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Purchasing Handbook





Purchasing Handbook

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Foreword

One of the most critical responsibilities of municipal officials is ensuring that taxpayer funds are spent in an appropriate and lawful manner. For many reasons, municipal purchasing has become an increasingly complicated process. For example, each type of municipal government has its own laws addressing the manner in which it may acquire goods and services. In addition, over time the General Assembly has passed legislation directed at achieving specific economic or social goals or addressing concerns about actual or potential public corruption. The end result is a municipal purchasing process that requires compliance with many different state and federal laws. The *Purchasing Handbook* is intended to assist municipal officials, employees, and solicitors with navigating those laws.

Municipal officials should not take lightly their obligation to comply with municipal purchasing requirements. A municipal official may be subject to a surcharge action if there is financial loss to the municipality as a result of the official's acts or omissions in violation of law or beyond the scope of the official's authority.

Please note that the material in the *Purchasing Handbook* is for information purposes only. The material 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 to municipalities. Any questions regarding the legality of any municipality's general purchasing procedures or a specific proposed contract, purchase, or course of action should be brought to the attention of the municipality's solicitor or special counsel.

I. Goals of the Municipal Purchasing Process

Municipal purchasing has many important similarities to purchasing conducted by for-profit companies; municipalities and for-profit companies both have a desire to meet budgetary obligations and obtain quality goods and services in a timely manner. However, because public funds are used and the public has a right to know how the government's business is conducted, there is a heightened level of sensitivity to ensuring that municipal purchasing is carried out in accordance with all applicable laws and regulations and that budget limits are not exceeded.

To ensure that taxpayers are served by a municipality that runs efficiently and effectively, municipal officials should keep in mind the following best practices when spending public funds.

Purchase only necessary goods and services. An authorized person should prepare a written statement (such as a purchase request form) that identifies the need for the good or service to be purchased. For small purchases, this statement can be quite informal, but the explanation or justification should become more thorough and formal as the purchase price increases. For example, large purchases are often specifically explained and justified as part of the annual budgeting process.

Keep purchases within budgeted limits. Municipalities must remain aware of how and if proposed purchases fit within the overall municipal budget and the budget of the specific department requesting the good or service. To assist with that effort, the officer in charge of purchasing should identify the budget account code against which the purchase is to be applied and provide a statement that funds are available for this purchase. Officials should also ensure that departments are aware of changes to final approved budgets.

Use competitive purchasing as much as possible. It is wise to use competitive purchasing even when it is not required. Experienced municipal officials have learned that businesses "sharpen their pencils" to the benefit of municipalities and taxpayers when municipalities use a competitive process.

Obtain supplies in a timely manner. While checks and balances are important to safeguard public funds, public services suffer when procedures become too cumbersome and result in shortages or delays. Employees may react by buying extra items in advance rather than deal with excessive paperwork, which may lead to an unnecessary surplus of supplies. Therefore, municipalities need to plan ahead.

Ensure that the municipality is educated about current best practices and new technologies. To accomplish the goal of obtaining the best product at the best value, municipal officials should educate themselves about what is available to meet their municipality's needs before they simply purchase what they always have purchased.

Pay bills only for value received. The municipality should obtain a receiving report, a delivery ticket, or other written assurance from the vendor to use as evidence that it actually received the item. In addition, the municipality should also promptly inspect the item to ensure that it is in proper working order and is what was actually ordered.

Time purchases to accommodate the municipality's cash flow constraints. While the municipality's adopted budget is the main source of information for approved expenditure levels, all departments must be made aware that just because a proposed expenditure is "in the budget" does not mean cash is available. The use of formal purchase orders is one way to control the process. Small municipalities need not institute purchase orders if the same result can be achieved without them.

II. Exemptions from Bidding Requirements

Municipal purchases fall into two general categories: those for which competitive bidding is required by law, and those for which it is not. In general, purchases over \$19,100¹ require competitive bidding.² Purchases for which competitive bidding is not required fall into four general areas: 1) under the \$19,100 threshold; 2) specifically exempted from bidding requirements; 3) made under emergency conditions; and 4) made through cooperative purchasing programs such as the commonwealth's "COSTARS" program, which is explained in more detail in the section on Intergovernmental Purchasing.

Purchases Below Bid Threshold

Pennsylvania law does not require municipalities to engage in competitive bidding for contracts when the amount of the goods or services to be acquired does not exceed \$19,100.

However, municipalities cannot make purchases on a piecemeal basis (either a series of purchases over time or a number of simultaneous purchases) to avoid the competitive bidding threshold when, "in the exercise of reasonable discretion and prudence," those purchases could be made as a single purchase. If they do, county, city, borough, and township officials may be subject to a surcharge, which can be 10 percent of the full amount of the contract or purchase. Evasion of competitive bidding requirements is also considered a misdemeanor of the third degree for which imprisonment is a possible penalty.³

If the contract price falls between \$10,300 and \$19,100, municipalities (with some exceptions, such as third class cities) must obtain written or telephone price quotations from qualified and responsible contractors. If telephone price quotes are obtained, the municipality must retain a record of the quotes, which must include the name of the contractor and the contractor's representative, the subject of the contract, and the price. Records of written or telephone price quotes must be retained for three years. If fewer than three qualified vendors exist in the market area, the municipality must keep a memo on file that explains that fewer than three qualified contractors exist in the market area within which it is practical to obtain quotes.⁴

Informal price quotes are not required for purchases of \$10,300 or below, but they are a sound business practice and are recommended.

Purchases Exempted from Bidding Requirements

Each municipal code identifies certain types of purchases that do not require competitive bidding, regardless of the purchase price.⁵ Examples of those are set forth below:

1. Maintenance, repairs, or replacements for water, electric light, or other public works of the municipality if they do not constitute new additions, extensions, or enlargements of existing facilities and equipment. For example, a court determined that a project to clean the masonry exterior of a county courthouse was exempt because it involved maintenance.⁶ However, where a project involved building an addition to an electric generating facility, the court held that bidding was required.⁷
2. Improvements, repairs, and maintenance of any kind made or provided by the municipality through its own employees. However, all materials used for street improvement, maintenance, and/or construction projects that cost in excess of \$19,100 are subject to the bidding requirements. In addition, townships of the second class are exempt from bidding contracts that involve equipment rental, if more than 50 percent of the labor hours will be supplied by township employees.⁸
3. Purchases where particular types, models, or pieces of equipment, articles, apparatus, appliances, vehicles, or parts thereof are patented and manufactured or copyrighted products. This exemption is applicable to those items that are produced by only one manufacturer under patent or copyright protection and where there is

absolutely no competitor manufacturing the same type or class of article such that it would be futile for the municipality to seek bids.⁹ Note that while a municipality can be as detailed as it wants in its specifications, the determination of whether an article is manufactured by only one company must be made through 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.¹⁰ This exemption also does not apply to contracts for equipment systems if comparable systems are available elsewhere.¹¹ Townships of the second class are exempt from bidding requirements when purchasing repair parts or materials for use in existing equipment or facilities if the parts or materials are the sole item of their kind on the market or are manufactured as a replacement for the original item of equipment being repaired.¹²

4. Purchases of any insurance policies or surety company bonds and contracts made for public utility service, electricity, natural gas, or telecommunications service.¹³
5. Purchases of any public utility service under tariffs on file with the Pennsylvania Public Utility Commission. Townships of the second class may also purchase used equipment, vehicles, etc. from a public utility, municipal corporation, county, school district, municipal authority, council of government, or state or federal government without using the bidding process.¹⁴
6. Intergovernmental contracts made with another political subdivision or county, the state or federal government or any of their agencies, or any municipal authority.¹⁵ Municipal purchases through state contracts under the COSTARS program are exempt from advertising and bidding requirements.¹⁶
7. Contracts for purchase of personal or professional services, including, but not limited to, those provided by lawyers, engineers, auditors, and accountants.¹⁷ This exemption applies to services where quality is a paramount concern and which require recognized professional and special expertise. That expertise does not necessarily require graduate studies or state certification or licensure. For example, a court held that cost management services involving data processing software to monitor county telephone lines required specialized skill, technology, and training and therefore qualified for exemption.¹⁸ A construction management contract was likewise found to be exempt because it created a special relationship between the public entity and the contractor, who became, in effect, the entity's agent.¹⁹ Contracting requirements do not apply to the appointment and compensation of statutory public officers, such as municipal solicitors,²⁰ or to the designation of bank depositories for public funds.²¹ This exemption was extended to include contracts for ambulance service.²² However, contracts for garbage collection must be awarded through competitive bidding, even where the collector bills households directly and no money goes through the public treasury.²³
8. Purchases of real estate are negotiable.²⁴ Similarly, leases of public property do not require bidding because they do not involve the expenditure of public funds.²⁵ However, an agreement to use a landfill does not constitute a lease of real estate because it is considered a service.²⁶
9. County contracts with nonprofit cooperative hospital service associations for county homes or hospitals or those affiliated with the county in purchasing arrangements.²⁷

Municipal officials should be very cautious when asserting one of these exemptions because competitive bidding requirements are a well-established public policy intended to prevent fraud and favoritism and to protect public funds. Therefore, exemptions are narrowly construed, which means that if the court has any doubt as to the applicability of the exemption, it must rule in favor of requiring public bidding.²⁸

Even if a purchase is exempted from the competitive bidding process, municipalities 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 the Purchasing Professional Services section of this handbook. This is the customary process for evaluating the costs and services of professionals, such as solicitors, engineers, or certified public accountants.

