regulations **apply when the township sells** any of the items listed in the definition.

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<sup>7</sup> Minn. Stat. §471.345, subd. 6.

<sup>8</sup> *Coller v. City of St. Paul*, 26 N.W.2d 835 (1947); *Griswold v. County of Ramsey*, 65 N.W. 2d 647 (Minn. 1954); *Foley Bros., Inc. v. Marshall*, 123 N.W. 2d 387 (1963); and *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331 (Minn. 1978).

<sup>9</sup> Minn. Stat. §471.345, subd.2.

<sup>10</sup> *Otter Tail Power Co. v. Village of Elbow Lake*, 49 N.W.2d 197 (Minn. 1951); *Griswold*, (Minn. 1954); *R.E. Short Co.*, (Minn. 1978); and *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Com’n*, 381 N.W.2d 842 (Minn. 1986).

1. Real Estate purchases and sales;<sup>11</sup>
2. Employment contracts;
3. Professional service contracts, including attorneys, accountants, architectural services,<sup>12</sup>;
4. Garbage hauling contracts;
5. Service contracts;<sup>13</sup>
6. Limited contracts involving economically disadvantaged persons;
7. Fuel purchases for municipal power generation;
8. Cooperative purchases, which include use of the State’s Cooperative Purchasing Venture or a national municipal purchasing entity. These purchases must be made through cooperative purchasing entity. The township may not bypass the cooperative purchasing entity even if a seller is willing to sell to the township at the “State Contract” price or the same price offered by the cooperative entity;
9. Purchases between and among local governments, states, or the federal government;<sup>14</sup>
10. Reverse Auction or Electronic Purchasing process, including interactive online sales environments.

A complete list of exemptions can be found in Minnesota Statute § 471.345.

To be safe, the intent of each proposed contract should be reviewed independently to determine whether it will be exempt from the requirements of the MCL. If there is any question, the township should consult their town attorney, MAT, or consider requesting a formal opinion from the Minnesota Attorney General’s office.

2. **Emergencies:** An emergency may also create an exemption to following the requirements of the MCL. Townships have express authority to waive the requirements during a time of emergency. Even without this express authority, the courts have recognized a need to allow local governments to deal with emergencies without strict compliance to normal contracting procedures.

The scope of what constitutes an emergency exemption, however, is extremely limited. The courts have adopted the rule that an emergency must be “...present, immediate and existing, and not a condition which may or may not arise in the future, or a condition which reasonably may be foreseen in time to advertise for bids.”<sup>15</sup> Essentially a problem

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<sup>11</sup> A.G. Op - 707a15, September 14, 1987.

<sup>12</sup> *Krohnberg v. Pass*, 244 N.W. 329, (Minn. 1932) (finding architectural services are “technical and professional in character” despite that fact such services precede construction and are directly related to construction).

<sup>13</sup> *Hubbard Broadcasting, Inc.*, (Minn. 1986) (court found the exchange of a scoreboard in the Metrodome for the contract rights to control the advertising on the billboard was a service contract and not a sale or rental of services or materials).

<sup>14</sup> Minn. Stat. § 471.64.

<sup>15</sup> *Layne Minnesota Co. v. Town of Stuntz*, 257 N.W.2d 295 (Minn. 1977).

must exist that was unforeseeable or was not reasonably preventable and which if left undealt with would pose an imminent threat to the health, safety, and welfare of the community.

3. **Joint Powers Contracts:** The courts have held that when two entities enter into a joint powers agreement<sup>16</sup> prior to the letting of a joint contract, only one of the two entities must follow the procedural requirements. To require both to do so is a duplication of effort and expense.<sup>17</sup> Whether the contract needs to be let by competitive bids by one or the other entity would still depend on the total combined value of the contract and not each community's individual portion.<sup>18</sup> To further protect each participating entity, the joint powers agreement should specify who will do the bidding and that it is being done on behalf of all participating entities.

