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TEN GUIDELINES TO MUNICIPAL CONTRACTS

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INTRODUCTION

Even the smallest of Illinois municipalities enters into scores of contracts each year. In many cases, the communities enter into these contracts with very little assistance or hindrance from their municipal attorneys. Any municipality with a population in excess of several thousand may well enter into a hundred or more contracts a year. Sometimes, the community does not appreciate the fact that it is actually entering into a contract when, for example, it authorizes the expenditure of funds and signs a form purchase agreement provided by the vendor of goods. In spite of the fact that many municipal contracts are casually entered and efficiently performed, a substantial number of State statutes and case law decisions govern the ability of municipalities to contract and the rules which must be followed in doing the public's business. This article sets out ten guidelines which Illinois municipal officials should recognize when entering into contracts.

1. Right to Contract

A non-home rule municipal entity is empowered to contract only if authorized by statutes or constitutional provisions. According to Chapter 24, Section 2-1-12 of the Illinois Revised Statutes, municipalities have a basic right to enter into contracts. However, this general provision permitting governmental entities to contract does not cloak these entities with authority to contract regarding specific matters. **City of Marquette Heights v. Vrell**, 22 Ill. App. 2d 254, (1959). These municipalities exercise only those contractual powers which have been expressly granted to them by the legislature, or implied powers which are necessarily incident to the express powers granted. Home rule units of government have a broader array of contractual powers than non-home rule units. However, even these contractual powers of home rule units are circumscribed by the limits of Article VII, Section 6 of the Illinois Constitution of 1970 and cases interpreting those provisions.

Persons contemplating contracting with municipal entities must carefully determine whether the proposed agreement is within the purview of the entity's contractual authority. The Courts have consistently charged persons entering into contracts with municipal entities with the knowledge of these limitations. **Martin v. City of Greenville**, 54 Ill. App. 3d 42 (1977). If a purported contract is entered into with a local governmental body and the contemplated transaction is either prohibited by law or beyond the scope of the municipality's authority that contract is void and parties to the agreement may be left without remedy or redress. **Dekam v. Streater**, 316 Ill. 123 (1925). To somewhat modify this harsh result, Courts have permitted a party partial recovery based upon the benefits received by the municipality where the type of contract, although generally within the scope of corporate powers, nevertheless was

defectively or irregularly concluded. **Stahelan v. Board of Education**, 87 Ill. App. 2d 28 (1967).

2. Illinois Municipalities Are Only Required To Engage In Competitive Bidding Where That Requirement Is Contained Within The State Statutes Or Within Its Own Regulations

In Illinois, it has been held that the purposes behind requiring governmental units to engage in competitive bidding are to invite competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable. **Smith v. FWD Corporation**, 106 Ill. App. 3d 429 (1983).

In forming these contractual relationships, municipalities are not required in every instance to implement a system of competitive bidding. Where there is no statutory or ordinance requirement, governmental entities need not employ competitive bidding as an essential prerequisite to the validity of proposed contractual relationships. **People ex. rel. Adamowski v. Daley**, 22 Ill. App. 2d 87 (1959); **Village of Downers Grove v. American Surety Company of New York**, 218 Ill. App. 608 (1921). Furthermore, where competitive bidding is utilized, the provisions upon which such bidding are predicated are restrictive and should not be extended

October 1988 / Illinois Municipal Review / Page 13

beyond the language used. **Hassett Storage v. Board of Election Commissioners**, 69 Ill. App. 3d 972 (1979).

For example, public works projects in municipalities of less than 500,000 population where expenses for such projects exceed \$5,000 must be let to the lowest responsible bidder, unless two-thirds of the aldermen or trustees then holding office vote not to advertise for bids. Chapter 24, § 8-9-1 of the **Illinois Revised Statutes**. This vote does not require or permit the vote of the mayor or village president to be counted in the extraordinary majority. Public works projects refer to all projects constructed for public use by any public body. Mere incidental public benefit is insufficient. The definition of public works contemplates undertakings for the benefit and use of the public in general. **Zickuhr v. Bowling**, 97 Ill. App. 3d 534 (1981).

Additionally, municipalities of less than 500,000 population may provide by ordinance that all supplies needed for use by the municipality shall be furnished by contract, let to the lowest responsible bidder. Competitive bidding is not required. Chapter 24, § 8-9-2 of the **Illinois Revised Statutes**.

Notable exceptions to competitive bidding requirements include contracts for the services of individuals possessing a high degree of professional skill where the ability of that individual plays an important part and contracts for materials which are available only from a single source. Chapter 24, § 8-10-3 of the **Illinois Revised Statutes**.