Once a governmental agency chooses to use a competitive bidding process when it is not required, the agency must continue to use the process through the award of the contract.²⁹ This rule was applied to local governments in a case involving the award of retail concessions at the Greater Pittsburgh International Airport.³⁰ It was again applied when Berks County advised bidders that a contract for waste disposal would be awarded to the most economical bid, even though strict adherence to the statutory bidding requirements was not required.³¹

Purchases Made under Emergency Conditions

The Emergency Management Services Code permits political subdivisions to carry out disaster emergency management, response, and recovery activities without regard to statutory purchasing requirements.³²

A “disaster emergency” must actually or likely meet all the following criteria: 1) seriously affect the safety, health, or welfare of a substantial number of citizens of the commonwealth or preclude the operation or use of essential public facilities; 2) be of such magnitude or severity as to render essential the commonwealth’s supplementation of county and local efforts or resources exerted or used in alleviating the danger, damage, suffering, or hardship faced; and 3) 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.³³

Disaster emergencies declared by the commonwealth 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. In addition, the mayor or chief executive of a city or the board of commissioners of a county may declare an emergency by issuing a proclamation or adopting a resolution, respectively.³⁴ Local declarations of a disaster emergency cannot exceed seven days except by consent of the governing body.

The municipal codes do not expressly delegate to governing bodies the ability to bypass competitive bidding requirements in cases of disaster emergency. However, Pennsylvania courts have held that municipal officials may do so where “immediate action” is necessary to correct a dangerous situation and there is insufficient time to advertise for bids.³⁵ This does not include situations in which there is a potential problem that does not require instant action or where there is an ongoing condition that has not been remedied.

Petty Cash Purchases

From a practical standpoint, nearly every municipality should have a petty cash fund to handle small disbursements for postage, small quantities of minor office supplies, overnight shipping charges, and similar items. The items purchased from a petty cash fund must be accounted for, and the expenditures must be reflected in the municipality’s financial records. A relatively simple method of petty cash control will satisfy accounting and auditing requirements, yet avoid placing an unduly heavy burden on the municipal secretary or treasurer.

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, which will vary depending on the specific needs of the individual municipality; 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 management of the petty cash fund.
- As expenditures are made, record the amounts and the applicable account numbers. Keep vouchers and receipts.
- Periodically write further checks to the responsible person in order to replenish the fund.

There are numerous cautionary reminders when handling petty cash. Petty cash 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. In addition, avoid buying ordinary office supplies with petty cash; municipalities nearly always can obtain a better price by buying such items in quantity using the normal purchasing process.

References

1. Pursuant to Act 84 of 2011, adjustments to the bidding thresholds will be made on an annual basis (for the period ending September 30 of each year). Those adjustments will be based on the percentage change in the Consumer Price Index for All Urban Consumers: All Items (CPI-U) for the United States City Average as published by the U.S. Department of Labor, Bureau of Labor Statistics. 8 Pa.C.S.A. § 1402(a.2) (Borough Code, Section 1402(a.2)); 16 P.S. § 1801(b.1) (County Code, Section 1801(a)); 53 P.S. § 36903.1(a) (Third Class City Code, Section 1903.1(a)); 53 P.S. § 56802(a.2) (First Class Township Code, Section 1802(a.2)); 53 P.S. § 68102(b.1) (Second Class Township Code, Section 3102(b.1)). The amounts used in this handbook are adjusted as of September 30, 2013.
2. 8 Pa.C.S.A. § 1402(a) (Borough Code, Section 1402(a)); 16 P.S. § 1801(a) (County Code, Section 1801(a)); 53 P.S. § 36901.1 (Third Class City Code, Section 1901.1); 53 P.S. § 56802(a) (First Class Township Code, Section 1802(a)); 53 P.S. § 68102(a) (Second Class Township Code, Section 3102(a)).
3. 8 Pa.C.S.A. § 1403(a) (Borough Code, Section 1403(a)); 16 P.S. § 1803(a) (County Code, Section 1803(a)); 53 P.S. § 36902 (Third Class City Code, Section 1902); 53 P.S. § 56803(a) (First Class Township Code, Section 1803(a)); 53 P.S. § 68104(a) (Second Class Township Code, Section 3104(a)).
4. 8 Pa.C.S.A. § 1401(a.1) (Borough Code, Section 1401(a.1)); 16 P.S. § 1801(b) (County Code, Section 1801(b)); 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)).
5. 8 Pa.C.S.A. § 1402(d) (Borough Code, Section 1402(d)); 16 P.S. § 1802(h) (County Code, Section 1802(h)); 53 P.S. § 36901.4(b) (Third Class City Code, Section 1901.4(b)); 53 P.S. § 56802(d) (First Class Township Code, Section 1802(d)); 53 P.S. § 68102(h) (Second Class Township Code, Section 3102(h)).
6. *Heiges Masonry, Inc. v. Adams County*, 24 D.&C.3d 315 (Adams C.C.P. 1981).
7. *Gerhart v. Getz*, 45 Lanc. 314 (Lanc. C.C.P. 1936).
8. 53 P.S. § 68102(h)(6) (Second Class Township Code, Section 3102(h)(6)).
9. *Knapp v. Miller*, 34 D.&C.2d 380 (Allegheny C.C.P. 1963).
10. *Coleman v. Stevenson*, 72 D.&C.2d 499 (Mercer C.C.P. 1974).
11. *In re 1985 Washington County Annual Financial Report Surcharge*, 601 A.2d 1223, 529 Pa. 81 (1992).
12. 53 P.S. § 68102(h)(7) (Second Class Township Code, Section 3102(h)(7)).
13. *Johnson v. Horsham Tp.*, 54 Mun. 265 (Montgomery C.C.P. 1962); *Downing v. City of Erie*, 32 Erie 211 (Erie C.C.P. 1948).
14. 53 P.S. § 68102(h)(8) (Second Class Township Code, Section 3102(h)(8)).
15. *Griffith v. McCandless Tp.*, 77 A.2d 430, 366 Pa. 309 (1951).
16. *Schaefer v. Hilton*, 373 A.2d 1350, 473 Pa. 237 (1977).
17. *Doverspike v. Black*, 535 A.2d 1217, 126 Pa. Cmwlth. 1 (1988), *aff'd*, 541 A.2d 1191, 126 Pa. Cmwlth. 11 (1988).
18. *In re 1983 Audit Report of Belcastro*, 595 A.2d 15, 528 Pa. 29 (1991).
19. *Malloy v. Boyertown Area School Bd.*, 657 A.2d 915, 540 Pa. 308 (1995).
20. *Snyderwine v. Craley*, 254 A.2d 16, 434 Pa. 349 (1969).
21. *Latsnic v. Canon-McMillan School Dist.*, 69 D.&C.2d 499 (Washington C.C.P. 1975)
22. *Emergency Care Unit v. Second Alarmers Ass'n*, 10 D.&C.3d 472 (Montgomery C.C.P. 1979).
23. *Yohe v. City of Lower Burrell*, 208 A.2d 847, 418 Pa. 23 (1965).
24. *Gladwyne Colony, Inc. v. Lower Merion Tp.*, 187 A.2d 549, 409 Pa. 441 (1963).
25. *Gaab v. Borough of Sewickley*, 692 A.2d 643 (Pa. Cmwlth. 1997).
26. *Fassman v. Whitehall Tp.*, 60 Mun. 47 (Lehigh C.C.P. 1968).
27. 16 P.S. § 1802(h)(6) (County Code, Section 1802(h)(6)).
28. *Doverspike v. Black*, 535 A.2d 1217, 126 Pa. Cmwlth. 1 (1988), *aff'd*, 541 A.2d 1191, 126 Pa. Cmwlth. 11 (1988).
29. *American Totalisator Co., Inc. v. Seligman*, 384 A.2d 242, 34 Pa. Cmwlth. 391 (1977), *aff'd*, 414 A.2d 568, 489 Pa. 568 (1980).
30. *Lasday v. Allegheny County*, 453 A.2d 949, 499 Pa. 434 (1982).
31. *Stapleton v. Berks County*, 593 A.2d 1323, 140 Pa. Cmwlth. 523 (1991), *appeal denied*, 604 A.2d 251, 529 Pa. 660 (1992).
32. 35 Pa.C.S.A. § 7501(c-d).
33. 35 Pa.C.S.A. § 7102.
34. 35 Pa.C.S.A. § 7501(b).
35. *Appeal of Lasky*, 475 A.2d 966, 82 Pa. Cmwlth. 516 (1984); *In re Muhlenberg Tp. Supervisors' Appeal*, 45 Berks 241 (Berks C.C.P. 1953); *Upper Darby Tp. v. Ramsdell Construction Co.*, 51 D.&C. 246 (Delaware C.C.P. 1943).

III. Bidding Procedures

Once municipalities determine that they need competitive bids, they must then formally advertise for bids from interested parties. Normally, the advertisement and invitation to bid are prepared by the municipal solicitor or a consultant; however, it is advisable for elected officials to take part in the process so that they can be sure that the governing body's priorities and requirements are incorporated into the advertisement.

