



CONTRACTING ISSUES & REMINDERS

Contracting for goods and services is one of the most fundamental functions of town government. Because contracting is commonplace in the operation of town government, it is important for town boards to understand their statutory powers and obligations regarding contracting, and to follow standard procedures that promote compliance and consistency in the contracting process. This is particularly true of towns that contract frequently, for a wider range of services, larger projects, higher dollar amounts, and perhaps find themselves and their procedures more closely watched given the higher values and greater competition.

This resource describes some issues towns should consider when working through the contracting process. By no means is this a complete list or a contracting “how to” manual. There are simply too many variables in the contracting process to capture them all in a list such as this. However, this list may provide a helpful overview of issues and some reminders for town officers to consider when contracting.

I. The Planning Stage

Emphasis should be placed on the planning stage of the contracting process. The better a town plans, the less likely it will run into problems with its purchase or project. Remember, the Municipal Contracting Law (Minn. Stat. § 471.345), was established based on mistrust of local public officials. Anything the town does that is perceived as manipulating the contracting system is likely to be interpreted against the town. The following steps are helpful in the planning stage of contracting:

- A. Gather information about town contracting. General information can be found in Information Library Document Number: C4000. The primary statute is Minnesota Statute 471.345, which sets up different contracting processes depending on the expected value of the contract.
- B. Identify the statutory authority to be relied upon to enter into the contract.
 - i. A town may “enter into any contract that is necessary for the town to use any of its powers;” Minn. Stat. § 365.02, subd. 1.
 - ii. “Notwithstanding other law, a town board may enter into any contract it considers necessary or desirable to use any town power.” Minn. Stat. § 365.025, subd. 1.

- iii. Seek assistance from contractors, but do not simply adopt a contractor’s spec list – do not take any list of specifications at face value. Also, be careful when attempting to adopt by reference someone else’s specifications. Make sure they “fit” your circumstances and that they have not changed since the town last reviewed them.
 - iv. If the contract is for the construction or improvement of a road that must be let by sealed bid, the contract must not be let unless the plans and specifications for the project are on file with the town clerk. Minn. Stat. § 160.17, subd. 1.
 - v. Consider adding a provisions requiring: (1) the contractors to inspect the site and to fully inform themselves as to all conditions affecting the work; and (2) an inspection and approval from the town board before a final payment can be made.
- G. Develop the contract form: A sample short form contract for services can be found in the Information Library, Document Number: C5000A. A sample road contractor summer services contract can be found in the Information Library, Document Number: C5000B. Or consult the township attorney for an acceptable contract.
- i. The contract should: (1) provide measures to protect the town against faulty work or goods; (2) require the contractor to carry certain insurances and certain levels (\$1,500,000 per occurrence); (3) provide the town hold harmless, defense, and indemnification; (4) detail specifications for the project; (5) set any required timelines; (6) give the township liquidated damages provision if appropriate; (7) place limits on subcontracting, if desired; (8) limit or regulate change orders and describe how they will be handled; (10) state whether this is a unit price or lump sum contract; and (11) state if the item or work is to be warranted;
 - ii. If the contract is for the construction of a building, consider requiring the contractor to obtain a builder’s risk policy in the event something happens to the building during construction. Ensure the policy protects the town’s interests (i.e., it covers the structure to the benefit of the town and not just the contractor’s interests).
 - iii. Urban towns in the metropolitan area that contract with private persons to perform any of the town’s functions must include a provision in the contract making it clear that the data created or held by the private party that relates to the project is subject to the data practices act. Minn. Stat. § 13.05, subd. 11.
 - iv. The contract must contain an audit clause “that provides that the books, records, documents, and accounting procedures and practices of the vendor or other party, that are relevant to the contract or transaction, are subject to examination by the contracting agency and either the legislative auditor or the state auditor, as appropriate, for a minimum of six years.” Minn. Stat. § 16C.05, subd. 5.
 - v. The contract must require the prime contractor to pay any subcontractor within 10 days of when the prime contractor is paid. The clause must also impose a 1-

1/2 percent interest rate applicable to amounts not paid on time. Minn. Stat. § 471.425, subd. 4a.