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## IV. THE GENERAL REQUIREMENTS OF THE MCL

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### A. Estimating Total Contract Value

Once a contract is determined to be subject to the MCL, the next issue to consider is the anticipated value of the contract. The town board is expected to make a *good faith estimate* of the total cost, but of course some contracts cannot be accurately estimated. For example, the board does not know how much snow will fall in the next winter. However, the board has information about what winter maintenance has cost in the past. With that information, they can make a general finding of what could be required in upcoming years.

The value of the contract should be based on the complete cost, including any applicable sales tax, service fees, etc. This approach protects townships from accidentally violating the procedural requirements of the MCL by actually paying more than allowed under a particular contract value classification when items such as sales tax are added to the base price of the contract but only the base price was used to determine the proper procedural requirements.

Contracts based on a unit price should be valued by multiplying each unit's price by the total number of units being obtained. The value of a contract that is based on a currently undetermined yet definitive variable, such as the number of hours worked, should be estimated by using an average of actual costs of past comparable work and other quantifiable data.

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<sup>16</sup> Minn. Stat. § 471.59.

<sup>17</sup> *Village of Excelsior v. F.W. Pearce Corp.*, 226 N.W.2d 316 (Minn. 1975).

<sup>18</sup> A.G. Op. 1007, March 22, 1971.

## B. The Three Contracting Levels

The MCL divides contracts into three basic categories and the specific requirements for contracting changes with each level. The first category is contracts that have estimated values of less than \$25,000. Contracts in this value range can simply be directly negotiated on the open market, or by obtaining at least two quotations. If quotations are sought, they must be kept for at least one year after the date of receipt.<sup>19</sup>

Any statement of the market price for a good or service can constitute a quotation, but the information must be reduced to writing (preferably by the vendor) in order to have the necessary record.

The second category is contracts that have estimated values between \$25,000 and \$175,000. Contracts that fall into this middle category can be let on direct negotiation only after receiving at least two quotations that must then be kept on file for at least one year following the date of receipt.<sup>20</sup>

The third category regulates contracts exceeding \$175,000. Contracts of these values are to be entered into after the advertising for and receipt of sealed bids.<sup>21</sup> In this category, the township must award the contract to the lowest responsible bidder, if they award the contract at all. MAT's Information Library includes information about the Lowest Responsible Bidder requirements. An exception to the bidding requirement are contracts estimated not to exceed \$60,000 for the rental of equipment by counties or townships. Such rental contracts can be let by direct negotiation following the receipt of at least two quotations that must be kept for a period of at least one year.<sup>22</sup>

While bids are not required for contracts below the \$175,000 threshold, or for contracts exempt from the requirements of the MCL any township may voluntarily choose to follow the bidding procedure. However, it is not to do so recommended as it is generally more complicated than other forms of creating a contract. Once a township has decided or begun to follow the competitive bidding process the courts have said that they must see the process through to completion.<sup>23</sup>

## C. Splitting Contracts

A township cannot split a contract into a series of smaller contracts solely for the purpose of avoiding the need to advertise for sealed bids by keeping each individual contract under the \$175,000 limit.<sup>24</sup> However, if the contract is made up of independently identifiable parts, then it may be possible to treat each part as a separate contract, even if the same vendor or provider ends up being

### MCL's Three Contracting Levels:

- \$0-\$25,000: Direct negotiation, at least 2 quotes, or sealed bids
- \$25,000-\$175,000: At least 2 quotes or sealed bids
- \$175,000+: Sealed bids only

<sup>19</sup> Minn. Stat. § 471.345, subd. 5.

<sup>20</sup> Minn. Stat. § 471.345, subd. 4.

<sup>21</sup> Minn. Stat. § 471.345, subd. 3.

<sup>22</sup> Minn. Stat. § 471.345, subd. 5a.

<sup>23</sup> *Griswold*, (Minn. 1954); and *R.E. Short Co.*, (Minn. 1978).

