

STATUTES DICTATE PUBLIC CONTRACTING REQUIREMENTS

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With shrinking public budgets and spiraling labor costs, many park and recreation administrators have apparently begun contracting various services to the private sector. A recent survey of 106 northeastern U.S. park and recreation agencies, for example, found that 49 percent of the respondents were using private contractors to provide services to the public. Moreover, 30 percent of the non-contracting agencies indicated that they expected to begin contracting services in the near future. Improved management and administrative flexibility were cited as major reasons for using independent contractors.

Without question, the contracting of services is a growing trend in the United States. Most of the contracting agencies in the aforementioned study conducted by Rod Warwick of Pennsylvania State University Department of Recreation and Parks, indicated that they had adopted such an approach within the past five years. For those respondents using contractors, such services typically averaged 10 percent of the overall park and recreation budget. In addition to maintenance functions, sports and games activities were the park and recreation programs most frequently contracted.

While the use of private contractors may appear to be an attractive low cost alternative to providing public service delivery systems, there are certain legal constraints which have been imposed on the municipal contracting process. Once administrators become familiar with some of these basic principles of public contract law, they may possibly avoid the legal hassles which have plagued public contracting agencies in the past.

The following discussion introduces some of the more likely problem areas as indicated by a review of reported court decisions. The decision to contract or not, however, should be based upon a detailed analysis of policy and managerial objectives in concert with local counsel's review of pertinent statutes and court decisions.

GENERAL LEGAL PRINCIPLES

The power and authority of local governments to enter into contracts is derived from the sovereignty of the state. As a result, a given type of contract which cannot trace its genesis to some expressed or implied legislative authorization from the state is *ultra vires*, and consequently void. An action is *ultra vires* when it exceeds prescribed legal powers.

Local governments are customarily given a general power to contract which is ordinarily interpreted to authorize all contracts necessary to accomplish the purposes and objectives of the local governmental unit as expressed in the state constitution, state laws, or corporate charter

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(Antieau, Municipal Corporations Law § 10:13). For example, Virginia state law authorizes local park authorities “to enter into any contracts. . . for or relating to the furnishing of park services or facilities.”

When the manner of entering into a public contract is not prescribed by statute or charter, the adoption of a method of contracting is left in the control of the governing body of the local unit. In most jurisdictions, however, the mode of contracting is prescribed by statute or charter (Antieau § 10:30). A typical provision from the Maryland Code prescribes purchasing and contracting procedures pursuant to a municipal corporation charter:

The Council may provide by ordinance for rules and regulations regarding the use of competitive bidding and contracts for all purchases and contracts. All expenditures for supplies, materials, equipment, construction of public improvements, or contractual services involving more than one thousand dollars (\$1,000) shall be made a written contract . . . The written contracts shall be awarded to the bidder who offers the lowest bid, quality of goods and work, time of delivery or completion, and responsibilities of bidders being considered. All such written contracts shall be approved by the council before becoming effective. The clerk-treasurer may reject all bids and readvertise. The town at any time in its discretion may employ its own forces without advertising for or readvertising for bids. (Article 23B Sec. 64, Maryland Annotated Code)

As indicated in the above example, statutes and charters frequently provide that a local government shall have the right to reject any and all bids. In these jurisdictions, the lowest bidder has no right to the award of the contract, and the municipal action is upheld by the courts absent strong proof of arbitrary or illegal action (Antieau §10:50).

Statutory and charter bid requirements customarily demand that there be adequate notice given by the local government to prospective bidders announcing the need for services and inviting bids. Where competitive bidding is compulsory for local governments, the advertisement for bids must sufficiently notify prospective bidders of the kind and nature of the contract and should contain enough information to enable bidders to intelligently prepare and submit their proposals (Antieau § 10:35).

Persons contracting with local governments are held by the courts to have constructive knowledge of any constitutional or statutory limitations on contracting authority. As a result, parties who enter into contracts with local governments which are ultra vires or in excess of statutory limitations have been denied recovery for breach of such unauthorized agreements (Antieau § 10:61).

### CONTRACT RULES APPLY

The general rules of contract law governing the formation and interpretation of enforceable

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agreements apply to local governments. A valid contract must exhibit the following characteristics: 1) mutual consent of the parties to be bound by their agreement, “offer and acceptance”; 2) an exchange of promises or performance having legal significance, the basis of the bargain referred to as “consideration”; 3) no defenses which preclude contract formation such as ultra vires, fraud, or duress.