3. A Municipality Has Broad Discretion In Choosing The Lowest Responsible Bidder

Municipal officials may use discretion in choosing the "lowest responsible bidder". Essentially, the term "lowest responsible bidder" contemplates that the bidder will satisfactorily complete the contract. **Hallett v. City of Elgin**, 254 Ill. 343 (1912). A contract may be awarded to one who is not the lowest bidder where there is a sound or reasonable

basis for the award. **Cardinal Glass Company v. Board of Education**, 113 Ill. App. 3d 442 (1983). For example, it has been held proper to refuse to award a contract to the lowest bidder who had no prior experience relating to the requested task. In addition, it is a proper exercise of discretion to accept a bid where the contractor promised to furnish better quality materials than the lowest bidder. 27 ALR. 2d 917.

4. A Municipality Should Not Seek Bids Which Invite Quotations On Only A Single Named Brand

Case law in Illinois prohibits a municipality from specifying a particular patented article in the bidding form. In **Village of Rossville v. Smith**, 256 Ill. 302 (1912), the bid specifications held invalid required use of material protected under "the Warner Brothers patent". The Court found such specifications improperly impeded competition. Bid specifications are not invalid merely because they tend to favor one manufacturer over another, but may become improper when drawn so as to confine bids to one particular firm. **McQuillan, Municipal Corporations**, 3rd Ed. Vol. 10. Section 29.49. Specifications may not be built around one make of vehicle. **McQuillan**, Section 29.49 n.3. However, various cases from other jurisdictions have held it proper to specify a particular brand "or equal". **McQuillan**, Section 29.42 n.12.

In one Illinois case, the bidding specifications required "Trinidad Asphaltum obtained from Pitch Lake in the Island of Trinidad". Pitch Lake was owned by a private corporation. The Court invalidated the bidding noting that the direct effect of this provision was to create a monopoly in favor of that corporation and to restrict competition in bidding. **Fishburn v. City of Chicago**, 171 Ill. 338 (1898). It is suggested that a municipality not limit in advance its requirements to one specific item or person. If, however, after careful review of the particular item or person, such an item or

Page 14 / Illinois Municipal Review / October 1988

person compares favorably with its competitors based upon criteria relevant to the task, a municipality may choose that item or person despite its greater financial cost to the entity. For example, the action of a town board in accepting a higher bid for a snowplow was justified where the snowplow purchased was a sturdier machine, had interchangeable equipment and was immediately available. 27 ALR 917 n.5.

5. A Municipality May Engage In An Affirmative Action Program Which Will Award A Contract To One Who Is Not The Lowest Bidder

Affirmative action legislation creating a minority set aside plans and designed to ameliorate the effects of past discrimination in contracts has been tested and approved in a number of federal and state decisions. **J. A. Cronson Co. v. City of Richmond**, 779 F. 2d 181 (1985). These plans do not violate equal protection of the 14th Amendment and may be implemented by States or their political subdivisions. **Ohio Contractor's Assn. v. Keip**, 713 F. 2d 167 (1983) Section 132.601 of Chapter 127 of the Illinois Revised Statutes, creates affirmative action programs for both minorities and women. Various municipalities provide for affirmative action programs through local ordinance or executive order.

As a result, municipal officers may take a bidder's affirmative action program into account in determining the lowest responsible bidder. In **S. N. Nielson Company v. Public Building Commission**, 81 Ill. 2d 290 (1980), the lowest bidder in terms of the contract price lost out to the third lowest bidder. However, the third lowest bidder was awarded the contract based on

"extra points" it received because it included minority participation in the project.

6. A Municipality May Award A Contract Where Only One Bid Has Been Received

It is also proper to award a contract based upon the bid of only one bidder if the law governing the bidding circumstances has been followed. **McQuillan, Municipal Corporations**, 3rd Ed., Vol. 10 Section 29.74.

7. A Municipality May Reject All Bids

A municipality may reject all bids and the lowest bidder does not acquire a vested interest in the contract merely by reason of the fact he submitted the lowest bid. The governmental entity may then re-bid the contract. *Sanitary Dist. of Chicago v. McMahon*, 110 Ill. App. 510 (1903). In instances where the lowest bidder has not conformed to the bid requirements, the governmental entity may award the contract to the next lowest bidder without readvertising for bids. **Johnson v. Sanitary Dist.**, 163 Ill. 285 (1896).

8. A Bid Not Guaranteed For A Definite Term May Be Withdrawn Prior To Acceptance

A bid is no more than an offer which, until accepted, does not create a contractual relationship. **Hassett Storage Warehouse, Inc. v. Board of Education Commissioners**, 69 Ill. App. 3d 972 (1979). Therefore, absent an ordinance or provision in the bid package, a bid may be withdrawn prior to acceptance and any bid deposits must also be returned to the bidder. **Oscar George Electric Company v. Metropolitan Fair & Exposition Authority**, 104 Ill. App. 3d 957 (1982). However, the express terms of the bid requirements may validly provide that a bidder has no right to withdraw his bid even before the bids are opened. **McQuillan, Municipal Corporations**, 3rd Ed., Vol. 10 Section 19.67.