Advertising for Bids

The Newspaper Advertising Act lays out a uniform set of qualifications for publications where advertisements for bids may be posted (each municipal code includes related procedures and requirements).¹ It also requires publications to fix and establish rates for official, legal, and all other kinds of advertising. All publications must furnish, upon request, detailed schedules of their rates and charges in effect at the time of the request. Publications are required to give notice when they increase their rates and charges for advertising, and they must do so prior to accepting payment for such advertising.²

All of the municipal codes require municipalities seeking bids to publish a notice in at least one newspaper of general circulation printed and circulating within the municipality. If no newspapers meet both requirements, municipalities may publish the notice in a newspaper circulating generally in the jurisdiction. Boroughs may place notices in newspapers printed outside the borough if their circulation is equal to or greater than that of any newspaper published within the borough.³ If notice must be published in more than one newspaper, townships must publish in at least one newspaper of general circulation printed in the municipality if there is one.⁴ The Newspaper Advertising Act requires that advertising involving a road, street, highway, bridge, municipality, village, or boundary include the common, local, or general usage designation so that the advertising can be readily understood by the people of the area involved.⁵

Once a municipality determines the newspapers in which it must place notices, it must then ensure that it complies with the applicable timing requirements. Each municipal code specifies minimum requirements for the number and timing of advertisements; each also provides for the time at which the bids will be opened. Municipalities should follow specific advertising requirements over any general advertising requirements.⁶ They should also allow at least two weeks for small projects and up to several months for large and complex projects to ensure that prospective bidders see the advertisement. On large projects, it is often desirable to also advertise in trade journals that have a general readership among the contractors, manufacturers, or dealers who provide the material or services sought in order to expand the number of quality bids received.

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 used, then the notice must be published once a week for two successive weeks. The first advertisement must be published no fewer than 10 days before the date set for opening bids.⁷

For cities, notice for bids must appear two times, on different days, in no more than two newspapers. The first advertisement must be at least 10 days before the date set for opening bids. A copy of the notice must be posted in the city office designated by council.⁸

For boroughs and townships, notice must be published at least two times in daily newspapers at intervals of not less than three days. If weekly newspapers are used, notice must be published 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 10 days before the date set for opening bids. In addition, a copy of the notice must be posted in a conspicuous place within the borough or township.⁹

The advertisement should be clearly written. At a minimum, it must contain the following items:

- Name and address of the municipality requesting the services or material.
- Name and address of the person authorized to receive the bids.
- The time, date, and place set for opening bids.
- A brief description of the desired work, its scope and location, and the completion date.
- 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 for managing the project on behalf of the municipality.
- Deadline for receipt of bids if it will be before the time and date of bid opening.
- Confirmation as to whether the purchase price can include an allowance for trade-ins of used equipment or vehicles where applicable.
- The time period 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.

Separation of Bids

When preparing for the erection, construction, and alteration of any public building, a municipality must prepare for separate bids for the plumbing, heating, ventilating, and electrical work if the entire cost of the work exceeds \$19,100, except in the case of boroughs, for which separate bids are optional.¹⁰ In third class cities, the same also applies to elevators, escalators, and all other work.

When separate bids are required, the municipality must receive separate bids on each type of work and award the contract to the lowest responsible bidder for each type. Municipalities cannot work through a single prime contractor that awards bids for the separate types of work.¹¹

Bidders' Instructions

Municipalities should supply prospective bidders with a set of instructions, which provide identical information about what is expected in the 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 that must be met by both sides; otherwise, the bid is void.¹² Violations of bidders' instructions constitute legally disqualifying errors, and a municipality must reject a bid for such errors. 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.

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.¹³ The test is whether waiving defects causes the bidding process to become noncompetitive.¹⁴ In addition, if the municipality specifically states that it will not waive a defect, it cannot then do so.¹⁵ 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 regarding the municipality's operation, and strict adherence lessens the possibility of fraud and favoritism.¹⁶ The instructions should follow the same format as the advertisement but go into more detail and include a standard set of bid forms for each bidder.

The following topics should be considered by the municipal governing body when preparing bidders' instructions:

Preparation of Proposal. To eliminate confusion and ensure that all bids are consistent, insist that the blank forms furnished are used and that all blank spaces are completed.

Qualifications. Insert a clause in the instructions stating that the municipality may examine qualifications of the bidder and request additional information and data from the bidder. Non-collusion affidavits under the Antbid-Rigging Act may be required; failure to supply them can be grounds for disqualification.¹⁷

Withdrawal. This addresses the right of any bidder to withdraw its bid as long as a written request is received by the municipality prior to the time and date that the bids are opened. See the Withdrawal of Bids section in this handbook for additional information.

Bid Bond. Specify the amount and form of the bid bond or other security and the method of its return to unsuccessful bidders. See the Contract Contents section in this handbook for additional information.

Performance Bond. Specify the amount and type of performance bond or other security required as well as insurance requirements. See the Contract Contents section in this handbook for additional information.

Marking Bids. State that bidders should clearly mark and identify bidding documents so they are not opened inadvertently before the time for opening bids.

Naming of Subcontractors. To avoid unforeseen changes, require every bidder to identify its principal subcontractors and prohibit them from changing subcontractors without the prior approval of the municipality. The municipality should maintain a list of persons ineligible for participation in contracts or subcontracts under the Antbid-Rigging Act and furnish a copy upon request to prospective bidders.¹⁸

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

Bidders' Obligations. The instructions should state that the bidder is presumed to have investigated and examined the plans and all other contract documents, as well as the site, if applicable, and it is assumed the bid is made with the bidder's full knowledge and understanding of the conditions of the work.

Lowest Qualified Bidder. The municipality should specify that 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 specifications should be advertised in order to provide an opportunity to prospective bidders who may have chosen not to bid under the original specifications. All changes must be mailed to all bidders who have already picked up the bidders' instructions and specifications.

Specifications

The specifications provide the common standards by which municipalities evaluate received bids. They must be made available to all entities and individuals who want to compete for the contract. Municipalities cannot change the specifications without re-advertising.¹⁹ Municipal officials cannot reject a bid by the lowest qualified bidder if it meets the specifications, nor can they award a bid to a party submitting a bid for something other than the specified product.²⁰ A wide departure from the specifications in the terms of the contract can invalidate it.²¹

When preparing specifications, consider the fundamental issue of how much detail is too much or too little. If the specifications are too loosely drawn, then the municipality will likely fail to receive the desired results. However, if they are unnecessarily restrictive, then contractors will likely bid higher than what might be otherwise necessary in order to protect themselves.

The purpose of good specifications and standards is to provide information to enable the successful bidder to complete the project as desired by the municipality at a reasonable cost. The only basis contractors have for judgment is through their understanding of the plans and specifications. Municipal officials should consider the following issues when preparing their specifications:

Clarity. The contractor and municipality's agent, such as an engineer, must be able to understand what the municipality wants. When a project is under way, they are responsible for ensuring that the contract is fulfilled. If the requirements are not clear, then disagreements and friction could occur, which will require excessive time and costs.

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

Standards. 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. Other various organizations and trade groups, such as the National Institute of Standards and Technology, National Association of State Procurement Officials, Asphalt Institute, Ductile Iron Pipe Research Association, Portland Cement Association, and the National Corrugated Steel Pipe Association, provide a similar assistance.

The specifications produced by trade associations and technical societies have generally been refined after years of testing and experience. Because of their technical quality and the fact that bidders are familiar with them, standard specifications usually provide benefits because they reduce uncertainties and generate a more favorable set of bids. Another convenience of using widely known, standard specifications is that municipalities can simply refer to them rather than reprint them in a bidding document.

In addition, 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 that 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. Municipalities may wish to include one or more preferred brand names in the specifications, but they should be accompanied by an "or equal" clause. This type of specification has been upheld as not unduly stifling competition.²² However, it is unlikely that the municipality or its consultant will be aware of all appropriate items for a particular job. In addition, allowing contractors an opportunity to express ideas about options is good practice and could improve the overall project. But, the specifications should state that contractors must name in their bids the brands they intend to use. Such a commitment cannot change after the contract is signed, which has the effect of ensuring the contractor obtains the best prices beforehand and incorporate them into the bid. If the contractor is able to shop around after the contract award, the contractor, not the municipality, benefits.

Local Preference. Any requirement of a local source of supply should be avoided unless it is clearly necessary, such as contracts involving service to equipment. In one case, language in the specifications stating that preference will 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.²³ In another case, specifications limiting the source of labor were held to conflict with the requirement that the contract be let to the lowest responsible bidder if the limit would increase the cost of the project.²⁴

Electronic Bidding

Pursuant to the Local Government Unit Bidding Act, counties, cities, townships, boroughs, and other units may receive bids electronically if they have the electronic capability to maintain the confidentiality of the bids until it is time to open them. The invitation for bids must reference that bids will be received by electronic auction; public notices and advertisements must be made and given in the same manner as other notices and advertisements.²⁵

In addition, if the municipality determines by resolution that the use of competitive electronic auction bidding is in its best interests, then it may engage in such bidding. Bidders must be allowed to view their bid rank and the low bid price and may reduce their bids during the auction. The municipality must make the record of bid prices and names of each bidder open to public inspection at the end of the auction. Contracts must be awarded within 60 days of the auction.²⁶

Furthermore, townships of the second class are permitted to dispose of personal property valued at \$1,000 or more by online or electronic auction sales. The price must be paid immediately or at a reasonable time after the conclusion of the auction.²⁷

Awarding Bids

The award of contracts must 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.²⁸ If for any reason one or both of the meetings are not held, the same business may be transacted at a subsequent meeting, if at least five days' notice is provided by boroughs and townships of the second class and six days' notice is provided by townships of the first class. 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.

Borough councils and township boards may direct a committee of the governing body, a member of the governing body, or a staff person to receive, open, and review bids during normal business hours. The information is then forwarded to the entire council or board for subsequent consideration and award at a public meeting. When this option is exercised, municipalities must notify bidders and other interested parties of the date, time, and location where the bid opening will take place. Bidders and other interested persons have the right to be present when bids are opened.