In the case of *Spray v. City of Albuquerque*, 608 P 2d 511, 1980, the Supreme Court of New Mexico found adequate consideration to establish a contract between a group of homeowners and the parks and recreation department. In this instance, the homeowners had reached an “agreement” with the parks and recreation department whereby the city promised it would not enclose an adjacent municipal golf course with a fence higher than four feet.

Without notice to the homeowners, the city later installed a five-foot fence pursuant to the new mayor’s directive.

In exchange for the city’s promise not to erect a fence higher than four feet, the homeowners argued that they had promised not to sue the city. The issue, therefore, was whether forbearance from suing constituted adequate consideration to support the alleged contract.

The Court found that the homeowners had indeed created a binding contract with the city. “In New Mexico, forbearance may be consideration for a contract where either an express agreement to forbear exists or where the circumstances otherwise suggest that a contract ought to be enforced by implying such an agreement.”

The city argued unsuccessfully in *Spray* that the alleged contract was against public policy, and therefore void, because it “may have bargained away sovereign powers delegated to the City by the State.” As a general rule, the Court said, “contracts which merely involve the proprietary or business functions of the municipality [are valid] . . . those which attempt to curtail or prohibit its legislative or administrative authority . . . are uniformly invalid.”

Proprietary functions are discretionary powers exercised by local governments for the specific benefit of inhabitants within their jurisdiction. Legislative or administrative functions are mandatory, non-delegable duties of local government to preserve the public health, safety, and welfare. According to the Court, New Mexico law clearly designated maintenance of municipal parks as a proprietary function. As a result, the homeowner contract with the city prescribing the height of the golf course fence was valid and enforceable.

### PRIOR APPROPRIATION

In the case of *Davis v. City of New York*, 270 NYS 2d 265, 1966, taxpayers challenged the city’s acceptance of \$600,924 from the family and friends of Adele Levy to erect a \$1.2 million recreational facility in Riverside Park as a memorial to Levy. In addition to the Levy money, the city had appropriated \$500,000 over two years from the capital budget. The total, however, was

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still \$99,500 less than the lowest bid of \$1.2 million. The issue, therefore, was whether the city could accept the Levy offer without a specific appropriation to cover the \$99,500 shortfall.

In most jurisdictions, statutes or charter provisions require local government contracts to be preceded by a budgeted item or general appropriation to cover the cost of the contract (Antieau §10:59). Reiterating this general rule in Davis, the court said. "a contract is invalid if made in excess of the previous budgetary appropriation therefore, and that the invalidity is not cured by a subsequent appropriation to cover the deficit." In this particular instance, the charter prohibited the city from entering into a contract in the absence of a prior appropriation to cover the cost. As a result, the court enjoined the city from awarding contracts to erect the Levy memorial. Despite the injunction, the court said the city had the right "to readvertise for bids and to award the contracts if the bids fall within the amount covered by the present appropriation."

### COMPETITIVE BIDDING

An exclusive services contract to sell ice cream and refreshments throughout a New Jersey county park system was challenged in the case of *Pied Piper Ice Cream Inc. v. Essex County Park Commission*, 314 A 2d 93, 1974 reversed on appeal, 334 A 2d 337, 1975. Prior to awarding the contract, the commission contacted ten local ice cream distributors to determine their service capacity. An initial evaluation by the recreation division concluded that Pied Piper and Good Humor were the only distributors capable of providing the desired service.

Informal bids were received by the commission and reviewed by the superintendent of recreation and his assistant. Based upon the superintendent's recommendation, the commission found Good Humor would best serve the needs of the community and public, and awarded Good Humor the exclusive three-year service contract. In their contract proposals, Good Humor had offered to pay the commission 12 1/2 percent of gross sales while Pied Piper had offered 16 percent. Pied Piper sued to set aside the contract alleging it violated the state competitive bidding statute.

The issue before the court was whether the competitive bidding statute applied to a contract for the provision of a convenience service involving no public funds. The trial court found competitive bidding was required solely in situations where public funds were to be expended or where the contract involved performance of a duty which the public authority was legally obligated to provide. Since the commission had no duty to provide ice cream services to park patrons and no public expenditures were involved in the contract, the trial court upheld the Good Humor contract. Pied Piper appealed the trial court's determination.