Once a bid is accepted, a contract exists. Generally, a party will not be able to "back out of" or rescind a contract unless he can show that all parties to the contract were mistaken about the basis upon which the contract was formed. In addition, a party attempting to rescind must show (1) that the mistake is of such grave consequence that enforcement of the contract would be unconscionable, (2) the mistake occurred notwith-

October 1988 / Illinois Municipal Review / Page 15

standing the exercise of reasonable care, and (3) the parties can be returned to their original positions. **John Burns Construction Company v. Interlake, Inc.**, 105 Ill. App. 3d 19 (1982).

9. A Contractor May Be Able To Correct Minor Errors In A Bid After Submission Or Acceptance

It is permissible, though not advisable, to allow a bidder to alter a bid after it has been submitted and/or approved. The Courts will look to whether such an alteration constitutes a "material variance" between the original and modified proposal. A "material variance" is one which gives a bidder a substantial advantage or benefit not enjoyed by any other bidder. **Leo Michuda & Sons Company v. Metropolitan Sanitary District of Greater Chicago**, 97 Ill. App. 3d 340 (1981). The key, therefore, to any necessity for rebidding is not whether a bid is modified or altered, but whether such amendment creates a special advantage not enjoyed by other bidders. For example, in **City of Chicago v. Mohr**, 216 Ill. 320 (1905) the Court held that allowing a bidder to double the number of furnace purifiers to be installed after bids were opened was violative of competitive bidding principles.

10. Rights Of Unsuccessful Bidders

As suggested in Guideline 3, an award of a contract to a bidder will not normally be interfered with unless there is a showing of manifest injustice or a palpable abuse of discretion. Where an unsuccessful bidder does challenge an award it is usually through an action for injunction of declaratory relief. The purpose of such a lawsuit is to overturn the award of the contract. **Stanley Magic-Door, Inc. v. City of Chicago**, 74 Ill. App. 3d 595 (1979). In the recent Illinois Appellate Court case of **State Mechanical Contractors, Inc. v. Village of Pleasant Hill**, 132 Ill. App. 3d 1027 (1985), an unsuccessful bidder claimed the contract was improperly granted and sought not to halt the competitor's contract but rather requested compensation for lost profits it would have received had it been awarded the contract. The Court acknowledged that very recently there has been some movement toward granting lost profits to the unsuccessful bidder, citing the California case of **Swinerton & Walberg Company v. City of Inglewood Los Angeles County Civic Center Authority**, 114 Cal. Repr. 834 (1974) which reasoned that in letting bids, a governmental entity promises to award the contract to the best bidder.

The Illinois Appellate Court remained unpersuaded and refused to extend the remedy of lost profits to unsuccessful bidders. The Court noted that the purpose of competitive bidding was to secure for the public the best work at the lowest prices. That purpose could not be accomplished by requiring the taxpayer to pay not only the full contract price to the bidder awarded the contract but also to pay lost profits to the unsuccessful bidder who should have received the contract had it been properly awarded. However, the Illinois Court

Page 16 / Illinois Municipal Review / October 1988

held that the challenging bidder might recover from the municipality its expenses incurred in preparing and presenting the bid.

Where a lawsuit is brought by an unsuccessful bidder challenging the award of a contract the successful bidder is an indispensable party and must be joined in the lawsuit. The Courts have felt that the entity which granted the challenged bid may not always represent the interest of the successful bidder. **Burt v. Board of Education**, 132 Ill. App. 3d 393 (1985).

The acceptance of a competitor's bid does not, in and of itself, give rise to a federal civil rights action on the part of an unsuccessful bidder. **Coyne-Delany Company v. Capital Development Board**, 616 F. 2d 341 (1980). If, however, the unsuccessful bidder establishes that there was (1) a regulated bidding procedure, (2) material compliance with the bid procedure by the unsuccessful bidder, and (3) material and significant non-compliance with the bid procedures by the successful bidder, a civil rights claim exists. **Northwest Disposal Company v. Village of Fox Lake**, 119 Ill. App. 3d 546 (1983). These cases do not affect a governmental entity's discretion to award a contract to a bidder who is not the lowest bidder solely in terms of contract price.

CONCLUSION

Municipal officials and attorneys who counsel governmental entities should recognize that a municipality's ability to contract is subject only to limited restrictions. **Many contract decisions need not be made on the basis of competitive bidding.** Where competitive bidding is utilized, Illinois Courts have been relatively restrained in their review of municipal contract decisions. Courts appear hesitant to substitute their judgment for a municipality's selection. In

addition, only a few cases get to the Appellate Court level and thus the range of precedents is small and many of the cases are more than fifty years old.

This is not to suggest, however, that municipal contract discretion is unbridled. A Court will interject itself in a contract dispute when an unsuccessful bidder alleges that the municipality fails to abide by its own bidding procedures. Government officials in order to avoid delays, litigation and needless expense should establish objective, reasonable criteria for bidders and adhere to these procedures throughout the bidding process. ◆

October 1988 / Illinois Municipal Review / Page 17

[|Home|](#) [|Search|](#) [|Back to Periodicals Available|](#) [|Table of Contents|](#) [|Back to Illinois Municipal Review 1988|](#)

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