LEAGUE of MINNESOTA CITIES

INFORMATION MEMO

Competitive Bidding Requirements in Cities

Learn what types of contracts are subject to competitive bidding requirements; the methods of best value and joint contracting; and the exemptions, exceptions, and alternatives to competitive bidding. Learn about preparing bid specifications and advertising, opening, and investigating bids. Find out about permitted changes after bid award and when a city needs to require performance and payment bonds.

RELEVANT LINKS:

Minn. Stat. § 471.345.
Minn. Stat. § 412.311.
Home rule charter cities generally have a charter provision requiring that a contract that must be competitively bid must be awarded to the lowest responsible bidder or other similar term.

Minn. Stat. § 471.345, subd. 6.
A.G. Op. 430 (Dec. 29, 1981).

Minn. Stat. § 429.041, subd. 1.
See LMC information memo, *Special Assessment Toolkit*.

Foley Bros., Inc. v. Marshall, 266 Minn. 259, 123 N.W.2d 387 (1963). *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331 (Minn. 1978). *Griswold v. Ramsey County*, 242 Minn. 529, 65 N.W.2d 647 (1954).

I. Competitive bidding law

The uniform municipal contracting law (competitive bidding law) requires cities to use the competitive bidding process for certain contracts estimated to exceed a dollar threshold. Typically, this involves the solicitation of sealed bids and the award of the contract to the "lowest responsible bidder." The law makes no distinction based on the funds from which payments will be made. For example, a contract that will be paid from municipal liquor store revenues must be competitively bid if the estimated cost is expected to exceed the bidding threshold.

The competitive bidding law generally supersedes all inconsistent laws and charter provisions. A city may, however, need to comply with additional statutory requirements. For example, the competitive bidding process for local improvement projects that are paid for with special assessments has additional requirements. It is important to review any additional requirements that apply to a particular type of contract before beginning the competitive bidding process.

A. Purpose

The competitive bidding law serves three general purposes. First, it is intended to ensure city taxpayers receive the benefit of the lowest obtainable price from a responsible contractor. Second, competitive bidding provides contractors a level playing field on which to compete for city contracts. Third, it limits the discretion of contract-making officials in situations that are susceptible to fraud, favoritism, or other similar abuses.

B. Contracts subject to competitive bidding

When this memo uses the term "contract," it is only describing agreements subject to the competitive bidding law.

RELEVANT LINKS:

There are two elements that determine if the competitive bidding law applies to a particular contract: the type of contract and its estimated price.

1. Types of contracts

Minn. Stat. § 471.345, subd. 2.

The competitive bidding law applies to:

- Contracts for the sale, purchase, or rental of supplies, materials, or equipment.
- Contracts for the construction, alteration, repair, or maintenance of real or personal property.

2. Estimated price

The estimated price of the contract also determines if the competitive bidding process is required.

a. Contracts over $175,000

Minn. Stat. § 471.345, subd. 3.
See Section II. *Procedure*.

City contracts exceeding the estimated price of $175,000 must use the competitive bidding process.

b. Contracts exceeding $25,000 but not $175,000

Minn. Stat. § 471.345, subd. 4

Griswold v. Ramsey County, 242 Minn. 529, 65 N.W.2d 647 (1954).

Competitive bidding is not required on contracts that exceed $25,000 but do not exceed $175,000. However, competitive bidding on contracts in this price range is allowed. So, the city has the option of either using the competitive bidding process or making the contract by direct negotiation. If the city chooses to use the competitive bidding process, it must likely comply with the requirements of this process even though it was not originally required. If direct negotiation is used, the city must get at least two quotations when possible and keep them on file for at least one year.

c. Contracts $25,000 or less

Minn. Stat. § 471.345, subd. 5.

If the price of the contract is estimated to be $25,000 or less, the city has discretion to make the contract by obtaining quotations or it may simply buy or sell the item on the "open market." If the city chooses to use quotations for the contract, it shall be based, as far as practicable, on at least two quotations which shall be kept on file for at least one year.

d. Calculating estimated contract price

Because the competitive bidding law applies to the estimated contract price, it can sometimes be difficult to determine whether a specific contract is subject to the law.

RELEVANT LINKS:

(1) Splitting contracts

A.G. Op. 707-A-4 (Apr. 29, 1952).

Generally, the competitive bidding process may not be avoided by splitting a contract into several smaller contracts, each of which is under the competitive bidding threshold. A court will probably find a contract to be void if it is split for the purpose of avoiding the competitive bidding process.

A.G. Op. 707a-7 (Mar. 14, 1988).