<sup>24</sup> A.G. Op. April 29, 1952.

awarded each of the separate contracts.

Take a town hall construction project as an example. The building project has several, independent parts, including the foundation, the physical structure, electrical work, etc. The township may use a general contractor and one contract for all this work, but they could create separate contracts for each sub-part of the project. In effect, the township serves as its own general contractor. Because each of these parts are reasonably separate and identifiable, they can be broken into different contracts. In that model, sealed bidding will likely not be needed because most, if not all, of the would be for less than \$175,000. On the other hand, it would not be reasonable to create separate contracts for each of the four walls of the structure, or for each section of the roof.

#### **D. Specifications**

If a contract is subject to the sealed bidding requirements set forth the MCL, or the township decides to voluntarily follow the provision, the next step is to develop bid specifications. There are no statutory guidelines for developing bid specifications. However, bidding requirements should be carefully drafted to ensure that the township will receive exactly what it is looking for. The general rule is that requirements must be “sufficiently definite” and precise to afford the basis for a bid.<sup>25</sup>

However, a township cannot be too restrictive where the process becomes unfair and uncompetitive. The courts have said that bid specifications should be “...framed to permit free and full competition...,”<sup>26</sup> and to “...give all bidders an equal opportunity without granting an advantage to one or placing others at a disadvantage....”<sup>27</sup>

This does not mean that contracts must be so broad that they allow absolutely every manufacturer or supplier to meet the bid specifications.<sup>28</sup> In fact, vague specifications can be grounds for finding a violation of the applicable contracting statutes, even if no actual fraud or other wrongdoing is alleged.<sup>29</sup>

In preparing bid specifications it is okay to consult with vendors and other experts in the field. It is also acceptable to consider past experiences of other units of government.<sup>30</sup> When drafting the final specifications township officials need to be careful about accidentally including language that has the effect of excluding all other potential bidders or which gives the consulting entity an advantage.

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<sup>25</sup> *Davies v. Village of Madelia*, 287 N.W. 1 (Minn. 1939); and *Duffy v. Village of Princeton*, 60 N.W.2d 27 (Minn. 1953).

<sup>26</sup> *Diamond v. City of Mankato*, 93 N.W. 911 (Minn. 1903).

<sup>27</sup> *Foley Bros., Inc.*, (Minn. 1963).

<sup>28</sup> *Otter Tail Power Co.*, (Minn. 1951).

<sup>29</sup> *Davies*, 287 N.W. 1 (Minn. 1939); *Coller*, (Minn. 1947); *Duffy*, (Minn. 1953); and *Gale v. City of St. Paul*, 96 N.W.2d 377 (Minn. 1959).

<sup>30</sup> *Davies*, (Minn. 1939); and *Otter Tail Power Co.*, (Minn. 1951).

To illustrate this point, consider the hypothetical purchase of a computer. It would be proper to develop bid specifications stating a minimum processor speed, memory size, and software compatibility, etc. It would not be permissible to unduly restrict the bid and only advertise for an IBM model XYZ. However, if the government unit were already using IBM computers, it would be prudent to require any new component to be compatible with the existing system.

The specifications can also require the posting of a bid bond, and should include notice of any other bond, insurance, or other documentation that will need to be provided to be eligible for the contract.

Some communities have found it helpful to have a pre-bidding meeting with potential bidders to ensure that the would-be contractors understand all the requirements that needs to be satisfied. A township wishing to do this should include notice of such a meeting in the notice listing the specifications and should schedule the meeting far enough in advance as to allow ample time to actually compile and submit a bid before the stated deadline for receiving bids.