- vi. Towns are prohibited from entering into any contract for public work until it receives from the contractor acceptable evidence of compliance with the workers' compensation insurance coverage requirements. Minn. Stat. § 176.182.
- vii. If state or federal funds are involved in the project, then the contract must contain provisions relating to paying prevailing wages. Minn. Stat. §§ 177.41-.44; 40 USC 3141-3148 (Davis Bacon Act).
 - a. For the purposes of the state law, project is defined as the "erection, construction, remodeling, or repairing of a public building or other public work financed in whole or part by state funds." Minn. Stat. § 177.42, subd. 2.
- viii. If the contract involves the construction or improvement of a road, culvert, or bridge, the town must have as a condition of the contract that the contractor shall place suitable warning signs at the road intersections. Minn. Stat. § 160.16, subd. 1.
- ix. Do Not Use the Contractor's Sample Form until your township attorney approves its use. The Contractor's version of a contract frequently protects only the contractor or provides unequal protections to the town.

H. Consider holding a pre-contracting meeting with potential contractors.

- i. Such a meeting can be extremely valuable in assisting the town gain the prospective and advice of those knowledgeable in the field. Potential contractors can comment on draft specifications, the draft contract form, and offer ideas on probable timelines, costs, and other items to consider with project of the type being considered.

I. Determine if permits are needed and who will seek them.

- i. Storm water construction; Public water works; wetlands; watershed district requirements

J. Define the scope of the contract (i.e., what exactly will be part of the contract).

- i. Do not engage in artificially dividing up a contract to avoid having to use sealed bids.

K. Make a good faith estimate of the total cost of the contract.

- i. Do not subtract from the estimate the trade-in value of equipment.
- ii. If entering into a lease-purchase agreement, the amount of the contract for the purposes of the municipal contracting law includes the total of all lease payments for the entire term of the lease. Minn. Stat. § 465.71.

L. Based on the estimated amount of the contract, determine the whether the contract needs to be let on the open market, by written quotes, or by sealed bids.

- i. \$0-\$25,000 Open Market
- ii. \$25,000-\$175,000 -- at least two written quotes
- iii. Above \$175,000 -- sealed bids
- iv. Rental of equipment
 - a. Under \$60,000 – at least two written quotes
 - b. Over \$60,000 – sealed bids
- v. Exceptions to the sealed bid requirement
 - a. Real estate purchases; professional service contracts (ex: attorney, engineer, architect); public safety emergencies (Minn. Stat. § 365.37, subd. 4); intergovernmental purchases (Minn. Stat. § 471.64); intergovernmental road work contracts (Minn. Stat. § 160.21); national municipal association cooperative purchasing programs (Minn. Stat. § 471.345, subd. 15); purchases made through the state cooperative purchasing program (Minn. Stat. §§ 16C.03; 16C.10; 16C.11); and contracts that fall outside of the definition of contract in Minn. Stat. § 471.345, subd. 2 and are not otherwise required to be let by bid.
 - b. Non-exempt purchase or products
 - 1. Design/build projects are not exempt from the municipal contracting law even though architectural services are involved in the contract. *W.V. Nelson Construction Company v. City of Lindstrom*, 565 N.W.2d 434 (Minn. App. 1997).
 - 2. Requests for proposals (RFP's) cannot be used in place of sealed bids if sealed bids are required by law.
 - 3. A contract that is required to be let by written quotes or sealed bids may not simply be renewed at the end of the contract term.
- vi. Electronic submissions
 - a. Vendors may submit bids, quotations, and proposals electronically in a form and manner required by the town. Towns may allow bid, performance, or payment bonds, or other security, to be furnished electronically. Minn. Stat. § 471.345, subd. 18.

