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## Statement of Position City Bidding and Contract Requirements

In addition to finding the right products at the right prices, city officials and employees must follow various state laws that govern the bidding and contracting process. This Statement of Position provides general information on bidding and contract requirements.

### I. Uniform Municipal Contracting Law

The Uniform Municipal Contracting Law sets out procedures that cities must follow for contracts to sell, purchase or rent supplies, materials, or equipment, or to construct, alter, repair or maintain real or personal property. The procedures to follow depend on the estimated amount of the contract. Of course, estimates should be reasonable. For example, if a city asks for quotations because it estimates the value of a contract will be below the bid threshold but all of the quotations are substantially over the threshold, the city should solicit formal bids.

Contracts estimated to have a value over \$175,000 must be made by sealed bids, solicited by public notice, and awarded to the lowest responsible bidder.<sup>1</sup> Bids should be retained for the period specified in a validly adopted records retention schedule.<sup>2</sup> A contract should be executed in writing.

The requirement that the successful bidder be “responsible” protects cities from having to choose unqualified or unscrupulous low bidders. It allows a city council to consider factors such as the bidder’s financial responsibility, integrity, skill and ability, and the likelihood that the bidder will do satisfactory work.<sup>3</sup> A city can even include evaluation criteria for “responsible” bidders in the bid specifications.<sup>4</sup>

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<sup>1</sup> Minn. Stat. §§ 471.345, subd. 3 and 412.311. The \$175,000 threshold took effect on August 1, 2018, for contracts entered into on or after that date. 2018 Minn. Laws, ch. 107. The prior threshold was \$100,000. *Id.* As an alternative to the bidding process, the law allows electronic reverse auction purchases and electronic sales if certain conditions are met. See Minn. Stat. § 471.345, subs. 16, 17.

<sup>2</sup> The General Records Retention Schedule for Minnesota Cities (July 2017) provides a ten-year retention period for accepted bids. Rejected bids should be kept for six years.

<sup>3</sup> *Kelling v. Edwards*, 116 Minn. 484, 134 N.W. 221 (Minn. 1912).

<sup>4</sup> *Westra Constr., Inc., v. City of Minnetonka*, No. A03-50, slip op., 2003 WL 23023938 (Minn. Ct. App. Dec. 30, 2003) (unpublished decision).

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Contracts estimated to be worth more than \$25,000 and up to \$175,000, can be made either by sealed bids or by direct negotiation based on quotations. Two or more quotes must be obtained if possible, and the quotations must be kept on file for at least one year.

Contracts with estimated values of \$25,000 or less may be made either upon quotation or in the open market. If quotations are used, at least two quotations must be obtained if practicable, and the quotations must be kept on file for at least one year.

## **II. “Best Value” Procurement Alternative**

As an alternative, cities and other government entities may use a “best value” procurement process for “construction, building, alteration, improvement or, repair [and maintenance] contracts.”<sup>5</sup>

Best value procurement is a process based on competitive proposals that awards the contract to “the vendor or contractor offering the best value, taking into account the specifications of the request for proposals, the price and [specific] performance criteria.”<sup>6</sup>

The price and performance criteria may include, but are not limited to:

- (1) The quality of the vendor's or contractor's performance on previous projects;
- (2) The timeliness of the vendor's or contractor's performance on previous projects;
- (3) The level of customer satisfaction with the vendor's or contractor's performance on previous projects;
- (4) The vendor's or contractor's record of performing previous projects on budget and ability to minimize cost overruns;
- (5) The vendor's or contractor's ability to minimize change orders;
- (6) The vendor's or contractor's ability to prepare appropriate project plans;
- (7) The vendor's or contractor's technical capacities;
- (8) The individual qualifications of the contractor's key personnel; or
- (9) The vendor's or contractor's ability to assess and minimize risks.<sup>7</sup>

The solicitation document must state the relative weight of price and other selection criteria. The award must be made to the vendor or contractor offering the best value applying the weighted selection criteria. If an interview of the vendor’s or contractor’s personnel is one of the selection criteria, the relative weight of the interview must be stated in the solicitation document and applied accordingly.<sup>8</sup>

Personnel administering best value procurement procedures must be trained in the Request for Proposals (RFP) process for best value contracting for construction projects.<sup>9</sup>

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<sup>5</sup> Minn. Stat. §§ 412.311, subd. 2, and 471.345, subs. 3a, 4a, and 5.