Finally, specifications and plans for any road construction or road improvement contract should be filed with the town clerk prior to soliciting sealed bids.<sup>31</sup>

#### **E. Notice Requirements**

While the MCL is silent regarding notices, nevertheless, notice of bids must be provided upon completing the specifications. This obligation is created by both jurisdiction and topic specific statutes related to government contracting, as well as by recognition of the courts.<sup>32</sup>

While specific requirements may differ between jurisdictions and between types of contracts, bid notices should generally provide the following information:

1. A brief description of the item or service being sought
2. Information on how to obtain the formal bid specifications
3. When, where, and to whom bids are to be submitted
4. Notice of when, where, and by whom the bids will be opened
5. Any special requirements (i.e. submit bid in sealed and labeled envelope, bonds or other bid security, affidavits, etc.)
6. Notice of the right to waive any minor defect
7. Notice of the right to reject all bids

The length of time and the process for providing the notice also differs by the subject matter of the contract. Townships must generally provide at least ten days' posted notice prior to the opening of the bids. The posting must be made at the three most public places in town. As an alternative to

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<sup>31</sup> Minn. Stat. § 160.17, subd. 1.

<sup>32</sup> *Diamond*, (Minn. 1903) citing *Nash v. St. Paul*, 11 Minn. 174 (Gil. 110) and *Schiffman v. St. Paul*, 92 N.W. 503.

posting, the township may elect to publish the notice in a newspaper of general circulation within the town, but such published notice must be provided for at least two weeks prior to the opening of the bids.<sup>33</sup> Public improvement contracts under Minn. Stat. § 429.041 are subject to special notice requirements.

If a township maintains a website of its own, the town board to designate the website and alternative or additional place means of disseminating notice.<sup>34</sup> The use of trade journals is also authorized. Before a township can cease publishing notice in a qualified newspaper, however, it must go through a six-month period of providing duplicate notices both in published form and on its website. The website notice must be in substantially the same format as the published notice and remain on the website for the same duration as any applicable publishing requirements. Further, notice of the notices that will be placed on the website must be published, either as part of the publishing of the minutes of the meeting at which the board authorized the use of the town website, or as a separate formal notice.

Official newspapers which, as a course of their normal business, maintain a website, to add a copy of any public notice which it publishes in the newspaper to that website at no additional cost to the governmental entity.<sup>35</sup> This website notice, however, does not satisfy the alternative publication option discussed above as it would not be the township's own website.

**Posting Notice for Bids:** When posting notice for bids, it is essential to review the requirements found in Minnesota Statute 365.37 subdivision 3. This statute states that a contract must receive ten days' public notice of the time and place where the receiving bids are to be given. Also, notice must be posted in the three most public places in the town, or published in the town newspaper for two weeks. This is different than the standard notice, which requires one posting at a public place designated by the town board for 3 days prior to the meeting.

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## V. AWARDING A CONTRACT

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At the stated time and place provided for in the bid notice, the designated officials should gather, open, and review all the bids received. Townships are generally required to award the bid to the lowest responsible bidder.<sup>36</sup> This does not mean that they are automatically bound to the lowest price submitted.

The courts have repeatedly recognized a need to allow the governing body some discretion in determining who is the lowest responsible bidders, especially when exact bid specifications are not possible. The courts have stated that the discretionary decision to award a contract will only

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<sup>33</sup> Minn. Stat. § 365.37, subd. 3.

<sup>34</sup> Minn. Stat. § 331A.03, subd. 3.

<sup>35</sup> Minn. Stat. § 331A.02.

<sup>36</sup> Minn. Stat. § 365.37 and Minn. Stat. § 412.311.

be enjoined if the decision was illegal and arbitrary, capricious, or unreasonable.<sup>37</sup>

This discretion is in recognition that the lowest price does not always equal the best value and is, therefore, not always in the best interest of the public.<sup>38</sup> If, however, two or more responsible bids are received, the town board has no discretion and must accept the lowest one.<sup>39</sup>

Factors other than price that can be considered when determining the lowest responsible bidder. These factors include such things as the quality (to the extent not quantifiable in the bid specifications), suitability, and adaptability of the item being purchased.<sup>40</sup> The credibility of the bidder, past experiences, and direct knowledge about the bidder can also be considered.<sup>41</sup>

