

St. Louis County Municipal League Municipal Official Training Academy

Municipal Contracts and Purchasing: Best Practices

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Presentation Summary

I. PUBLIC CONTRACT AND PURCHASING LEGAL REQUIREMENTS

A. Contracts

1. Statutory Requirements
2. Constitutional Limits
3. Conflicts of Interest
4. Public Works Contracts

B. Purchasing Requirements

1. Statutory Competitive Bidding Requirements
2. Local Ordinance Requirements
3. Bidding procedures

II. KEY CONTRACT TERMS AND NEGOTIATION TIPS

III. PRACTICAL RECOMMENDATIONS & DELIVERABLES

A. Practical Recommendations

B. Deliverables

- Exhibit 1 – Model Contract Form
- Exhibit 2 – Contracts Checklist
- Exhibit 3 – Form Contract Approving Ordinance
- Exhibit 4 – Affidavit of Citizenship
- Exhibit 5 – Supplemental “Public Works” Legal Requirements
- Exhibit 6 – Op. Atty. Gen. No. 138, Webster, 12-18-1987
- Exhibit 7 – Purchasing Policy

I. PUBLIC CONTRACT AND PURCHASING LEGAL REQUIREMENTS

3 Major types of Municipal Contracts:

- 1. Goods**
- 2. Services**
- 3. Public works**

a. Public Contract Statute of Frauds

- § 432.070 RSMo.: No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.

What This Requires

- All Contracts Must be:
 - Within powers authorized by law
 - Consideration wholly performed subsequently
 - In writing
 - Dated
 - Signed by all parties
 - Authorization to sign also in writing
- **§432.070 requirements “are mandatory ... and ... a contract made in violation of them is void rather than voidable.”** *City of Fenton v. Executive intern. Inn, Inc.*, 740 S.W.2d 338 (Mo. App. E.D. 1987)
- Examples:
 - City was prohibited from paying supplier of materials for City road project because the amount of the materials exceeded the limit contained within its City Charter allowing purchases without bidding. *Riney v. City of Hannibal*, 712 S.W.2d 49 (Mo. App. E.D. 1986).
 - Contract was not validly authorized where no single written approval but rather only a piecemeal majority of the governing body consenting separately. *Moynihan v. City of Manchester*, 265 S.W.3d 350 (Mo. App. E.D. 2008)
 - Cooperative Contract could not be ratified where County was 12th county signatory to a cooperative agreement where statute only authorized 10 county signatories. *St. Charles County v. A Joint Bd. Or Com'n*, 184 S.W.3d 161 (Mo. App. E.D. 2006)

Common Questions

- **Approve by Ordinance or Resolution?**
- **Contract approval still needed if expenditure approved in budget?**
- **Change out exhibits after approval?**
- **Okay to authorize City manager to “negotiate and enter into contract?”**

b. Immigration Status - Proof of Lawful Presence

- 208.009 RSMo. (2008): “At the time of application for **any** state or **local public benefit**, an applicant who is eighteen years of age or older shall provide **affirmative proof** that the applicant is a citizen or a permanent resident of the United States or is **lawfully present** in the United States.”
- Public benefit means any “grant, contract or loan” –

BUT NOT:

“The term ‘public benefit’ shall not include ... any **municipal permit**, or contracts or agreements between **public utility providers** and their customers....”

What this Means:

- **Proof of ID Applies to:**
 - Any “public benefit” - Any contract, grant or loan
- **Does not apply to:**
 - Business license
 - City permits
 - Utility provider contracts with customers
- **Tips**
 - **Simply put copy of driver’s license of applicant in file**
 - Exhibit 4 - Use this affidavit only when applicant cannot provide written proof (e.g., driver’s license)

c. Federal E-Verify Law - Services Contracts over \$5,000

- § 285.530 RSMo. (2008): As a **condition for the award of any contract or grant in excess of five thousand dollars** ... by any political subdivision ... to a business entity ...the business entity shall, by **sworn affidavit and provision of documentation** affirm its enrollment and participation in a federal work authorization program... in connection with the contracted **services**

What this Means:

- City contracts **over** \$5000 for **services** must require:
 - Affirmation of enrollment in E-verify
 - Affirm it does not knowingly employ any person who is an unauthorized alien in connection with the contracted services
- **EXCEPTIONS:**
 - Does NOT apply to contracts for goods or products
 - Only need affirmation on annual basis
- **Tip: Use Exhibit B of Exhibit 1** to satisfy this law

d. Confidentiality Provisions

- Generally, executed contracts are open records under Missouri Sunshine Law – RSMo. 610
 - Which means: City cannot agree to unqualified confidentiality agreement
- A few exceptions
 - See handout