<sup>6</sup> Minn. Stat. § 16C.28, subd. 1(a) (2). The performance criteria is set forth in Minn. Stat. § 16C.02, subd. 4a, and is described in solicitation documents.

<sup>7</sup> Minn. Stat. § 16C.02, subd. 4a.

<sup>8</sup> Minn. Stat. § 16C.28, subd. 1(c).

<sup>9</sup> Minn. Stat. § 16C.03, subd. 19.

### **III. Notice of Solicitation of Bids**

The notice that bids are being solicited must be published once in the city's official newspaper at least ten days before the last day for the submission of bids. As an alternative to publishing the notice in a newspaper, a city may post the notice on its Web site or publish it in a recognized industry trade journal if certain steps (described below) are followed.<sup>10</sup>

### **IV. Alternative to Publishing of Bids and Requests for Proposals (RFPs)**

As an alternative to publishing bids in a newspaper, a city or other political subdivision may post solicitations of bids, requests for information or requests for proposals by using its Web site or recognized industry trade journals. The political subdivision must simultaneously publish, either in minutes or separately in a notice published in the official newspaper, a description of all solicitations or requests so distributed, along with the means by which the publications occurred. Publication by alternative means must be in substantially the same format and for the same period of time as a publication in a qualified newspaper.

For the first six months after the political subdivision designates an alternative means of publication, it must continue to publish solicitations of bids, requests for information, and requests for proposals in the official newspaper in addition to the alternative method. The publication in the official newspaper must indicate where to find the designated alternative methods.

If, in the normal course of its business, a qualified newspaper maintains a Web site then, as a condition of accepting and publishing public notices, the newspaper must agree to post all the notices on its Web site during the notice's full publication period.<sup>11</sup>

### **V. Electronic Bidding**

Cities have authority for the following procedures related to purchases and sales:

#### **A. Reverse Auction Purchases—Minn. Stat. § 471.345, subd. 16**

A city may contract to purchase supplies, materials and equipment (but not services), using an electronic purchasing process in which vendors compete to provide the supplies, materials, or equipment at the lowest price in an open and interactive environment.

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<sup>10</sup> Minn. Stat. §§ 412.311, subd. 1 (published notice); 331A.03, subd. 3 (alternative methods).

<sup>11</sup> Minn. Stat. § 331A.02, subd. 5.

## **B. Electronic Sales—Minn. Stat. § 471.345, subd. 17**

A city may contract to sell supplies, materials, and equipment which are surplus, obsolete, or unused, using an electronic selling process in which purchasers compete to purchase the surplus supplies, materials, or equipment at the highest purchase price in an open and interactive environment.

## **VI. The Cooperative Purchasing Venture (“State Contract” or “CPV”)**

Minnesota law now requires cities to consider the Cooperative Purchasing Venture (CPV) for purchase contracts estimated to exceed \$25,000. For those contracts, a municipality must “consider the availability, price and quantity of supplies, materials, or equipment available through the state’s cooperative purchasing venture before purchasing through another source.”<sup>12</sup>

Vendors sometimes say cities can purchase from them without bidding because they are on the “state contract” or they will sell at the state contract price. Cities should beware of this approach. Cities cannot avoid the normal bidding requirements by simply purchasing at the state contract price or from a state contract vendor without joining the program and following its requirements.

The real name of the state contract is the Cooperative Purchasing Venture. It is a members-only joint powers program operated by the Minnesota Department of Administration, Materials Management Division.<sup>13</sup> The CPV allows members to purchase goods and services under contract terms established by the State of Minnesota. To purchase through it, cities must join. There is currently no fee to join.

For additional information, visit the Cooperative Purchasing Venture website at <http://www.mmd.admin.state.mn.us/cpv2.htm>.

## **VII. Cooperative Purchasing**

A city may contract for the purchase of supplies, materials, or equipment without regard to the competitive bidding requirements of the Uniform Municipal Contracting Law if the purchase is through a national municipal association’s purchasing alliance or cooperative created by a joint powers agreement that purchases items from more than one source on the basis of competitive bids or competitive quotations.<sup>14</sup>

## **VIII. Purchase or Lease of Used Public Safety Equipment**

In 2011, the Minnesota Legislature granted cities and other local governments authority to lease or purchase used public safety equipment without bidding in certain specified

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<sup>12</sup> Minn. Stat. § 471.345, subd. 15.

<sup>13</sup> See Minn. Stat. § 16C.03, subd. 10.