All contracts involving competitive sealed bidding must be awarded within 60 days of the date that bids were opened.²⁹ Where approval is required by another governmental agency, bonds must be sold, or a grant must be received, the award must be within 120 days of the date that bids were opened.³⁰ Extensions of the deadline may be made by mutual written consent of the municipality and the lowest responsible bidder.³¹

Lowest Responsible Bidder. When evaluating bids, the governing body has a duty to determine the "lowest responsible bidder." Courts have defined that term as meaning more than being pecuniarily responsible enough 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.³² Determining the lowest responsible bidder is a matter for the sound discretion of the municipal officials. However, awarding a contract without a full and careful investigation constitutes an abuse of discretion. Where a full investigation discloses a substantial reason for exercising discretion, the municipality may award the contract to a higher bidder.³³ The test for whether a municipality properly awarded a bid to a higher bidder is whether it acted without caprice and after a full investigation.³⁴ Where the lowest bidder has been bypassed without any investigation, the courts have upheld surcharges against municipal officers.³⁵

Clearly, to qualify as the lowest bidder, the bidder must also meet the municipality's specifications. The municipality does not have to award the bid to the lowest bidder if that bidder fails to meet the specifications.³⁶ However, if the lowest bidder meets the specifications, the municipality cannot reject the lowest bid if doing so will in effect amount to a change in the proposal.³⁷ 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.³⁸

Bid Negotiations. A municipality may not negotiate privately with a successful bidder to effectively change the terms and conditions of the bid.³⁹ This practice violates competitive bidding rules and voids the contract. Likewise, private meetings and negotiations with some bidders to the exclusion of others after bids are opened and before a contract is awarded constitute favoritism and give an unfair advantage.⁴⁰ However, a municipality did not engage in prohibited post-bid negotiations by merely correctly adding together itemized prices to generate an accurate bid base and confirming with a bidder that the lower figure was accurate.⁴¹

Negotiations Regarding Amendments. Municipalities cannot ignore competitive bidding requirements by negotiating amendments to the price of a contract where the price term is definite, even if the negotiated price would result in savings, without putting the contract out for bid.⁴²

Unsatisfactory Bid Outcomes

Rejecting All Bids. A municipality can reject all bids when it reserves the right to do so in the advertisement or specifications.⁴³ However, there should be a good reason for doing so.

Lack of Bids. When a municipality advertises for bids and receives none, the municipality must rebid. If the municipality receives no bids within 45 days of the second advertisement, then it may negotiate the purchase price of the item.⁴⁴

Challenges to Bid Awards

Pennsylvania courts have long held that disappointed bidders have no standing to challenge the bidding process.⁴⁵ However, a taxpayer has standing if certain criteria are met.⁴⁶ 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 disappointed bidder still has standing to challenge if it is also a taxpayer.⁴⁷

References

1. 45 Pa.C.S.A. § 301 *et seq.*; 8 Pa.C.S.A. § 109 (Borough Code, Section 109); 16 P.S. § 110 (County Code, Section 110); 53 P.S. § 35109 (Third Class City Code, Section 109); 53 P.S. § 55110 (First Class Township Code, Section 110); 53 P.S. § 65109 (Second Class Township Code, Section 109).
2. 45 Pa.C.S.A. § 304.
3. 8 Pa.C.S.A. § 109(a) (Borough Code, Section 109(a)).
4. 53 P.S. § 56802(a) (First Class Township Code, Section 1802(a)); 53 P.S. § 68102(a) (Second Class Township Code, Section 3102(a)).
5. 45 Pa.C.S.A. § 309(a).
6. *Verardi v. Borough of Sharpsburg*, 180 A.2d 6, 407 Pa. 246 (1962).
7. 16 P.S. § 1802(b) (County Code, Section 1802(b)).
8. 53 P.S. § 36901.1(b) (Third Class City Code, Section 1901.1(b)).
9. 8 Pa.C.S.A. § 1402(a) (Borough Code, Section 1402(a)); 53 P.S. § 56802 (First Class Township Code, Section 1802); 53 P.S. § 68102(a) (Second Class Township Code, Section 3102(a)).

10. 8 Pa.C.S.A. § 1405 (Borough Code, Section 1405); 16 P.S. § 2317 (County Code, Section 2317); 53 P.S. § 36909 (Third Class City Code, Section 1909); 53 P.S. § 56805 (First Class Township Code, Section 1805); 53 P.S. § 68107 (Second Class Township Code, Section 3107); *Tragesser v. Cooper*, 169 A. 376, 313 Pa. 10 (1933).
11. *Mechanical Contractors Ass'n of Eastern Pennsylvania v. SEPTA*, 654 A.2d 119 (Pa.Cmwth. 1995).
12. *March v. Downingtown Area School Dist.*, 775 A.2d 876 (Pa.Cmwth. 2000); *Jay Tp. Authority v. Cummins*, 773 A.2d 828 (Pa.Cmwth. 2001).
13. *Rainey v. Borough of Derry*, 641 A.2d 698, 163 Pa.Cmwth. 606 (1994).
14. *Kimmel v. Lower Paxton Tp.*, 633 A.2d 1271, 159 Pa.Cmwth. 475 (1993).
15. *Dragani v. Borough of Ambler*, 37 A.3d 27 (Pa.Cmwth. 2012), *appeal denied*, 49 A.3d 444 (Pa. 2013).
16. *Hanover Area School Dist. v. Sarkisian Bros., Inc.*, 514 F.Supp. 697 (M.D.Pa. 1981).
17. 62 Pa.C.S.A. § 4507.
18. 62 Pa.C.S.A. § 4505(b).
19. *Page v. King*, 131 A. 707, 285 Pa. 153 (1926).
20. *Manchester Borough Audit*, 42 York C.C.P. 1928; *Mazet v. Pittsburgh*, 20 A. 693, 137 Pa. 548 (1890).
21. *Oldershaw v. Plains Tp.*, 26 Luz. 431 (Luz. C.C.P. 1931); *Snyder v. Borough of Hanover*, 25 Mun. 183 (York C.C.P. 1929).
22. *Guthrie v. Armstrong*, 154 A. 33, 303 Pa. 11 (1931).
23. *Dalton v. Haverford Tp.*, 49 Dep. 304 (1961).
24. *Dunleavy v. City of Coatesville*, 4 Chest. 265 (Chester C.C.P. 1949); *Perry v. Borough of Wyoming*, 24 Mun. 113 (Luzerne C.C.P. 1932).
25. 62 Pa.C.S.A. § 4603.
26. 62 Pa.C.S.A. § 4604.
27. 53 P.S. § 66504 (Second Class Township Code, Section 504).
28. 8 Pa.C.S.A. § 1402(b)(1) (Borough Code, Section 1402(b)(1)); 16 P.S. § 1802(e) (County Code, Section 1802(e)); 53 P.S. § 36901.5 (Third Class City Code, Section 1901.5); 53 P.S. § 56802(b)(2) (First Class Township Code, Section 1802(b)(2)); 53 P.S. § 65802(e) (Second Class Township Code, Section 802(e)).
29. 62 Pa.C.S.A. § 3911(a).
30. 62 Pa.C.S.A. § 3911(b).
31. 62 Pa.C.S.A. § 3911(c).
32. *Wilson v. City of New Castle*, 152 A. 102, 301 Pa. 358 (1930); *Kierski v. Township of Robinson*, 810 A.2d 196 (Pa.Cmwth. 2002).
33. *Kratz v. City of Allentown*, 155 A. 116, 304 Pa. 51 (1931); *Berryhill v. Dugan*, 491 A.2d 950, 89 Pa.Cmwth. 46 (1985).
34. *Auman v. Lehigh County*, 16 Lehigh L.J. 52 (1934).
35. *Appeal from Hazle Tp. Audit*, 51 Luz. 207 (Luzerne C.C.P. 1958).
36. *Tri-County Motor Sales, Inc. v. Moore*, 415 A.2d 439, 52 Pa.Cmwth. 62 (1980).
37. *Oldershaw v. Plains Tp.*, 26 Luz. 431 (Luz. C.C.P. 1931).
38. *Riley v. Norristown Borough*, 64 Mun. 169 (Montgomery C.C.P. 1973).
39. *Philadelphia Warehousing and Cold Storage v. Hollowell*, 490 A.2d 955, 88 Pa.Cmwth. 574 (1985).
40. *Stapleton v. Berks County*, 593 A.2d 1323, 140 Pa.Cmwth. 523 (1991), *appeal denied*, 604 A.2d 251, 529 Pa. 660 (1992).
41. *Rainey v. Borough of Derry*, 641 A.2d 698, 163 Pa.Cmwth. 606 (1994).
42. *Hanisco v. Township of Warminster*, 41 A.3d 116 (Pa.Cmwth. 2012), *appeal denied*, 53 A.3d 758 (2012).
43. *Conduit and Foundation Corp. v. City of Philadelphia*, 401 A.2d 376, 41 Pa.Cmwth. 641 (1979); *R.S. Noonan, Inc. v. School Dist. of City of York*, 162 A.2d 623, 400 Pa. 391 (1960); *American Artificial Stone Pavement Co. v. Wagner*, 21 A. 160, 139 Pa. 623 (1891).
44. 73 P.S. § 1641(a).
45. *Highway Exp. Lines v. Winter*, 200 A.2d 300, 414 Pa. 340 (1964); *J.P. Mascaro & Sons, Inc. v. Bristol Tp.*, 505 A.2d 1071, 95 Pa.Cmwth. 376 (1986); *Independent Enterprises Inc. v. Pittsburgh Water and Sewer Authority*, 103 F.3d 1165 (3d Cir. 1997).
46. *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).
47. *American Totalisator Co., Inc. v. Seligman*, 384 A.2d 242, 34 Pa.Cmwth. 391 (1977); *affirmed*, 414 A.2d 568, 489 Pa. 568 (1980).