2. Constitutional Limits

a. No Extra Compensation for Work Already Performed

- **Mo. Const., Art. III, § 39(3):**
 - The general assembly shall not have power: ... To grant or to authorize any county or municipal authority to **grant any extra compensation**, fee or allowance to a public officer, agent, servant or contractor **after service has been rendered** or a contract has been entered into and performed in whole or in part
- What this means:
 - NO bonuses or retroactive pay increases for past services

Extra Compensation Examples:

- City violated constitution by amending contract to **increase compensation** to corporation for same collection and disposal service already committed to in original contract. *Kizior v. City of St. Joseph*, 329 S.W.2d 605 (Mo. 1959)
- A highway contractor was not entitled to **extra compensation** for increased expense in excavating with labor instead of machinery, where contractor was paid for excavating on basis provided in contract, and condition necessitating labor could have been seen on examination of site. *Sager v. State Highway Comm'n*, 160 S.W.2d 757 (Mo. 1942)
- State board of cosmetology **could not grant bonuses** to its employees because this provision prohibits granting or authorizing bonuses after service has been rendered. Op. Atty. Gen. No. 72, Pray, 6-14-55.

b. Annual Appropriation/debt

- **Mo. Const. Art. VI, § 26(a):** prohibits cities from entering into any contract requiring the City to pay more than “income and revenue provided for such year plus any unencumbered balances from previous years.”
- **Practical Meaning:**
 - Cannot contract to spend more than your current year revenues + unencumbered cash
 - Multi-year contracts should include “annual appropriation” clause limiting future payments if not “appropriated” by governing body
- See Model Form Contract (EX. 1)

b. Annual Appropriation/debt Examples:

- Copier rental agreement signed by school district that accelerated rent payments upon default was **voidable** upon showing that contract required school district to pay amounts greater than school districts' income and revenue for current year, plus unencumbered balances from previous years. *Mercantile Bank of Illinois v. School Dist. of Osceola*, 834 S.W.2d 737 (Mo. banc 1992).
- Certificates of Participation with 15-term issued by City did not violate Mo. Const. Art. VI, § 26(a) where Certificates set up yearly payments by City and yearly **payments did not exceed City's annual income and revenue**, plus unencumbered balances. Entire debt undertaken by City under Certificates was not required to be counted as a single year's expenditure. *Burks v. City of Licking*, 980 S.W.2d 109 (Mo. App. S.D. 1998).

3. Conflicts of Interest

a. Prohibited Conflicts

- **Three** main statutes describe prohibited transactions:
 - §105.452; §105.454; §105.458 RSMo.
 - Applies to elected or appointed officials and employees
- No appointed or elected official or employee shall:
 - **Sell, rent or lease any property, or perform any service, to the city in excess of \$500 per transaction or \$5,000 per year unless competitively bid**
 - Use or disclose confidential information in any manner with intent to result in financial gain
 - Use decision making authority for financial gain
 - Take anything of value in exchange for official action or inaction (a bribe)
 - Favorably act on any matter for personal monetary benefit

4. Public Works Contracts

***See Exhibit 5** for full list of supplementary requirements

1. Prevailing Wage – § 290.210 RSMo., et seq.
2. OSHA Training – § 292.675 RSMo.
3. Payment Bond – § 107.170 RSMo.
4. Excessive Unemployment – §§ 290.550 – 290.580 RSMo.
5. Prompt Payment Act – § 34.057 RSMo.
6. American Products Requirement – § 34.353 RSMo.
7. Davis-Bacon Act – 40 U.S.C. § 3141 et seq.