A town board is also free to allow some deviation from the bid specifications when reviewing submitted bids. The failure to satisfy a mere formality or ministerial act is generally not sufficient to invalidate a low bid.<sup>42</sup> In fact, the courts have gone so far as to say that minor deviations must be overlooked in order to preserve the intent of getting the most for the best price.<sup>43</sup>

On the other hand, the courts have made it clear that deviations that are material and substantial, or which could give one bidder an unfair advantage over the others, cannot be accepted.<sup>44</sup> The courts have adopted the dictionary definitions for the terms “substantial” (meaning considerable in importance, value, degree, amount, or extent) and “material” (meaning both relevant and consequential or crucial) and have held that the context of review must be in relation to the entire contract.<sup>45</sup>

Whether or not a bid with a deviation is to be considered responsible must be determined at the time the bid is opened and no future offer to modify the proposal can be considered prior to awarding the contract.<sup>46</sup>

The courts have also accepted the right to reject any or all bids.<sup>47</sup> Any or all bids can be rejected for either being unresponsive to the specifications, or if all the bids come in at an amount higher

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<sup>37</sup> *Nielsen v. City of Saint Paul*, 88 N.W.2d 853 (Minn. 1958); and *Queen City Const., Inc. v. City of Rochester*, 604 N.W.2d 368 (Minn. App. 1999, rev. denied).

<sup>38</sup> *Kelling v. Edwards*, 134 N.W. 221 (Minn. 1912); *Otter Tail Power Co.*, (Minn. 1951); and *Leskinen v. Pucelj*, 115 N.W.2d 346 (Minn. 1962).

<sup>39</sup> *Otter Tail Power Co.*, (Minn. 1951).

<sup>40</sup> *Otter Tail Power Co.*, (Minn. 1951); and *Duffy*, (Minn. 1953).

<sup>41</sup> *Kelling*, (Minn. 1912).

<sup>42</sup> *Nielsen*, (Minn. 1958).

<sup>43</sup> *Foley Bros., Inc.*, (Minn. 1963); *Electronics Unlimited v. Village of Burnsville*, 182 N.W.2d 679 (Minn. 1971); and *Madsen-Johnson Corp. v. City of Becker*, 1996 WL 106192 (Minn. App. 1996, rev. denied, unpublished)

<sup>44</sup> *Coller*, (1947); *Sutton v. City of St. Paul*, 48 N.W.2d 436 (Minn. 1951); and *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204 (Minn. 1990).

<sup>45</sup> *Madsen-Johnson Corp.*, (Minn. App. 1996).

<sup>46</sup> *Griswold*, (Minn. 1954); *Nielsen*, (Minn. 1958); *Carl Bolander & Sons Co.*, (Minn. 1990); and *Madsen-Johnson Corp.*, (Minn. App. 1996).

<sup>47</sup> *State v. Snively*, 221 N.W. 535 (Minn. 1928); *Electronics Unlimited*, (Minn. 1971); *J.L. Manta, Inc. v. Braun*, 393 N.W.2d 490 (Minn. 1986); and *Ryan v. City of Coon Rapids*, 462 N.W.2d 420 (Minn. App. 1990, rev. denied).

than anticipated or budgeted for.

Once a contract has been awarded, the terms of the contract, like the terms of the bid, cannot be substantially altered. However, from time to time unanticipated situations arise that create additional expenses or other necessary modifications. As a general rule such changes are permissible without having to re-start the contract process, but the detailed contents of the contract will govern the parameters of acceptable changes.<sup>48</sup>

Finally, with one limited exception, completed contracts cannot be extended or added onto for new projects or purchases for the purpose of avoiding following the normal contracting procedures outlined in this paper.<sup>49</sup> The exception is unit priced contracts, which allows additional units to be purchased at the same unit price if the total additional cost will not exceed twenty-five percent of the original contract value.<sup>50</sup>

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## VI. REQUESTS FOR PROPOSALS

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RFPs are like bid specifications and the call for bids. They are frequently used to contract for services that are otherwise exempt from requirements of the MCL. The advantage of using RFPs is that the township is not bound to accept the lowest priced proposal, or for that matter any of the proposals, and it is also free to negotiate and modify any term of the proposal.