IV. Withdrawal of Bids

The Bid Withdrawal Act outlines the procedure through which bids on certain public contracts may be withdrawn after bids are opened.¹ Any bidder who meets the requirements of the Bid Withdrawal Act may withdraw its bid without forfeiting the security it filed with the bid. However, because a public contract is binding from the date of the award, if the contractor fails to follow the withdrawal procedures, then the contracting body can proceed against the bid bond if and when the contractor refuses to undertake the work.²

The Bid Withdrawal Act applies to bids relating to any public works construction contract or the provision of services to or lease of real or personal property, except for highway work. It defines a “contracting body” to include any municipality, municipal authority, political subdivision, or agency of the commonwealth, but it does not define “public improvement.”³ All municipal bid specifications and regulations must state whether bids are subject to this statute.

Requirements for Withdrawal without Forfeiture

Any bidder may withdraw its bid from consideration after the bid is opened without forfeiting the security if the bidder submitted the bid price in good faith and submits credible evidence that its bid price was substantially lower because of a clerical mistake rather than a judgment mistake. The mistake 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.”⁴

It is important to note that there are no statutory or judicially created definitions of what constitutes a “substantially lower” bid, a “substantial arithmetical error,” or “substantial quantity of work, labor, material or services.” Accordingly, municipalities should consider adopting regulations defining these terms and using a set percentage deviation from the bid price as a standard. Those regulations could then be incorporated into the bidding specifications.

Method of Withdrawal

To properly withdraw a bid, the bidder must give notice of its claim to the right to withdraw the bid in writing to the contracting body within two business days after the contracting body opens the bids.⁵ That requirement is strictly construed. The Commonwealth Court held that a bidder failed to comply with the statute when it waited four days before notifying the contracting body of its intention to withdraw its bid. As a result, the court held that the bidder was precluded from exercising its right to arbitration.⁶

Withdrawal is not permitted if it will result in the award of the contract on another bid by 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 permitted to withdraw a bid cannot participate in another bid on the project as a subcontractor or material supplier without the written approval of the contracting body.⁷

A contracting body should adopt regulations setting forth precisely how the written notice of withdrawal is to be accomplished. Is the notice to be mailed or personally delivered? Where? What constitutes “two business days” for the body? What should the notice contain? Due to the time limits in the Bid Withdrawal 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 contracting body will “consider” the bid for at least two days. But what if the contracting body designates the successful bidder upon opening bids or shortly thereafter and the successful bidder then gives the required notice of withdrawal as required by the statute? Technically, the bidder would be out of luck since the bid was no longer “under consideration,” and it would have to accept the contract or forfeit its security. It would also be an unjust result that is contrary to the intent of the statute. It would be tempting for a contracting body to immediately accept a bid with an obviously substantial error in order to take advantage of the

situation. Instead, after opening the bids, contracting bodies 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 properly withdrawn, the contracting body may either award the contract to the next lowest bidder or reject all bids and resubmit the project for bidding. If the contracting body elects to reject all bids and resubmit as a result of withdrawal (and not for other reasons), the withdrawing bidder is required to pay the costs of printing new contract documents, required advertising, and printing and mailing notices to prospective bidders.⁸

If a contracting body intends to contest a bidder's right to withdraw, it must hold a hearing within ten business days after opening the bids and issue an order allowing or denying the claim of withdrawal within five days after the hearing.⁹ If the contracting body decides it will not contest the withdrawal, then no hearing is required.¹⁰

If the contracting body contests, it must pick a hearing time, obtain a stenographer, and provide "timely and reasonable" notice of the hearing. Municipalities should adopt regulations that specify that 24 hours' notice of such hearing is "timely and reasonable." The notice is to be made by posting, which places responsibility for reading the notice on the withdrawing bidder. Solicitors should review the bid documents to determine the method and means of arbitration because the order will be arbitrated under the terms of the bid documents or, if they have no provisions regarding arbitration, the rules of the American Arbitration Association.

The Bid Withdrawal Act provides the contracting body with the right to proceed with the project if the bidder elects to arbitrate or refuses to perform.¹¹ No time period to elect to arbitrate is specified. Accordingly, municipalities should consider specifying that time period (for example, 20 days' written notice) in the bidding specifications. If the arbitrator rejects the bidder's claimed right to withdraw, then the bidder forfeits the security as liquidated damages. A contracting body should make sure its security requirements are sufficient because the deposit appears to be the limit of a bidder's liability under the Bid Withdrawal Act.

The Bid Withdrawal 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. The penalty for a violation is a misdemeanor, with a fine of up to \$25,000 and/or imprisonment of not less than one or more than two years.¹² Both the withdrawing bidder and the bidder ultimately awarded the contract, or even their subcontractors, could potentially be charged under this provision. Accordingly, it would be good practice for any contracting body permitting a bidder to withdraw to advise it and all who subsequently participate in the project of this criminal liability in order to avoid any inadvertent violation of the Bid Withdrawal Act. Furthermore, neither the contracting body nor its elected or appointed officials will incur any liability or surcharge if they permit the withdrawal of bids in accordance with the statute.¹³

Regulations

The Bid Withdrawal Act specifically provides that a municipality or authority may prepare regulations to carry out the intent and purposes of the law.¹⁴ The following possible regulations might be adopted:

- A regulation specifying contracts subject to the Bid Withdrawal Act and a statement of such in bidding specifications.
- A regulation defining "substantial error" based upon the percentage of the total bid without such error.
- A regulation setting forth a precise method for giving notice of withdrawal, which must 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 specific method of arbitration if none is contained in bidding specifications or if another method is desired.

References

1. 73 P.S. § 1601 *et seq.*
2. *Muncy Area School Dist. v. Gardner*, 497 A.2d 683, 91 Pa.Cmwlth. 406 (1985).
3. 73 P.S. § 1601.
4. 73 P.S. § 1602.
5. 73 P.S. § 1602.
6. *Perry Construction, Inc. v. Palmyra Borough Authority*, 389 A.2d 255, 37 Pa.Cmwlth. 126 (1978).
7. 73 P.S. § 1602.
8. 73 P.S. § 1603.
9. 73 P.S. § 1604(a).
10. *Myers v. Bushkill-Lower Lehigh Joint Sewer Authority*, 24 D&C.3d 573 (Northampton C.C.P. 1982).
11. 73 P.S. § 1604(b).
12. 73 P.S. § 1606.
13. 73 P.S. § 1605.
14. 73 P.S. § 1602.

V. Contract Contents

Municipalities should carefully review all contracts, including construction contracts, before entering into them to ensure that all terms they desire are included or, conversely, that any undesired terms are omitted or the subject of further negotiation. They should also rely on the expertise and advice of their solicitors, who should be involved in the preparation and review of the contract and any supporting documents.

Counties, cities, and townships of the first class must execute written contracts.¹ Boroughs and townships of the second class do not have this requirement, but reliance on oral contracts is inadvisable for many reasons.

Standard Terms

The rights, duties, and responsibilities of the contractor and the municipality are defined in the contract. The following standard terms are generally found in construction contracts.

Statement of Work. The statement of work is particularly important because the contractor is bound to perform only the work specifically defined and referred to in the statement of work. Thus, all desired items must be included, either by expressly describing them or by referring to descriptions of them in other supplemental documents, such as the plans and specifications, and incorporating those documents by reference.

Change Orders and Extra Cost Claims. The contract should include language that indicates the procedure for making changes in the statement of work. The contract should require that requests for changes be made in writing and approved by the municipality before the change is undertaken. Municipalities 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 earned if the extra work was unforeseen as a possibility in the original contract and the extra work was performed in strict compliance with the terms of the contract.² Change orders cannot vary so far from the original plan or be so significant as to constitute a new undertaking.³ The amount of cost changes should be limited, usually no more than 15 percent. All changes should be executed as required by the original contract. Requested extensions in construction time should be considered at the time changes are ordered.

Payment Schedule and Interest Penalties. For public works contracts that are more than \$50,000, the contracting body must make each payment within 45 days after the contractor submits an application for payment. 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.⁴ Interest penalties do not apply where the municipality has failed to receive grant funds allocated by the federal or state government for the project. The municipality 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.⁵

In addition, the Political Subdivision Procurement Interest Payment Act requires political subdivisions to pay an interest penalty when they fail to make payment for property and services obtained from a “qualified small business concern” by the date specified in the contract.⁶ 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.⁷ The law applies only to those invoices payable to businesses employing 100 or fewer people, and it does not apply to any public works contracts valued at more than \$50,000 or to any municipalities that are determined to be distressed under the Municipalities Financial Recovery Act.⁸ Any business that qualifies must state so on the invoice or provide a separate statement to the political subdivision. 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. The political subdivision must notify the contractor of any defect in supplies or services within the initial 30-day period.

Holdback of Payments (Retainage). To protect themselves from damages not evident during construction, political subdivisions should consider setting a percentage (often 10 percent) to be withheld until all claims have been satisfied. That retainage may also be used if there is some question about whether or not the contractor can complete the job with the balance of payments due. Examples of the damages the political subdivision 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 exceed \$50,000, retainage provisions in contracts are limited by law. Retainage cannot exceed 10 percent of the amount due the contractor until 50 percent of the contract is completed. After that, half of the retainage must be returned to the contractor, unless there is specific cause for greater withholding. For example, 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. All money retained by the municipality may be withheld until substantial completion.⁹

Authority of the Municipality's Consultant. Define the role of the municipality's consultant, whether an engineer, architect, landscape architect, or other type of consultant. 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. The contract should require the contractor to identify all subcontractors and their area(s) of competency. The contractor should be held responsible for the performance of all subcontractors. The contract should also prohibit the contractor from subcontracting more than a stated portion of the work.