M. If sealed bids are required:

- i. Determine what information contractors will be required to submit in their bids. These requirements will be used to determine the responsiveness of the bids received.
 - a. Consider adding language indicating that failure to provide [*list the critical pieces of information needed*] as part of the bid shall render the bid/bidder nonresponsive and that the bid will not be considered by the town.

- ii. Put together the request for bids notice. Consider the following points for the notice:
 - a. Title of the project; nature and scope of the work; reserve the town's right to reject any or all bids and to waive minor irregularities in the bidding process; the date, time and place of when bids are due; a list of the specific items that must accompany the bid (e.g., bid bond, proof of insurance, etc.), or indicate that a list of the requirements is contained in the contract package; indicate where the specifications and other parts of the contract package can be obtained and the cost (if any)
 - iii. Determine the appropriate method of notice.
 - a. As an alternative to publishing bid notices in a newspaper, a town may elect as an alternative to post the notice on its web site if
 - b. A description of the solicitations to be placed on the web page is placed in the minutes of a regular board meeting or is published; the web advertisement must be in substantially the same format and for the same period as a published notice; and for the first six months after designated the use of the alternative means of dissemination, the town continues to publish bid solicitations in the official newspaper. Minn. Stat. § 331A.03, subd. 3.
- N. Determine of contractor bonds are required or, if not required, whether the town still wishes to require contractors to supply those bonds.
 - i. On public works contracts over \$175,000, a town must require a contractor to supply the town a performance bond and payment bond. Each bond must be for at least the total estimated amount of the contract. Minn. Stat. § 574.26.
 - a. Requiring bonds does increase the cost of the project, but keep in mind that the bonds are there to protect the town and its taxpayers. As such, seriously consider requiring bonds even for contracts that are far below the \$175,000 level.
 - b. If the reason a contractor does not want to supply a bid is because they have difficulty obtaining one, that should be a red flag to the town about the contractor's financial stability.
 - ii. Failure to obtain the required payment bond can result in the town being liable to subcontractors who do not get paid. Minn. Stat. § 574.29.
 - iii. Bid bonds are not required by law regardless of the amount of the contract, but a town may choose to require contractors to submit bid bonds.
- O. If the contract is for the purchase equipment or other goods, determine if purchasing the item through the state cooperative purchasing program would be beneficial. Minn. Stat. §§ 16C.03; 16C.10; 16C.11.
 - i. Towns that join the state cooperative purchasing program are not required to conduct its own sealed bid procedure before purchasing the item. Caution: either the town must join the program, or the county can enroll all the towns in

the county in the program, before a purchase can be made under the state contract. Buying directly from a vendor without joining the state contract, even if the town is buying at the same price available under the state contract, is not covered under the cooperative purchasing exclusion of the contracting law.

- P. If the contract involves excavation, the town must contact Gopher One to request a utility locate. Minn. Stat. § 216D.04, subd. 1a. For additional information refer to Information Library Document Number: C3000.
 - Q. Determine if any of the supervisors may have a statutory conflict of interest or a common law conflict of interest and take the appropriate steps to avoid the criminal and civil penalties that could result if the situation is not properly handled. For additional information refer to the Information Library, Document Numbers: C6000 & TP7000.
 - R. Keep in mind that the sale of town property or materials may not be sold to a town officer or employee until after reasonable public notice and the item is either sold at public auction or by sealed response. Minn. Stat. § 15.054. It appears that town officers or employees may not purchase town owned real estate.
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II. Soliciting State

- A. Designate the person contractors can contact to receive the contracting packet (specifications, contract, etc.) and who will receive and hold the bids until they are opened.
 - i. Sealed bids, including the number of bids received, prior to opening of the bids are classified as nonpublic data under the data practices act. Minn. Stat. § 13.37, subd. 2.
- B. Determine when the bids will be opened and awarded.
 - i. Typically, bids are held sealed until opened a public town board meeting. In some cases, bids are opened before a meeting, but if a town takes this approach the contractors must be told when the bids will be opened and the public must be allowed to observe. Make sure the bids are not opened before the date and time scheduled for opening them.
- C. Determine the required length and method of providing notice.
 - i. Contract let on the open market or by written quote: No specific notice requirements.
 - ii. Sealed bids generally: “The notice must be posted in the three most public places in the town or published for two weeks in a newspaper generally circulated in the town.” Minn. Stat. § 365.37, subd. 3.
 - iii. Road contracts let by sealed bids: Must be published for at least two successive weeks in a newspaper of general circulation in the town with the last publication to be made at least 10 days before the time fixed for receiving bids and letting