It may be appropriate, however, to enter into two separate contracts for materials or work if they involve separate transactions. An example of this might be when the services of different specialty contractors are necessary to complete a particular project. In such a case, there appears to be no reason why the work or material may not be contracted for without advertising for bids if each of the contracts does not exceed the competitive bidding threshold.

Another example might be two separate contracts for different sidewalk improvements, each involving less than the competitive bidding threshold. In this situation, it appears the contracts could be let without advertising for bids if the two contracts involve separate improvements on two different streets. It will usually be more advantageous, however, to combine like improvements in a single contract, and this will probably result in the total contract amount being large enough to require competitive bidding.

Similar considerations apply in determining whether it is possible to purchase materials and contract for labor separately. The Minnesota Supreme Court has not considered this question. Whether facts support splitting a contract in a given situation must be determined on a case-by-case basis after consulting the city attorney.

(2) Used equipment and trade-in value

A.G. Op. 707A-15 (Jan. 29, 1962).
Minn. Stat. § 471.345.

Bids must be solicited if the contract's cost is estimated to exceed the competitive bidding threshold even when used items are being purchased. The competitive bidding law does not distinguish between new and used supplies, material, or equipment.

If the city will be trading in old equipment when purchasing replacement equipment, the trade-in value should not be subtracted when calculating the contract price to determine whether competitive bidding is required. In short, the contract price will be the total cash value of the new item, not the total that is paid after the trade-in is made.

(3) Sales tax

Minn. Stat. Ch. 297A.

Cities should probably include the cost of sales tax when estimating the amount of a construction contract. This will result in a closer estimate of the total cost of a construction project.

RELEVANT LINKS:

Sales tax on materials, as well as withholdings for the contractor's workers, will be included by the bidder in the total amount for a construction contract.

Although it is unclear whether sales tax should also be included when estimating the cost of a contract to purchase equipment, cities may wish to include this amount. For example, suppose a city is going to purchase office equipment priced at exactly $175,000 without sales tax and the city opts not to use the competitive bidding process because the amount does not *exceed* $175,000. The addition of the sales tax, however, brings the amount to more than $175,000. It is possible someone could argue that the contract should have been let using the competitive bidding process.

C. Joint contracting

Governmental entities may jointly contract to undertake projects and purchase services or equipment when competitive bidding is required.

1. The Joint Powers Act

Minn. Stat. § 471.59.
Handbook, *Intergovernmental Cooperation*.

Under the Joint Powers Act, any city may enter into an agreement with one or more governmental units to exercise powers common to all parties. Under such an agreement, one governmental entity may solicit bids on behalf of itself and other governmental units that are parties to the agreement.

Handbook, *Expenditures, Purchasing, and Contracts*.

Joint purchasing agreements should be made using a formal council action, such as a resolution. Ideally, cities wishing to make purchases under one set of bids or quotations should agree to do so before the request for bids or quotations is made. This allows bidders to know how many purchases are likely to be made.

A.G. Op. 1007 (Mar. 22, 1971).

The attorney general has advised that the competitive bidding requirements apply to the total amount of a joint contract, not to an individual participant's share. Thus, if the total amount of the contract is more than the competitive bidding threshold, and it is the type of contract that is subject to the competitive bidding law, sealed bids must be sought even if the city's share of the contract is less than the competitive bidding threshold.

2. Cooperative purchasing programs

Minnesota's Cooperative Purchasing Venture (CPV).

Many cities purchase a variety of supplies and equipment through cooperative programs.

MN Dept. of Administration - Materials Management Div.
112 Administration Building
50 Sherburne Avenue
St. Paul, MN 55155
(651) 201-2600.

The Department of Administration operates a cooperative purchasing program (Minnesota's Cooperative Purchasing Venture (CPV)) that all cities can join. Cities that participate in this program are allowed to purchase equipment under state contracts that the state has already competitively bid.

RELEVANT LINKS:

Minn. Stat. § 471.345, subd. 15(a).

Minn. Stat. § 471.345, subd. 15(b).

In fact, for contracts estimated to exceed $25,000, a city must consider the availability, price, and quality of supplies, materials, or equipment available through the CPV before buying through another source.

Cities also have authority to engage in joint purchasing for contracts for the purchase of supplies, materials, or equipment through a national municipal association's purchasing alliance or cooperative. The alliance or cooperative must have been created by a joint powers agreement and must purchase items from more than one source based on competitive bids or competitive quotations.

D. Best value contracting

Minn. Stat. § 16C.28.
Minn. Stat. § 412.311, subd. 2.
Minn. Stat. § 429.041, subd. 2a.
Minn. Stat. § 469.015, subd. 1a.
Minn. Stat. § 469.068, subd. 1a.
Minn. Stat. § 469.101, subd. 5a.
Minn. Stat. § 471.345, subds. 3a, 4a, and 5.