Final Cleanup. The contract should require the contractor 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 to maintain insurance to protect itself, the municipality, and municipal officials from claims arising from workers' compensation or other damage claims arising from operations under the contract, whether they are the result of actions or omissions of 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 for public liability and \$20,000 for property damage. The municipality should approve the company underwriting the insurance, and certificates of insurance must be filed with the municipality, if requested.

Licenses, Permits, and 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 conspiring and colluding to commit bid-rigging.¹⁰ Although non-collusion affidavits are not required in municipal contracts, it is a good practice to incorporate them. Forms are available from the Pennsylvania Attorney General's Office.

Non-Discrimination. Every contract for the construction, alteration, or repair of public buildings or public works must contain provisions prohibiting discrimination based on gender, race, creed, or color. That requirement also applies to subcontractors and others acting on behalf of the government. If there are violations, then the municipality may terminate the contract, and all money due or to become due may be forfeited.¹¹

Bonds

Bond requirements 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 for the performance of 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. Municipal officials should be guided by the advice of their solicitors in ascertaining that all required bonds are submitted.

Bid Bonds. Bid bonds in a reasonable amount are required for purchases and contracts for more than \$19,100 for second through eighth class counties.¹² For cities, bid bonds, certified checks, or bank checks may be required for advertised purchases and contracts exceeding \$19,100, but the amount is unspecified.¹³ For boroughs, any bid bonds are at the discretion of the council and must be in the form of cash, money order, certified or cashier's check, or letter of credit.¹⁴ There are no bid bond requirements for townships.

Payment Bonds. The Public Works Contractors' Bond Law requires payment bonds in the full amount of the contract for all contracts for construction, reconstruction, alteration, or repair of public buildings, works, or improvements, including highways, if the amount of the contract exceeds \$10,000.¹⁵ All of the municipal codes reference the Public Works Contractors' Bond Law, which is intended to offer protection to subcontractors.¹⁶

Performance Bonds. The municipal codes also include provisions for performance bonds from contractors. For example, boroughs and townships may require a bond, letter of credit, or other reasonable security valued between 10 and 100 percent of the contract amount, which shall be due 20 days after the award, unless the council or board sets a shorter period, which cannot be less than 10 days.¹⁷ Counties may require similar security in a sufficient amount, which shall be due within 30 days unless the county sets a shorter period.¹⁸

References

- 16 P.S. § 1801 (County Code, Section 1801); 53 P.S. § 36901.1 and 36901.2 (Third Class City Code, Sections 1901.1 and 1901.2); 53 P.S. § 56802(a) (First Class Township Code, Section 1802(a)).
- Teodori v. Penn Hills School Dist. Authority*, 196 A.2d 306, 413 Pa. 127 (1964).
- Hibbs v. Arensberg*, 119 A. 727, 276 Pa. 24 (1923); *Emporium Area Joint School Authority v. Arundson Construction and Bldg. Supply Co.*, 156 A.2d 554, 191 Pa. Super. 372 (1960), *reversed on other grounds*, 166 A.2d 269, 402 Pa. 81 (1961).
- 62 Pa.C.S.A. § 3932.
- 62 Pa.C.S.A. § 3934(b).
- 72 P.S. § 1603-C(a).
- 72 P.S. § 1609-C.
- 72 P.S. § 1610-C.
- 62 Pa.C.S.A. § 3921.
- 62 Pa.C.S.A. § 4507.
- 62 Pa.C.S.A. § 3701.
- 16 P.S. § 1802(f) (County Code, Section 1802(f)); 16 P.S. § 5001(b.1) (Second Class County Code).
- 53 P.S. § 36901.6 (Third Class City Code, Section 1901.6).
- 8 Pa.C.S.A. § 1402(b)(1) (Borough Code, Section 1402(b)(1)).
- 8 P.S. § 193.1.
- 8 Pa.C.S.A. § 1406 (Borough Code, Section 1406); 16 P.S. § 1802(j) (County Code, Section 1802(j)); 53 P.S. § 36901.6(c) (Third Class City Code, Section 1901.6(c)); 53 P.S. § 56804 (First Class Township Code, Section 1804); 53 P.S. § 68105 (Second Class Township Code, Section 3105); *Cornerstone Land Development Co. of Pittsburgh LLC v. Wadwell Group*, 959 A.2d 1264 (Pa.Super. 2008).
- 8 Pa.C.S.A. § 1402(c) (Borough Code, Section 1402(c)); 53 P.S. § 56802(i) (First Class Township Code, Section 1802(i)); 53 P.S. § 68102(g) (Second Class Township Code, Section 3102(g)).
- 16 P.S. § 1802(j) (County Code, Section 1802(j)).

VI. Purchasing Controls

Municipalities should adopt purchasing regulations that specify the duties of the purchasing agent, the procedure for obtaining competitive bids, how to purchase items that 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. Sales representatives often fail to understand the laws governing public purchasing and the restrictions placed on government officials. In addition, municipalities and the general public both benefit from having the ability to review and understand the purchasing policies of the municipality.

Standardized Purchases

An essential requirement of a good purchasing program is that goods are standardized and purchased in accordance with carefully drawn specifications. Such policies take advantage of lower prices that result from bulk purchases. They also lower 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 for many purposes — to send out tax, water, and sewer bills; to pay suppliers; and for general correspondence. Some differences may be justified, but others may 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 a highly specialized good 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 municipality should ensure that goods and services meet or even exceed specification requirements before it considers purchasing them. Specifications may be in the form of written descriptions, drawings, commercial designations, industry standards, or other descriptive references. Specifications 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 ensure that maximum value is obtained for tax dollars spent and that all qualified suppliers, large and small, are able to compete on a level playing field.

See page 8 for additional discussion of specifications.

Operating Procedures

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

At a minimum, all municipalities should have purchasing controls that accomplish the following:

- Ensure materials and services are ordered only by authorized employees and officials.
- Advertise purchases in accordance with the applicable municipal code.
- Ensure that goods are received and in good, working condition 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 found municipalities liable for the costs of goods or services beyond the contracted amount where the municipalities voluntarily accepted materials or services and made no effort to reject them where there was an opportunity to do so.¹

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 will exceed \$19,100, bids must be obtained in accordance with the applicable municipal codes. For purchases between \$10,300 and \$19,100, at least three written or telephone price quotations are required (except for cities and second class counties). Informal price quotations are desirable and can be required by local regulation. On high cost items, a bid bond might be appropriate.

When firm prices are received or formal bids are 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." A municipality should have a record of the amount of encumbered money at any given time so it can adjust its financial report to reflect the expenditures and the encumbrances as they affect the municipality's 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, received goods and 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, which means that 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

It is good practice for a municipality to keep a file relating to current and recently completed municipal contracts. This helps to determine when the process for advertising and awarding new annual contracts should be started and to identify the past qualified bidders. It also provides the municipality 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.

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 can include 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 forms 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 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 types 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, and snow removal materials. 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 Antidbid-Rigging Act.²

References

1. *J.A. & W.A. Hess, Inc. v. Hazle Tp.*, 305 A.2d 404, 9 Pa. Cmwlth. 409 (1973); *Township of Ridley v. Haulaway Trash Removal, Inc.*, 448 A.2d 654, 68 Pa.Cmwlth. 16 (1982); *Ridley Tp. v. Pipe Maintenance Services, Inc.*, 477 A.2d 610, 83 Pa.Cmwlth. 425 (1984).
2. 62 Pa.C.S.A. § 4505(b).

VII. Conflicts of Interest in Purchasing

The State Public Official and Employee Ethics Act (“Ethics Act”) plays an important role in ensuring that public purchasing is performed in a manner that appropriately safeguards taxpayer funds. The Ethics Act provides that “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.”¹

Under the Ethics Act, no public official or public employee can enter into a contract valued at \$500 or more with his or her 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. Furthermore, it applies to the public official or employee’s spouse or child or any business in which the public official or public employee or his or her spouse or child is associated. Any public official or public employee with a personal interest cannot have any supervisory responsibility for administering the contract.²

The various municipal codes contain references addressing the personal interests of public officials and public employees with respect to public contracting. For example, the County Code and Borough Code reference the restrictions set forth in the Ethics Act.³ In addition, a personal interest is prohibited in contracts exceeding \$300 in townships of the first class and \$500 in townships of the second class.⁴ Where a contract is awarded to a firm employing a borough council member, township commissioner, or township supervisor in a non-management position, the official must inform the governing body of the employment status and refrain from voting on the contract.⁵ Engineers and architects employed by the municipality to prepare plans or specifications for any public work are prohibited from bidding on the project. 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.⁶

The interest of an official must be certain, pecuniary, or proprietary and direct. Sentimental or general interest is not enough.⁷ 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 non-administrative or nonexecutive capacity.⁸ Also, two township supervisors with remote private business dealings with a bidder on a township contract did not violate the personal interest provision.⁹ Furthermore, a township supervisor did not violate the Ethics Act when he suggested at a meeting that township vehicles be serviced at a business where he worked because the supervisor did not enter into a contract to service the vehicles.¹⁰ However, other courts have held the prohibition to be broad and that the officer need not be a contracting party to have a personal interest; the amounts involved are immaterial.¹¹

Penalties for violation include fines, surcharges, terms of imprisonment, and ouster from office.¹²

Any contract or purchase a municipality wishes to make in which an official or employee has a personal interest should be closely scrutinized as to its legality. The appearance of honesty and impartiality is just as important as fulfilling legal requirements.