In reaching its decision, the appeals court looked to the applicable state statutes. In this instance, every contract which exceeded the aggregate sum of \$2,500, "shall be made or awarded only after public advertising for bids, and bidding therefore." The appeals court rejected the trial court's assertion that competitive bidding situations must involve a public duty or public expenditures. According to the court, "the purpose of bidding is to benefit the taxpayer by securing competition and guarding against favoritism, improvidence, extravagance, or

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corruption.” The court then applied this principle to the contract at issue. If the purpose of competitive bidding is to guard against favoritism

[W]e fail to see why the fact that the service is to be performed by a private contractor and is not required by law to be performed by the municipality should exempt it from the competitive bidding requirements of [the statute] when the cost of the service is passed directly out of the municipal treasury. It seems apparent that the same problems as those sought to be prevented or controlled by the Legislature with respect to mandatory services would as readily arise with respect to discretionary services.

In declaring the Good Humor contract null and void, the appeals court said any new service contract within the park system would have to be in full accordance with the provisions of the local public contracts law, including competitive bidding requirements. Moreover, the court stated that the commission could reject the highest bid (in this case Pied Piper’s 16 percent) “only after affording a hearing to the highest bidder, and finding upon the basis of the evidence. . . said bidder is *not responsible*.”

### BIDDER “NOT RESPONSIBLE”

In a 1972 case, *City of Inglewood v. Superior Court*, 500 P 2d 601, the Supreme Court of California was asked to define the term “lowest responsible bidder” in the state contracting statute. The lowest bidders for a civic center construction contract were subjected to a uniform point system to evaluate their respective performance capabilities. Under this procedure Argo scored second to Swinerton. Argo’s bid, however, was \$70,000 lower than Swinerton’s. The contract was awarded to Swinerton because of his superior qualifications as indicated by the point system.

The Court rejected what it called “the application of a relative superiority concept” and required an award to the lowest monetary bidder “unless it is found that he is not responsible.”

To permit a local public works contracting agency to expressly or impliedly reject the bid of a qualified and responsible lowest monetary bidder in favor of a higher bidder deemed to be more qualified frustrates the very purpose of competitive bidding laws and violates the interest of the public in having public works projects awarded without favoritism, without excessive cost, and constructed at the lowest price consistent with the reasonable quality and expectation of completion.

According to the Court, the term responsible “includes the attribute of trust-worthiness [but] it also has reference to the quality, fitness, and capacity of the low bidder to satisfactorily perform the proposed work.” If the contract is not awarded to the lowest monetary bidder, the Court said “the ineluctable implication is that [he] is not responsible.” In such instances, the Court described certain appeals rights which must be afforded to the lowest monetary bidder.

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We hold that prior to awarding a public works contract to other than the lowest bidder, a public body must notify the low monetary bidder of any evidence reflecting upon his responsibility received from others or adduced as a result of independent investigation, [and] afford him an opportunity to rebut such adverse evidence that he is qualified to perform the contract. We do not believe, however, that due process compels a quasi-judicial proceeding prior to rejection of the low monetary bidder as a non-responsible bidder.

In this case, the city's public works director testified that Argo was primarily a school contractor of four-story buildings while Swinerton had experience with high rise structures. The city, therefore, argued that Swinerton should be awarded the contract because the proposed project was deemed a high-rise structure. This problem could have been avoided if the city had stipulated high-rise construction experience in its bid specifications.

### PROFESSIONAL SERVICES

Contracts for professional services are not ordinarily subject to competitive bidding requirements. In such instances, the municipality can arguably ensure the public interest by negotiation rather than competitive bidding (Antieau § 10:33). In *Miami Marinas Assoc. v. City of Miami*, 408 So. 2d 615, 1981, the city awarded a marina management contract through competitive negotiation rather than the competitive bidding process. Competitive negotiation involves bargaining between the public entity and qualified firms as opposed to a comparison of sealed bids. Citing the applicable state statute, the court said, "an agency may engage in competitive negotiation to obtain certain professional services at fair, competitive, and reasonable compensation by negotiating separately with the three best qualified firms, commencing with the most qualified and proceeding.., to the other two firms."