<sup>14</sup> Minn. Stat. § 471.345, subd. 15.

circumstances. The new statute provides that a city may acquire by purchase or lease used public safety equipment without competitive bidding or proposals “if the equipment is clearly and legitimately limited to a single source of supply, and the contract price may be best established by direct negotiation.”<sup>15</sup>

The term “public safety equipment” is defined to mean “vehicles and specialized equipment used by a fire department . . . in firefighting, ambulance and emergency medical treatment services, rescue, and hazardous materials response.”<sup>16</sup>

## **IX. Responsible Contractor Minimum Requirements**

The Responsible Contractor Requirements apply to construction contracts over \$50,000 that are awarded on the basis of bidding or “best value.”<sup>17</sup> The threshold for formal bidding is \$175,000 and the best value alternative is available for contracts over \$25,000. Between \$50,000 and \$175,000 cities do not have to use the formal bidding process, however if they do use formal bidding or “best value” procurement for these contracts they will have to comply with the Responsible Contractor Requirements.

The statute sets forth “minimum criteria” for contractors which include such things as compliance with state workers compensation laws and unemployment insurance laws, federal tax I.D number, authority to transact business in Minnesota, compliance with Federal Wage and Hour requirements, etc.<sup>18</sup>

A contractor responding to the city’s contract solicitation must submit a signed statement under oath of compliance with the minimum criteria identified in this statute. If that contractor is awarded the contract, then a supplemental verification under oath must be presented to the city that the contractor has received from all subcontractors statements under oath that they also meet the minimum requirements under this statute.

## **X. Exceptions to Contract Bidding Requirements**

Exceptions to the competitive bidding requirements of Minn. Stat. § 471.345 exist for water tank service contracts, procurement from economically disadvantaged persons, shared hospital or ambulance service purchasing, fuel contracts for generation of municipal power, procurement from rehabilitation facilities, energy efficient projects, solid waste contracts, and road construction or maintenance contracts based on terms of county contracts for adjoining roads.<sup>19</sup>

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<sup>15</sup> Minn. Stat. § 471.3455; *see* 2011 Minn. Laws, ch. 33.

<sup>16</sup> Another provision of the law allows cities to issue certificates of indebtedness or capital notes to acquire new or used public safety equipment by lease for a term of up to 15 years. The long-term lease agreement obligation does not constitute debt under other statutes, and no election is required in connection with the execution of a lease agreement authorized by the new provision. *See* Minn. Stat. § 471.3455, subd. 3.

<sup>17</sup> Minn. Stat. § 16C.285.

<sup>18</sup> *See* Minn. Stat. § 16C.285, subd. 3 for the entire list of minimum criteria.

<sup>19</sup> *See* Minn. Stat. §§ 471.345, subds. 5b, 8, 10, 11, 12, 13, and 19; and 400.04.

## **XI. Prompt Payment to Subcontractors**

City contracts that involve a prime contractor must require the prime contractor to pay subcontractors within ten days of the prime contractor's receipt of payment from the city for undisputed services provided by the subcontractor.<sup>20</sup> The contract must require the prime contractor to pay interest of 1.5 percent per month or any part of a month to the subcontractor on any undisputed amount not paid on time.

## **XII. Performance and Payment Bonds**

For some contracts, cities must require contractors to provide a performance bond and a payment bond. This requirement applies to contracts over \$175,000 for the performance of public work. The required performance bond benefits the city by ensuring that the work is completed according to the terms of the contract, while the required payment bond benefits subcontractors and people who provide labor and materials, by seeing that their claims for labor and materials are paid.<sup>21</sup>

## **XIII. Withholding Certificates**

Before a city makes the final payment to a contractor under a contract requiring employment for wages, it must make sure the contractor and any subcontractors have complied with withholding tax laws.<sup>22</sup> Contractors and subcontractors show compliance by submitting a withholding affidavit to the Minnesota Department of Revenue. This can be done electronically or by mailing a completed Form IC134, "Withholding Affidavit for Contractors." If a contractor or subcontractor has withheld taxes as required, the Department of Revenue will return an electronic confirmation or sign and return the Form IC134, certifying compliance.

For more detailed information on contracting and bidding, see the Office of the State Auditor's [Minnesota Legal Compliance Audit Guide for Local Government](#).

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<sup>20</sup> Minn. Stat. § 471.425, subd. 4a.

<sup>21</sup> See Public Contractors' Performance and Payment Bond Act, Minn. Stat. §§ 574.26-.32.

<sup>22</sup> Minn. Stat. § 270C.66.