Like bid specifications, a good RFP should clearly state the services being sought, the process the township intends to use to select a provider, any requirements that will be imposed on the responder, and then solicit detailed responses from interested parties. RFPs can be advertised in the same manner as bids, or they can be sent directly to businesses or individuals with which the township is interested in doing business.

Unlike sealed bids, with one exception, the use of RFPs is not mandated by state law. That one exception is not likely to apply to most townships. RFPs must be used to solicit contract proposals for group insurance for 25 or more employees.<sup>51</sup>

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## VII. CONTRACT TERMS

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All agreements for purchases and services should be reduced to writing. While verbal contracts are enforceable, inevitably they lead to disputes over who agreed to what. A good contract should

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<sup>48</sup> *Carson v. City of Dawson*, 152 N.W.2d 842 (Minn. 1915).

<sup>49</sup> A.G. Op. 707-A-15, October 8, 1945.

<sup>50</sup> Minn. Stat. § 429.041, subd. 7.

<sup>51</sup> Minn. Stat. §471.6161.

contain very clear statements as to who is responsible for what, at what cost, by what deadline, and under what conditions. Issues such as insurance, indemnification agreements, bonds, and other liability issues need to be addressed. Billing and payment obligations must also be provided for in the contract, including any penalties, interest rates, etc. The issue of subcontractors must also be agreed upon when applicable. Warranties should also be made clear. For more details about what should be in a contract, See Document Number: **C9000**, See Also Document Numbers: **C5000A**; **C5000B**; **C5200**; and **C5700** for sample contracts.

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## VIII. CONFLICTS-OF-INTEREST

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Except as authorized by Minn. Stat. §§ 471.88 and 471.89, township officials are prohibited from being party to, being directly or indirectly interested in, or otherwise benefiting financially from any sale, lease, or other contract in which the official is authorized to participate in any manner.<sup>52</sup> A direct interest usually involves payment or other consideration given directly to the interested official and is usually fairly obvious. Indirect interests, however, require more caution. Examples of indirect interests include contracts with family members when there are shared finances, contracts with the official's employer if he or she receives any additional bonuses or stock benefits from increased business.

However, there is an extensive list of contracts in which public officials are allowed to have an interest without violating the normal conflicts-of-interest restrictions.<sup>53</sup> Of these numerous exceptions, two are of particular interest to townships.<sup>54</sup> The first is an exemption to any contract for which competitive bids are not required. The second allows an official in a community with a population of under 1,000 (according to the last federal census) to provide construction material or services, or both, if sealed bids are used and the officer does not vote on the contract.<sup>55</sup>

In order to take advantage of any of the exceptions, however, a specific process must be followed.<sup>56</sup> This process requires the following steps to be taken:

1. The town board must pass a resolution authorizing the contract. The resolution must provide for all the information required in Minn. Stat. §471.89, subd.2
2. The contract itself must be authorized by unanimous vote
3. The interested officer submits an affidavit complying with Minn. Stat. § 471.89, subd. 3 each time he or she submits a claim for payment.

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<sup>52</sup> Minn. Stat. § 365.37 and Minn. Stat. § 471.87.

<sup>53</sup> Minn. Stat. § 471.88.

<sup>54</sup> *Id.* At subd. 5.

<sup>55</sup> *Id.* At subd. 12.

<sup>56</sup> Minn. Stat. §§ 471.88 and 471.89.

To avoid any appearance of impropriety, it is also recommended that the interested official not participate in the any of the decision-making process.

