

legal

Local Government & School District Procurement Process

—Andrew T. Phillips, WCA General Counsel, von Briesen & Roper, s.c.



As stewards of taxpayer funds, public agencies have consistently sought out the best method by which to receive the highest-quality goods and services at the lowest price. For local governments, the state Legislature has required that certain contracts for materials, supplies and services be awarded to the lowest responsible bidder. In other circumstances, local ordinances and rules require that contracts be let following thorough examination of bidder qualifications and cost.

In an effort to create additional efficiencies and leverage cooperative purchasing power, many public agencies are realizing significant savings through cooperative relationships with similarly situated agencies in Wisconsin and throughout the country. In addition, the state of Wisconsin has allowed local governments and school districts to purchase off its contracts that have been subject to the state's solicitation rules. The purpose of this article is to explore the relatively few statutory exceptions to cooperative purchasing and underscore the importance of ensuring that local ordinances and rules are drafted in a manner that allows public agencies to participate in cooperative purchasing.

LEGAL CONSTRAINTS ON COOPERATIVE PURCHASING

The only statutory limitation on a county, city, village or town's authority to adopt its own

procurement process relates to projects involving "public work" or "public construction," the value of which exceeds \$25,000.¹ For Wisconsin counties, Wis. Stat. § 59.52(29)(a) provides:

All *public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind* where the estimated cost of such work will exceed \$25,000 shall be let by contract to the lowest responsible bidder. Any public work, the estimated cost of which does not exceed \$25,000, shall be let as the board may direct. If the estimated cost of any public work is between \$5,000 and \$25,000, the board shall give a class 1 notice under ch. 985 before it contracts for the work or shall contract with a person qualified as a bidder under s. 66.0901 (2). A contract, the estimated cost of which exceeds \$25,000, shall be let and entered into under s. 66.0901... (emphasis added).

For Wisconsin cities and villages, Wis. Stat. § 62.15(1) states:

All ***public construction***, the estimated cost of which exceeds \$25,000, shall be let by contract to the lowest responsible bidder; all other public construction shall be let as the council may direct. If the estimated cost of any public

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construction exceeds \$5,000 but is not greater than \$25,000, the board of public works shall give a class 1 notice, under ch. 985, of the proposed construction before the contract for the construction is executed....(emphasis added).

Pursuant to Wis. Stat. § 60.47(3), Wisconsin towns are subject to a similar requirement on public works projects:

The town board shall let a public contract for which advertising for proposals is required under sub. (2)(b) [requiring advertisement for a public contract with a value of more than \$25,000] to the lowest responsible bidder. Section 66.0901 applies to public contracts....

According to these statutes, contracts for projects that are considered “public work” or “public construction” and that exceed \$25,000 in value must be awarded to the lowest responsible bidder.² Therefore, if a project is considered “public work” or “public construction,”³ and the value of the contract exceeds \$25,000, a county, city, village or town would be required to follow the bidding processes and requirements contained within the bidding statutes identified above. For all other contracts, however, nothing in statute prohibits a county, city, village or town from cooperating with other public agencies to receive the best goods and services at the lowest cost.

PIGGY-BACKING ON THE STATE'S PROCUREMENT PROCESS

Given the state's resources and purchasing power, it is logical to assume that the state's procurement process will result in price and contract terms that are favorable to the state. Fortunately, Wis. Stat. § 16.73(1) specifically allows the state to work cooperatively with local governments in the procurement process. This statute states:

The department may enter into an agreement with a municipality⁴ or group of municipalities, and municipalities may enter into agreements with each other, under which any of the parties may agree to participate in, administer, sponsor or conduct purchasing transactions under a joint contract for the purchase of materials, supplies, equipment, permanent personal property, miscellaneous capital or contractual services. This subsection does not apply to construction contracts that are subject to s. 16.855 or 66.0901.

As noted in the language of the statute, cooperative purchasing with the state, or other agencies, on projects of “public work” or “public construction” (*i.e.*, subject to s. 66.0901) is not permitted. Nonetheless, the state maintains a database of resources available to counties, cities, villages, towns and school districts to assist

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with procurement and even “piggy-back” on the state’s contracts awarded following the state’s procurement processes.⁵

THE LOCAL GOVERNMENT COOPERATIVE MODEL

In addition to the state’s cooperative model, many local governments and school districts are realizing significant savings by leveraging the collective purchasing power of the nationwide network of public agencies. As noted above, Wis. Stat. § 16.73(1) authorizes municipalities, including school districts, to cooperate in procurement. In addition, Wis. Stat. § 66.0301(2) broadly authorizes municipalities, including school districts, to cooperate with one another “for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law.” These laws allow Wisconsin municipalities and school districts to cooperate with one another on procurement.