Best value contracting provides an alternative to the competitive bidding process for certain contracts. While competitively bid contracts generally must be awarded to the "lowest responsible bidder," cities may use best value contracting to award a contract for construction, alteration, repair, or maintenance work to the vendor or contractor offering the "best value." With best value contracting, cities are authorized to consider performance factors in addition to price when awarding contracts for construction projects.

Minn. Stat. § 16C.28, subd. 1b.

Rochester City Lines, Co. v. City of Rochester, 868 N.W.2d 655 (Minn. 2015) (holding the "unreasonable, arbitrary, or capricious" standard of review applies to a city's best value bidding process).

Performance criteria may include, but are not limited to:

- Quality of performance on previous projects.
- Timeliness of performance on previous projects.
- Level of customer satisfaction on previous projects.
- Record of performing projects on budget and ability to minimize cost overruns.
- Ability to minimize change orders.
- Ability to prepare appropriate project plans.
- Technical capabilities.
- Qualification of key personnel.
- Ability to assess and minimize risks.

Minn. Stat. § 16C.28, subd. 1d.

See Section II. A. 1. *Bids and proposals*.

Minnesota Department of Transportation-Best Value Procurement Training

Several Minnesota cities, counties, and school districts have received training through the Performance Based Studies Research Group.

Any staff or consultants who wish to bid out a construction project through best value contracting must first receive training in the request for proposals (RFP) process for best value contracting. The commissioner of the Department of Administration has authority to establish a training program for state and local government officials.

The law does not specify the content or amount of training required, and the training may be conducted by entities other than the Department of Administration.

RELEVANT LINKS:

Minn. Stat. § 16C.28, subd. 1(c).

See Innovative Contracting, Minnesota Department of Transportation for additional resources.

Minn. Stat. § 16C.28, subd. 1a (c).

The criteria used to evaluate best value contracting proposals must be included in the RFP. The RFP must also state the relative weight of price and other selection criteria. If an interview of the vendor or contractor's personnel is a factor in the selection criteria, the relative weight of the interview must be stated in the RFP and applied accordingly.

It appears that cities are limited to using best value contracting for either one project annually or 20 percent of their projects, whichever is greater for the first three fiscal years in which best value contracting is used.

E. Exemptions, exceptions, and alternatives

While the types of contracts subject to competitive bidding are broadly defined, a number of city contracts, purchases, or related agreements are not subject to the competitive bidding law. The following are some of the most common exemptions, exceptions, or alternatives to competitive bidding:

Minn. Stat. § 471.345, subd. 2.

Hubbard Broad., Inc. v. Metro. Sports Comm'n, 381 N.W.2d 842 (Minn. 1986).

Schwandt Sanitation of Paynesville v. City of Paynesville, 423 N.W.2d 59 (Minn. Ct. App. 1988).
A.G. Op. 707-A (Feb. 8, 1990).

- **Non-contracts**. An agreement that does not meet the definition of a contract under the competitive bidding law is exempt from the competitive bidding requirements. For example, an agreement in which a company supplied a special scoreboard system in exchange for the right to sell or lease advertising space on it was found to be exempt because it was not only a contract for "materials, supplies, or equipment." Likewise, contracts for refuse hauling and janitorial services were also found to be exempt from the competitive bidding requirements.

Minn. Stat. § 471.345, subd. 4.

- **Contracts below the competitive bidding threshold, but above $25,000.** As an alternative to competitive bidding, contracts that are estimated to cost more than $25,000, but not more than $175,000, may be made by direct negotiation. If direct negotiation is used, the council must seek at least two quotations when possible and keep them on file for at least one year after receipt.

Minn. Stat. § 471.345, subd. 5.

- **Contracts of $25,000 or less**. If a contract is estimated to be $25,000 or less, the city has the choice of making the contract upon quotation or in the "open market." If the city makes the contract upon quotation, it shall be based, as far as practicable, on at least two quotations which shall be kept on file for at least one year after their receipt.

Minn. Stat. § 471.345, subd. 16.

- **Electronic purchases through reverse auctions**. Cities may, regardless of costs, contract for the purchase of supplies, materials, and equipment through an electronic reverse auction process. Vendors compete to provide the requested supplies, materials, or equipment at the lowest selling price in an open and interactive electronic environment.

RELEVANT LINKS:

Minn. Stat. § 471.345, subd. 17.

- **Electronic sales of surplus supplies, materials, and equipment.** Cities may, regardless of value, sell surplus, obsolete, or unused supplies, materials, and equipment using an electronic process in which purchasers compete to offer the highest purchase price in an open and interactive environment.