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## IX. VIOLATIONS AND PENALTIES

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Any contract that violates the MCL, and any contract with an improper conflict of interest, is considered void and unenforceable.<sup>57</sup> The courts have also created a rule of law that contracts awarded in violation of the statutes must be voided to protect the intent of the statutes.<sup>58</sup>

Challenges to a contract can be brought by either a losing bidder claiming to be the real lowest bidder, or by any taxpayer within the community seeking to block the expenditure of public funds on an invalid contract. The sole enforcement mechanism is an injunction against the contract that was improperly awarded.<sup>59</sup> The courts have consistently refused to automatically award the contract to the original low bidder. Instead, the township has the authority to either re-let the contract to the lowest bidder, or to reject all the bids and start the process over again.<sup>60</sup>

Once a contract has been voided, neither party is liable for satisfying the terms of the original agreement, nor can full payment be demanded. The township, however, can be required to pay for any benefit received prior to the contract being voided.<sup>61</sup>

In addition to having the contract voided, the MCL provides that a losing bidder who successfully challenges the awarding of a contract is entitled to recover the cost of preparing his or her losing bid.<sup>62</sup> The costs must be those demonstrated and not just estimated.<sup>63</sup> No other damages, nor attorney fees, can be awarded.<sup>64</sup> The rationale behind these limitations on damages is that the courts do not want to force taxpayers to pay for speculative profits, higher contracts costs, etc.<sup>65</sup>

Finally, township officials need to be aware it is a misdemeanor for any township official to violate the MCL and makes such an offense grounds for removal from office.<sup>66</sup> It is also makes it a gross misdemeanor to enter into a contract with an improper conflict-of-interest.<sup>67</sup>

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<sup>57</sup> Minn. Stat. § 365.37, subd. 5 and Minn. Stat. § 471.89, subd. 1.

<sup>58</sup> *Diamond*, (Minn. 1903).

<sup>59</sup> *Nielsen*, (Minn. 1958).

<sup>60</sup> *Electronics Unlimited*, (Minn. 1971).

<sup>61</sup> *Kotschevar v. North Fork Tp., Stearns County*, 39 N.W.2d 107 (Minn. 1949); and *Layne Minnesota Co.*, (Minn. 1977).

<sup>62</sup> Minn. Stat. § 471.345, subd. 14.

<sup>63</sup> *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499 (Minn. App. 1997).

<sup>64</sup> *Queen City Const., Inc.*, (Minn. App. 1999).

<sup>65</sup> *Telephone Associates, Inc. v. St. Louis County Bd.*, 364 N.W.2d 378 (Minn. 1985).

<sup>66</sup> Minn. Stat. § 365.37, subd. 3.

<sup>67</sup> Minn. Stat. § 471.87.

Case law regarding removal from office makes it clear, however, that elected officials can only be removed based on malfeasance or nonfeasance. It seems unlikely that a violation of the MCL could rise to the level of malfeasance, which generally requires a serious offense based on “evil intent”. It may, however, be possible that repeated violations could constitute nonfeasance and thus be grounds for removal from office. Township officials with questions about contracting requirements are, therefore, encouraged to seek direct legal assistance.

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## X. FINANCING CONTRACTS

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Before entering any contract, the town board should know exactly how it intends to pay for the item or service being purchased. Some townships will save up funds until they can pay cash for the value of the contract. More often, however, some type of borrowing will occur, or the township will explore options for collecting additional revenues. Some of the most common financing tools include:

1. Certificate of Indebtedness
2. Bonds
3. Lease-Purchase
4. Special Assessments
5. Subordinate Service Districts.

Each of these types of financial tools have the benefits and their limits, and all come with specific procedures that must be followed to ensure the validity and lawfulness of the transaction. Additional information about each of these tools can be found in the MAT Information Library. Townships should also consider discussing their options with an attorney familiar with municipal finance matters, or a financial planner. One common mistake to avoid, however, is to simply go to the local bank and borrow money in what amounts to nothing more than a “handshake” agreement.