According to the court, the statutory and municipal code definitions of professional services to which competitive negotiation applied were architecture, professional engineering, landscape architecture, and registered land surveying. Since the marina management contract was not among the defined professional services of either the statute or code, the court required the city to make its selection upon a review of competitive bids. In refusing to apply the professional services exception to this contract, the court said, "competitive bidding statutes are enacted for protection of the public and should be construed in a manner to avoid their circumvention."

### BID SPECIFICATIONS

A local government contract awarded pursuant to competitive bidding procedures must be substantially in accordance with the terms of the invitation to bid and the specifications (Antieau Sec. 10:54). In *Glatstein v. City of Miami*, 399 So2d 1005, 1981, the city invited bids to construct a theme amusement park on an island owned by the city. In addition to proposals based upon an

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existing plan, interested parties could submit proposals which altered or modified the design scheme. The defendant, Diplomat World Enterprises, submitted a bid based upon a modified plan for \$55 million. Despite the fact that only \$45 million had been budgeted for the project, the city awarded Diplomat the contract.

A taxpayer suit to enjoin the proposed development alleged that the Diplomat contract was contrary to the city charter which required invitations for competitive bidding to be executed according to detailed plans. Applying the following principle of law, the court agreed:

It is the duty of public officers letting contracts under the statute to adopt in advance of calling for bids, reasonably definite plans or specifications as a basis on which bids may be received. Such officers . . . are without power to reserve in the plans or specifications . . . the power to make exceptions, releases, and modifications in the contract . . . which will afford opportunities for favoritism whether any favoritism is practiced or not.

Since Diplomat's adopted proposal constituted a "material variance" from the detailed plans upon which the competitive bidding was based, the court found the city's contract with Diplomat void.

In *Cave-of-the-Winds Scenic Tours v. Niagara Frontier State Park and Recreation Commission*, 407 NYS 2d 301, 1978, the commission's invitation to bid for the operation of an escorted tour to the base of Niagara Falls contained reasonably definite specifications. Bid specifications required that "applicant must satisfy Parks that he has had satisfactory experience in the successful operation of this type of operation. . . that he presently has an organization capable of handling the required operation, and that he has a publicly recognized reputation in a similar type of operation." Only two bids were received. Argy Heating and Sheet Metal Inc. offered the commission 52 percent of gross ticket sales, while plaintiff, Scenic Tours Inc., offered 50 percent.

In a suit to annul the contract award to Argy, plaintiff argued the Commission acted arbitrarily and capriciously in accepting a bid which failed to meet the specific qualification requirement regarding satisfactory experience in this type of operation. On his bid documents, Argy admitted he had never run a similar operation; he also failed to answer a question on related experience. Regarding his qualifications to merit a concession contract for this operation, Argy entered: "Parent of nine children - three in Niagara University - some of them would help in the Concession Operation - thirty years of Business Management with History of Satisfied Customers."

Applying the following rule of law, the court found Argy's bid did not satisfactorily respond to the invitation to bid. "If the bid does not conform substantially with the advertised specifications and gives a bidder a substantial advantage over other bidders, it should be rejected." The court, therefore, annulled the contract between Argy and the Commission citing the unfair advantage

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afforded unresponsive bids.

In ignoring its own unambiguous experience requirements, and accepting Argy's bid although it did not meet these requirements... Commission gave Argy an unfair advantage over petitioner and other persons or concerns who may have been dissuaded from bidding because of the requirement of experience in concession operation.

### SUMMARY CHECKLIST

The public entity in each of the seven cases discussed above ultimately lost its contracting battle in the courts. In most instances, closer attention to details and procedures required by state contracting statutes and municipal charters would have reversed the outcome. The following list of contracting checkpoints has been extrapolated from the state court decisions discussed above. It is not meant to be all inclusive. Rather, it suggests some potential issues open to judicial scrutiny in the area of public contract law.

1. Is there adequate consideration, an exchange of promises or performance, which might create an enforceable contract with a public entity?
2. According to state law, is the contracted service a discretionary proprietary function or a non-delegable governmental duty?
3. Has there been a prior appropriation to cover the entire cost of the contracted service?
4. In contracting a public service, did the agency conform to the statutory or charter requirements for competitive bidding?
5. Has the contract been awarded to the lowest monetary bidder; if not, does the evidence support a finding of "not responsible" with an opportunity for rebuttal?
6. Does the contracted service qualify for the professional services exception to competitive bidding, allowing competitive negotiation?
7. Does the contracted service conform to bid specifications without "material variance"?