In addition to the explicit statutory authority for municipalities within Wisconsin to cooperate with one another, there is nothing in the law prohibiting a Wisconsin public agency from leveraging the purchasing power of public agencies outside of Wisconsin for the benefit of Wisconsin citizens. An example of how Wisconsin public agencies are able to take advantage of the purchasing power of local governments throughout the nation is found in the program known as U.S. Communities. U.S. Communities explains its nationwide public agency cooperative purchasing model as utilizing the purchasing power of more than 55,000 public agencies to procure over \$1.8 Billion Dollars in products and services annually. According to the U.S. Communities website (www.uscommunities.org), the procurement efficiencies and economies are achieved as follows:

- Each lead public agency awards its contract to a supplier after a competitive solicitation

process designed to ensure that Participating Public Agencies receive the highest quality products and services at the lowest possible prices.

- Once the lead public agency has awarded a contract with the supplier, the lead public agency allows other Participating Public Agencies in need of similar products and services to make purchases through the existing contract through U.S. Communities. This ensures that all Participating Public Agencies have access to the same terms and conditions of the existing competitively solicited contract.
- U.S. Communities does not issue the solicitation for the contracts or participate in the bid selection process with suppliers. However, once the contract is in place it works with both the lead public agency and the supplier to ensure that the contract is administered properly through routine audits as well as additional oversight measures to ensure Participating Public Agencies are receiving the quality products and services of the highest quality and at the lowest prices.
- Through U.S. Communities, all contracts are available to state and local government agencies, public and private K-12 school districts and higher education organizations, and nonprofit businesses.

In the U.S. Communities nationwide cooperative purchasing model, all public agencies throughout the country are able to purchase off a “master contract” that has been solicited by a “lead public agency.” The vendors responding to a “lead public agency” request for proposals understand that the terms and conditions associated with the contract, including price, are available to not only the “lead public agency,” but to other public agencies throughout the country. As a result, the “lead public agency,” and public

agencies throughout the country, are able to get the best goods and services at the most competitive price.

LOCAL PROCUREMENT RULES & ORDINANCES

While statutory constraints on cooperative procurement are limited and apply only to “public work” or “public construction” projects exceeding \$25,000 in value, many public agencies have rules or ordinances that dictate how a particular county, city, village, town or school district will solicit proposals to supply goods and services. It is important that public officials review those rules and ordinances to ensure they are compatible with the cooperative procurement model before engaging in cooperative procurement. Moreover, to the extent that a local rule or ordinance contains additional contracting requirements, such as a disadvantaged or minority business enterprise rule, public officials should ensure that any contracts awarded under a cooperative procurement satisfy those particular local requirements.

The consequences for failing to follow established local rules or ordinances can be significant. If challenged, a court may force a public agency to follow its own procurement rules. See *Waste Management v. Wisconsin Solid Waste Recycling Authority*, 84 Wis. 2d 462, 267 N.W.2d 659 (1978). Local rules and ordinances should be updated and modified, if necessary, to ensure that a co-

operative procurement model can be utilized in conjunction with any specific conditions that a particular agency may place on a contracting party.

CONCLUSION

Procurement laws and regulations may appear daunting at times. Thankfully, there are state and local agencies, and service providers, that stand ready, willing and able to assist public agencies through the procurement process. Please contact the Wisconsin Counties Association with any procurement questions or for additional information surrounding resources to assist your agency in purchasing. In the end, all local governments work most efficiently when they receive the best goods and services at the lowest possible cost.

Endnotes

- 1 *There are no statutes that mandate that school districts award contracts in a certain manner.*
- 2 *Wis. Stat. § 66.0901 sets forth the procedure that counties, cities, villages and towns must follow in awarding a contract subject to the statutory bidding requirements.*
- 3 *The analysis of how “public work” and “public construction” are defined is beyond the scope of this article. For a discussion of what is considered “public work” or “public construction,” please see the Attorney General’s analysis and opinion at 66 Wis. Op. Atty. Gen. 198.*
- 4 *For purposes of this statute, “municipality” is defined to include, among other entities, school districts.*
- 5 *Additional information regarding the state’s procurement process and contracts can be found at <http://vendornet.state.wi.us/vendornet/default.asp>.*

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