References

1. 65 Pa.C.S.A. § 1101.1(a).
2. 65 Pa.C.S.A. §1103(f).
3. 8 Pa.C.S.A. § 1404 (Borough Code, Section 1404); 16 P.S. § 1806 (County Code, Section 1806); *Kimball v. Cambria County*, 36 D.&C.2d 662 (Cambria C.C.P. 1965).
4. 53 P.S. § 56811 (First Class Township Code, Section 1811); 53 P.S. § 68102(i) (Second Class Township Code, Section 3102(i)).
5. 53 P.S. § 36912 (Third Class City Code, Section 1912); 53 P.S. § 56807 (First Class Township Code, Section 1807); 53 P.S. § 68109 (Second Class Township Code, Section 3109).
6. 8 Pa.C.S.A. § 1402(f) (Borough Code, Section 1402(f)); 53 P.S. § 36901.8 (Third Class City Code, Section 1901.8); 53 P.S. § 56802(f) (First Class Township Code, Section 1802(f)); 53 P.S. § 68102(m) (Second Class Township Code, Section 3102(m)).
7. *Wilson v. City of New Castle*, 152 A. 102, 302 Pa. 358 (1930).
8. *Emergency Care Unit v. Second Alarmers Ass'n*, 10 D.&C.3d 472 (Montgomery C.C.P. 1979).
9. *Kimmel and Hornung v. Lower Paxton Tp.*, 633 A.2d 1271, 159 Pa.Cmwlth. 475 (1993).
10. *Bixler v. State Ethics Com'n*, 847 A.2d 785 (Pa.Cmwlth. 2004).
11. *Commonwealth v. Midouhas*, 62 D.&C.2d 441 (Bucks C.C.P. 1974).
12. *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 (Beaver C.C.P. 1943).

VIII. Special Purchasing Requirements

Numerous other laws impose special requirements on municipalities when they make purchases, such as limitations on the use of liquid fuels funds and federal grant funds, restrictions on purchases of steel products and motor vehicles, and requirements that prevailing wages and workers' compensation insurance be paid.

Liquid Fuels Funds

Municipalities must not commingle state funds allotted under the Liquid Fuels Tax Municipal Allocation Law ("Liquid Fuels Law") with any other funds. They must establish a special fund for such deposits and payments and submit an annual report to the Department of Transportation ("PennDOT") concerning the use of the funds.¹ However, PennDOT permits municipalities to spend money for highway purposes by borrowing or transferring money from their general fund and reimburse the general fund by transferring from the liquid fuels fund during the current year. These transfers can only be made if the municipalities can identify the reimbursed costs and the costs are permissible under the Liquid Fuels Law. 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 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 PennDOT, regardless of whether the work is performed by contract or by municipal employees. No work may be started until a Project Approved Form, MS-329, is approved by PennDOT. Authorization to proceed occurs when a copy is sent to the municipality.

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. Upon completion, the municipality must complete the Project Completion Report, MS-909, which will be countersigned by the municipal services representative.

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, PennDOT inspection of completed work, and notification of the county or PennDOT 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.

For additional information, see the Policies and Procedures manual prepared by PennDOT's Bureau of Municipal Services (PUB 9 (12-13)).

Davis-Bacon Act

When using federal grant or loan monies for the construction, alteration, or repair (including painting and decorating) of public buildings or public works, municipalities must comply with the wage rates and record-keeping procedures established by the Davis-Bacon Act. Those requirements apply when the project costs exceed \$2,000 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 www.dol.gov and search for "Davis-Bacon and Related Acts." Any municipality with a question as to whether it must comply with Davis-Bacon requirements should contact the regional office of the Philadelphia Employment Standards Administration at (215) 861-5830.

Steel Products

Under the terms of the Steel Products Procurement Act, all public works contracts, including construction, maintenance, and repair, must require the use of steel products made in the United States.² Each municipal code also contains a provision referring to the Steel Products Procurement Act.³ The definition of “public works” specifically includes, among other things, buildings, highways, transit systems, airports, and bridges, regardless of whether permanent or temporary and for governmental or private use.⁴ The Steel Products Procurement Act requires municipal officials to obtain certification of the source of steel products used before payments are made.⁵

Motor Vehicles

Under the Motor Vehicle Procurement Act, municipalities are required to purchase or lease motor vehicles manufactured or assembled in North America. A vehicle qualifies if a majority of the principal components are assembled into the final product in North America.⁶ However, if the municipality states in writing that compliance would be in the public interest or that the cost is unreasonable, then it need not satisfy the law. The municipality must be satisfied that the provisions of the law have been met before it can make payments to any contractor supplying motor vehicles.⁷

Prevailing Wages

For public works contracts exceeding \$25,000, except for maintenance projects,⁸ the Prevailing Wage Act requires municipalities to pay the prevailing minimum wage to all workers on the project.⁹ The purpose of the Prevailing Wage Act is to protect workers on public projects from substandard wages.¹⁰ 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.¹¹ Potential bidders may request wage reviews by the Department of Labor and Industry. Those determinations can, in turn, be appealed to the Prevailing Wage Appeals Board.¹² Those wages become part of the contract and cannot be altered during the contract period.¹³

In addition, in 2013, the General Assembly enacted Act 89, which modified the Prevailing Wage Act’s requirements for locally funded highway and bridge projects, which include those paid for entirely by funds allocated through the Liquid Fuels Law, made available from the Highway Bridge Improvement Restricted Account, awarded to municipalities as transportation enhancement grants, and allocated from municipal budgetary sources or from the impact fees distributed pursuant to the Oil and Gas Act. Those projects must comply with prevailing wage requirements if the estimated total project costs exceed \$100,000.¹⁴

For further information, contact the Bureau of Labor Law Compliance, Pennsylvania Department of Labor & Industry, 1301 Labor & Industry Building, Harrisburg, PA 17120 or (800) 932-0665.

Workers’ Compensation

The municipal codes require that all contracts involving the employment of labor include provisions for workers’ compensation insurance. All contractors must produce proof that they accept the provisions of the Workers’ Compensation Act and have insured their liability in accordance with that law.¹⁶

Guaranteed Energy Savings Contracts

Municipalities are permitted to enter into guaranteed energy savings contracts, which are for the evaluation and recommendation of energy conservation measures and for implementation of one or more such measures.¹⁶ The municipality may be required to award the contract at a public meeting after public notice. They are also authorized to accept competitive sealed bids.¹⁷

References

1. 72 P.S. § 2615.5(4).
2. 73 P.S. § 1885(a).
3. 8 Pa.C.S.A. § 1402(e) (Borough Code, Section 1402(e)); 16 P.S. § 1802(j) (County Code, Section 1802(j)); 53 P.S. § 36901.7 (Third Class City Code, Section 1901.7); 53 P.S. § 56802(e) (First Class Township Code, Section 1802(e)); 53 P.S. § 68102(g) (Second Class Township Code, Section 3102(g)).
4. 73 P.S. § 1886.
5. 73 P.S. § 1885(a).
6. 62 Pa.C.S.A. § 3734.
7. 62 Pa.C.S.A. § 3735.
8. *Borough of Youngwood v. Pennsylvania Prevailing Wage Appeals Bd.*, 947 A.2d 724, 596 Pa. 600 (2008).
9. 43 P.S. § 165-3 *et seq.*; *A.R. Scalise Company v. Commonwealth*, 393 A.2d 1306, 38 Pa.Cmwlth. 549 (1968).
10. *Ferguson Elec. Co., Inc. v. Foley*, 115 F.3d 237 (3d Cir. 1997).
11. 43 P.S. § 165-4.
12. 43 P.S. § 165-8.
13. *Lycoming County Nursing Home Ass'n v. Commonwealth, Dept. of Labor and Industry, Prevailing Wage Appeal Bd.*, 627 A.2d 238, 156 Pa.Cmwlth. 280 (1993).
14. 75 Pa.C.S.A. § 9023.
15. 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).
16. 62 Pa.C.S.A. § 3752.
17. 62 Pa.C.S.A. § 3753.

IX. Intergovernmental Cooperation in Purchasing

Municipalities looking for ways to reduce their purchasing costs should consider the viability of entering into intergovernmental arrangements. Such arrangements take advantage of economies of scale by increasing the volume of materials to be purchased.

Municipal Cooperative Purchasing

The Intergovernmental Cooperation Act sets forth the manner in which municipalities may enter into cooperative purchasing contracts with other municipalities. These contracts are deemed in force once they have been adopted by ordinance by all cooperating municipalities.¹

When several municipalities (particularly small municipalities) participate in a joint purchasing program, they are likely to save a considerable amount of money because they will be able to take advantage of volume pricing. In addition, each time a vendor receives a request for bids, it must prepare separate bid documents, maintain separate records, and be prepared to handle small orders individually. With a large contract, the vendor's administrative costs are reduced and the vendor will often be willing to accept a smaller profit per unit if assured of selling many units.

In a joint purchasing program, representatives from two or more municipalities estimate the quantities of certain items each municipality will need over the next year. If a municipality wants a special or different item, then the municipality does not need to participate in the program and can purchase the items separately. The end result is a list of requirements from each cooperating municipality and the total quantities required.