B. Purchasing Requirements

1. Competitive Bidding

- No general statute requirement that cities use competitive bidding generally, but there are exceptions:
 - Construction Management Services – § 8.679 RSMo.
 - Health and Life Insurance for Employees – § 67.150 RSMo.
 - Construction of Initial Waterworks – § 91.170 RSMo.
 - City Depository Services (3rd class cities) – § 95.280 RSMo.
 - Insurance contracts – § 376.696 RSMo.
 - Contracts with officials and employees of political subdivision over \$500 per transaction or \$5000 per year – § 105.454/.458 R.S.Mo.
 - Federal and state grants – See specific grant provisions and applicable law
 - Architectural, engineering or land surveying services (list of 3 on file) §8.291 RSMo.
 - **Local ordinance dictates other situations –**

2. Local Ordinance Requirements

Typical Ordinance Provisions:

- Key Terms Providing Flexibility-
 - Grant the City Administrator/Mayor authority to contract for and make purchases for goods and services on behalf of the City not to exceed a certain limit (i.e., \$500 - \$3,500)
 - Varying procedures for price range of purchases – See Exhibit 7.
 - Newspaper notice, posting, and website bid notification options (where state law creates no bidding requirement)
 - Emergency Authority
 - Waiver/Negotiation Authority

3. Bidding procedures

- Key Terms Providing Flexibility:
 - Allow governing body to **accept all bids, reject all bids or to negotiate** and modify bids.
 - Allow governing body to waive any technical deficiencies in any bid
 - Clearly state City is not required to accept lowest bid or any bid.
- **Example clauses:** “The City intends to award a contract for the Project based on the bid that, in the City’s sole discretion, best meets the interests and requirements of the City. The City reserves the right in the City’s sole **discretion to reject any and all bids, to waive technicalities or deficiencies in any or all bids, to negotiate with any or all bidders or others for more favorable terms or prices, and to award a contract to other than the bidder submitting the lowest cost bid proposal, with or without negotiation.** The City reserves the right not to open a sole bid.”



II. KEY CONTRACT TERMS AND NEGOTIATION TIPS

1. Indemnification OF City

- Hold Harmless
 - Basic indemnification: requires contractor to pay amounts awarded against City in suits by third parties.
 - Hold harmless generally arises when damages are awarded against City and may or may not include duty to defend.
- Duty to Defend
 - Requires contractor to provide defense to City in suits by third parties regardless of ultimate liability.
 - Duty to defend may arise when suit against City is filed
 - “If the complaint merely alleges facts that give rise to a claim potentially within the policy's coverage, the insurer has a duty to defend.” *McCormack Baron Mgmt. Services v. Am. Guaranty & Liability Insurance Co.*, 989 S.W.2d 168, 170 (Mo. banc 1999).
- Example Language

2. Indemnification BY City

- Avoid this – Use **Exhibit 6** (AG Opinion)!
- No authority to indemnify:
 - “To agree to the underlined terms [defend, indemnify and hold harmless], is to waive the state’s sovereign immunity, that is, the legal prohibition against the state being sued in its own courts for damages from the torts of its officers and agents. ***Only the legislature can waive this immunity.***”

3. Insurance

- Seek to receive not less than Sovereign Immunity Limit:
 - § 537.610 RSMo – sets sovereign immunity limit
- City may contract to purchase insurance that “**shall not exceed:**”
 - Currently single event \$398,638, aggregate claim \$2,657,587
- City **can** require private parties to obtain **any** reasonable amount
- **Tips:**
 - MAKE SURE YOU ACTUALLY GET COPY OF THE CERTIFICATE!
 - Contract for \$_____ “but not less than” 537.610 amount

- 4. Annual appropriation**
- 5. Ownership of work-product/copyrights**
- 6. Termination**
- 7. No damages against city**
- 8. Attorney fees (only to the city)**

See Exhibit 1 – Form contract



III. PRACTICAL RECOMMENDATIONS & DELIVERABLES

III. Practical Recommendation & Deliverables

1. **Form contracts:**

- a. Use a form contract solely when possible (**Exhibit 1**)
- b. Use City Form “on top” and attach vendor contract where necessary

2. **Checklists:** Use the attached checklist (**Exhibit 2**) or one of your own –

- Date
- Signatures
- Where is the written authority to sign?
- **DO NOT FORGET THE ATTACHMENTS** (posting and signed version)

3. **Timing:** Vendors sign first (ensures attachments are final)

4. **Approval:** Resolution/Ordinance Approval Language (**Exhibit 3**)

5. **Indemnification** – See **Exhibit 6** – use the AG opinion to avoid indemnification of private parties

6. **Purchasing Policy** – **Exhibit 7:**

- Small contract authority – Establish clear and useful administrator authority to contract (2,500 – 5,000 limit)
- Waiver Procedure

7. **Changes:** Do not make changes after the Board approves – limited exceptions



Questions



and Answers

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