the contract. The notice must “specify, generally, the work to be done, the place where the plans and specifications are on file, and the time and place of receiving bids and awarding the contract.” Minn. Stat. § 160.17, subd. 2.

iv. Special assessment projects have their own publication requirements.

D. Provide the required notice (if any is required).

- i. Be sure to retain a copy of notices posted or submitted to the newspaper for publication. Obtain an affidavit of publication from the newspaper and if notice is being posted, either record the date, time, and place of each posting or complete an affidavit of posted notice.

III. Opening and Awarding Stage

A. Sealed bids must be opened in the public – either at a board meeting or at public gathering called specifically for the purpose of opening bids.

B. Determine the responsiveness of the bids.

- i. Responsiveness of a bid must be determined at the time it is opened. *Carl Bolland & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204, 206 (Minn. 1990). Does the bid contain the information set out as required in the bid notice? If not, does the lack of information constitute a substantial or material variance so that allowing the contractor to supplement the bid give the bidder a substantial advantage or benefit not enjoyed by other bidders? If so, the bid must be rejected as being nonresponsive. *Id.* at 207.

C. Modifications of bids after they are opened may not be allowed if they are substantial or material – meaning the change would give a bidder a substantial advantage or benefit not enjoyed by the other bidders. *Lovering-Johnson v. City of Prior Lake*, 558 N.W.2d 499, 502 (Minn. App. 1997).

D. If legal questions arise at the meeting at which the bids are opened or submitted for action that the board is not able to have answered at the meeting, consider continuing the issue of awarding the contract until a later meeting.

- i. Be sure to announce the date, time, and place of the reconvened meeting on the record of the present meeting.

E. Contracts let by sealed bid must be awarded to the lowest responsible bidder. Minn. Stat. § 365.37, subd. 2. It is a crime to fail to comply with this requirement. Minn. Stat. § 365.37, subd. 5.

- i. For information on determining the lowest responsible bidder refer to Library Document Number: C1000.
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IV. After Awarding the Contract Stage

- A. Be sure the town receives all required items and information from the contractor before they can begin work.
 - i. Items that typically must be received include: certificates of insurance; performance and payment bonds; signed contract
- B. Implement enough oversight and inspections to make sure the town is receiving what it had contracted for.
- C. Change orders refer to changes to the original specifications of the item or project.
 - i. Change orders should only be used to accommodate minor changes as needed to respond to unforeseen circumstances. Do not allow change orders to change the nature or scope of the project.
 - ii. The use of change orders should be expressly limited in the contract and only allowed if in writing signed by both parties.
 - iii. Periodic payments to contractors must be handled under the town's standard claim review and approval process. Be sure the claim is specific as to the items of work for which payment is being sought and that the partial work has been inspected before payment is made.
- D. Before making final payment, be sure the following requirements are satisfied:
 - i. Make a final inspection is performed before making the final payment.
 - ii. If the contract involved road work, the person that inspected the work for the town must file a Work Completion Certificate with the clerk before final payment can be made. Minn. Stat. § 160.17, subd. 3. For more information refer to Information Library Document Number: C7000.
 - iii. Obtain an IC-134 form from the contractor signed by the MN Dept. of Revenue. For more information refer to Information Library Document Number: C2000.
- E. If the town has difficulties with the contractor, be sure to keep specific notes of the difficulties. These notes can be helpful if a lawsuit later occurs or if the contractor bids on other projects in the future.
- F. Be sure to retain all contracting related documents for at least six years.