The next step is formal advertising for the quantities requested by the cooperating municipalities. Advertising costs are reduced because only a joint advertisement is needed. The advertisement must be posted at least once a week for two weeks in at least one and not more than two newspapers of general circulation in the participating municipalities.² In addition, the participating municipalities must still satisfy the bidding requirements, including those relating to bidding thresholds and written or telephone quotes.³

Each municipality should keep a copy of the specifications for materials being purchased. Instructions to bidders should specify that each cooperating municipality will submit purchase orders even though a single, collective bid is being requested from the vendors. Deliveries will be made to each municipality, and the invoicing 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 cooperating municipalities. They jointly determine the lowest qualified bidder. The municipalities then prepare a joint letter notifying the successful bidder.

To simplify the administration of a joint purchasing program, each governing body can appoint 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 area-wide 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 them.⁴ Municipalities making such purchases are exempted from statutory requirements concerning competitive bidding. The municipality must agree to participate by ordinance or resolution and provide a

copy to the county purchasing agency and the county solicitor. The county establishes the regulations. Each contract that is let by the county under these provisions must specifically reference the availability of the municipal piggyback option.

Schools and Nonprofit Organizations. Counties or municipalities may, by ordinance, also authorize joint purchases of materials, supplies, and equipment with private or public schools, colleges or universities, and nonprofit human service agencies within the county or municipality.⁵

State-Local Cooperative Purchasing

The commonwealth Procurement Code permits “local public procurement units” such as political subdivisions to purchase materials, supplies, equipment, and vehicles through state contracts entered into by the Department of General Services.⁶ This cooperative purchasing program is administered by the Department of General Services’ Bureau of Procurement and is known as “COSTARS.” The program uses collective purchasing power to obtain more competitive pricing and choice than individual local public procurement units might otherwise be able to obtain on their own.

An additional benefit of the COSTARS program is that it exempts political subdivisions from complying with existing statutory requirements governing competitive bidding and execution of contracts because those requirements have already been satisfied at the statewide level.

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 political subdivision may work directly with the Department of General Services for its 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. Organizations are also required to forward a copy of each purchase order for contracted items to the department. Orders are sent directly to the vendor, and merchandise is delivered directly to the location specified by the participants. The commonwealth does not serve as a purchasing agent.

For additional information about these cooperative purchasing programs, please contact the Department of General Services, Bureau of Procurement, Room 414, North Office Building, Harrisburg, PA 17125 or (717) 787-5733.

Federal Surplus Property Program

The Department of General Services is responsible for administering the distribution of surplus federal property, such as motor vehicles, hand tools, office furniture, computers, electronic equipment, heavy equipment, and other usable property through the Federal Surplus Property Program. The program is available to municipalities, emergency service organizations, schools, and other nonprofit organizations.

There is no cost to apply to participate in this program. However, the participant incurs a service charge to cover the state’s cost to administer the program. The actual service charge on each item depends on the original cost of the item, its condition, and any unusual costs incurred.

Some restrictions are placed on federal surplus property. All property must be placed into use within one year from its acquisition and must be used for at least one year from the date it is placed into use. Higher value items (those valued at \$5,000 or more in new condition) must be used for at least 18 months. 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 minimum use period. Property must be used only by the receiving organization and cannot be transferred.

Eligible and prospective participants are invited to browse through the federal distribution centers and check the online inventory list to see what surplus items are currently being offered. The Main Distribution Center in Pennsylvania also operates a toll-free hotline at (800) 235-1555, and representatives are available to answer any questions about the program and the availability of surplus property. Additionally, the Department of General Services publishes a circular, called the Surplus Sampler, which lists equipment and supplies available to eligible organizations.

State Surplus Property

State surplus property, such as office furniture, typewriters, and tools, is offered for public sale at the Department of General Services' State Surplus Property Distribution Center in Harrisburg, at special sales held periodically throughout the commonwealth, or through online auctions.

The commonwealth also offers private online sales for municipalities on heavy equipment, off-road equipment, and dump trucks before they are offered for sale to the general public.

For more information regarding the state surplus property purchasing programs, visit the Department of General Services website at www.dgs.state.pa.us/bssso and click on "State Surplus Property Program." You may also call the Department of General Services' Bureau of Supplies & Surplus Operations at (717) 787-6159.

References

1. 53 Pa.C.S.A. § 2315.
2. 53 Pa.C.S.A. § 2308.
3. 53 Pa.C.S.A. §§ 2311-2313.
4. 53 Pa.C.S.A. § 2309.
5. 53 Pa.C.S.A. § 2310.
6. 62 Pa.C.S.A. § 1901 *et seq.*

X. Types of Purchasing Arrangements

Whether considering the purchase of materials, equipment, or supplies or entering into 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

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. Lump sum contracts are primarily used for purchases or projects where the plans and specifications are completed in detail before the municipality requests bids. This procedure allows the municipality to determine the cost of the project or purchase in advance. This type of contract is not generally recommended when plans and specifications are incomplete because the bids will generally be higher than otherwise necessary because of the uncertainty caused by the incomplete plans and specifications. In addition, change orders after construction has commenced can be costly and lead to disputes.

Unit Price Contracts

The unit price 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. This type of contract is advantageous when the work requires quantities of relatively few types of construction or purchases and the quantities cannot be accurately identified in advance. 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. In addition, 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.

It is also possible to combine the characteristics of lump sum and unit price contracts. There are advantages to this hybrid 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 in which the municipality requests and receives bids for the approximate quantities it expects to use during the year. As the need arises, the municipality can order the needed quantity. 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.

A listing of materials typically acquired through annual contracts is shown on the next page. The main advantage of annual contracts is that the municipality does not have to go through the advertising, bidding, and contract award procedures for each purchase. In addition, because 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 truck-spread
- Rock, sand, and crushed aggregate base furnished, delivered, and stockpiled or truck-spread
- 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

The contract arrangement with the successful vendor provides the basis for orders during the contract period.

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

If 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 trending downward, purchases should be delayed.

Guaranteed Maintenance Purchasing

Pennsylvania 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 expected operation and maintenance costs.

Sometimes this can be remedied by requiring guaranteed maintenance/life cycle bids. Specifically, the instructions may require a price for the purchase of the equipment and a guaranteed maintenance cost for the expected useful life of the equipment. Contracts of this type are usually more complex and require a considerable amount of municipal record keeping, but in the long run they often result 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 for the equipment and the other for the guaranteed maintenance cost. The bidder with the lowest total 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 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 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. As referenced above, 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 required to develop or modify 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. The contractor may also contest any large claim. The expense and time lost in settling claims can be significant.

Guaranteed maintenance purchasing should be investigated before buying large quantities of rolling equipment. It can cut down on expensive maintenance costs that 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 municipal contracting requirements.

Under a true lease, the municipality receives the right of use for a specified period of time and does not assume ownership of the property. 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, which transfer 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

Municipalities often need to obtain professional services in such fields as accounting/auditing, engineering, insurance, law, planning/community development, or the like. All of 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 or solely on the basis of price. However, municipalities 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 municipality is in a position to obtain both value and quality.

The competitive purchasing process for professional services typically proceeds as follows:

- Municipalities prepare an RFP that explains the service sought, the experience and qualifications required, the timing of both the purchasing process, and the deadline for the provision of services and any other requirements.
- Municipalities review the submitted proposals and select the one that gives the best combination of qualifications, experience, and price. They should be careful not to accept a proposal simply because it is the cheapest. Obtaining services from a professional who submits the lowest price proposal, but who is not qualified in the field can create expensive problems.
- Municipalities write a contract that incorporates 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.

Defining the Service to be Purchased

Before the municipality mails out an RFP, it should draft a clear statement of the services that are needed in terms and language that all recipients will understand. If the municipality does not provide clear and precise information about the service to be provided, then the prospective consultant may be uncertain as to how much work will be needed, and, as a result, its proposal may be priced higher than necessary.

The common terms and phrases used in the three most common fields necessary to municipalities — engineers, attorneys, and auditors/accountants — are set forth below.

Engineering. The municipality must decide whether engineering services are needed for a specific project (such as planning and rebuilding a road or bridge or planning and constructing a building) or on an ongoing basis through a continuing retainer. If the engineer is to be hired only for a specific project, then the municipality must clearly define what is to be accomplished, including time limits, government standards, and other requirements. If the municipality wishes to use the engineer’s services on an ongoing basis, then an annual retainer may be appropriate as long as the services to be included in the retainer are carefully specified. Identifying the expected volume of work (such as number of plans to be reviewed, meetings to be attended, and the like) is important.

Law. Similar to purchasing engineering services, the municipality must decide whether ongoing services are needed or whether payment will be on a case-by-case basis for specific work performed. In addition, the municipality should specify whether it will expect the solicitor to attend governing body meetings on a regular basis or only on an as-needed basis. 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 outside the scope of the retainer agreement. Some municipalities obtain specialized legal services for areas such as collective bargaining or other labor-related matters, cable tele-vision regulation, or land use control through RFPs.

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 United States 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. 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 to develop a carefully priced proposal includes the number and type of municipal funds, including the number, type, and location of pension funds, the size of the overall budget and general fund, the types of local tax revenues and identification of outside tax collectors, the number of bank accounts, and the volume of transactions during the year.

Reviewing Proposals and Selecting the Best

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

- Professional qualifications.
- Experience.
- Ability to perform the work needed within the specified time limits.
- Price.

Since the municipality will award the contract on the basis of all the factors listed, the result should be that the municipality selects the “best” service provider, taking all factors into account, rather than the one that offers the lowest cost.

Writing the Contract

The municipal solicitor normally advises as to the most appropriate form of the contract. As noted earlier, the contract should incorporate the winning proposal by reference and, at least in connection with the retention of 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 municipality will be protected if it specifies three one-year contracts with automatic renewal as long as deadlines and standards are met.

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