Minn. Stat. § 471.345, subds. 3a, 4a, and 5.
Minn. Stat. § 412.311, subd. 2.
See Section I- D, *Best value contracting*.

- **Best value contracting**. Under certain circumstances, cities may use best value contracting for construction projects. Best value contracting authorizes cities to consider performance criteria in addition to price in the selection process.

Minn. Stat. § 471.345, subd. 10.

- **Shared hospital or ambulance service contracts.** Certain hospital or ambulance purchases and leases are exempt from competitive bidding if made through a shared service purchasing agreement.

Minn. Stat. § 471.345, subd. 11.

- **Some fuel contracts.** Fuel purchased by municipal power plants for the generation of power may be made using either direct quotations or competitive bidding.

Minn. Stat. § 471.345, subd. 13.

- **Guaranteed energy-savings contracts.** Contracts for energy conservation measures that will reduce energy consumption or operating costs are not subject to competitive bidding. There are additional procedural requirements that must be considered and satisfied.

Minn. Stat. § 465.035. Minn. Stat. § 471.64.
A.G. Op. 59-A-15 (Mar. 30, 1965).
A.G. Op. 707a (Mar. 5, 1986).

- **Intergovernmental contracts**. Cities do not need to follow the competitive bidding requirements when contracting for the sale, lease, or purchase of real or personal property with another government entity (federal, state, or political subdivisions).

A.G. Op. 707a-15 (Sept. 14, 1987).
Ambrozich v. City of Eveleth, 200 Minn. 473, 274 N.W. 635 (1937).

- **Real estate contracts.** The purchase or sale of real property is generally not required to be competitively bid. However, a home rule charter may require a competitive bidding process for the purchase or sale of real estate.

Krohnberg v. Pass, 187 Minn. 73, 244 N.W. 329 (1932). *Schwandt Sanitation of Paynesville v. City of Paynesville,* 423 N.W.2d 59 (Minn. Ct. App. 1988).
A.G. Op. 707a-7 (July 22, 1985). A.G. Op. 707-A (Feb. 8, 1990).

- **Professional services contracts.** Cities are not required to follow the competitive bidding process when contracting for professional services such as those provided by doctors, engineers, lawyers, architects, accountants, as well as other services requiring technical, scientific, or professional training.

RELEVANT LINKS:

Minn. Stat. § 471.6161.

See Section II- A-1, *Bids and proposals*.

- **Insurance contracts.** Cities are not required to follow competitive bidding requirements for insurance contracts. However, group insurance coverage for 25 or more employees must be solicited through a request for proposals. The request for proposals must be in writing and must include the coverage to be provided, the criteria for evaluation of carrier proposals, and the aggregate-claims records for the appropriate period. The request for proposals must be published in a newspaper or trade journal for at least 21 days before the final day for submitting proposals.

Minn. Stat. § 12.37.

Minn. Stat. § 12.03, subds. 2, 3.

Layne Minn. Co. v. Town of Stuntz, 257 N.W.2d 295 (Minn. 1977).

See Handbook, *Expenditures, Purchasing, and Contracts*.

- **Emergency contracts.** The Emergency Management Act gives cities the ability to declare an emergency for a limited period of time. During an emergency ("an unforeseen combination of circumstances that calls for immediate action to prevent a disaster from developing or occurring") or disaster ("a situation that creates an actual or imminent serious threat to the health and safety of persons"), cities are not required to use mandated contracting procedures. If the facts of the situation do not indicate that a true emergency existed, such a contract would likely be considered void.

Village of Excelsior v. F.W. Pearce Corp., 303 Minn. 118, 226 N.W.2d 316 (1975).

- **Some intergovernmental construction contracts.** Competitive bidding is not required for a cooperative agreement to construct a project with the state or with another political subdivision of the state when the other unit does the construction. This applies only where there is an agreement prior to the initial advertising for bids on the project.

Minn. Stat. § 453.59.

- **Some municipal electric power construction contracts.** A city may contract for the planning, acquisition, construction, reconstruction, operation, maintenance, repair, extension, and improvement of generation and transmission facilities without advertising for bids. The facilities must be located outside of the city's corporate limits.

Minn. Stat. § 453A.09.

- **Some municipal gas construction contracts**. A city may contract for the planning, acquisition, construction, reconstruction, operation, maintenance, repair, extension, and improvement of generation and transmission facilities within or without its corporate limits or may contract with the other public or private owners of such facilities to perform the functions listed above without advertising for bids.

Minn. Stat. § 471.345, subd. 5b.

- **Water tank service contracts**. Multi-year contracts for water tower tank maintenance work used to be an exception to competitive bidding such that professional water tank services could be negotiated on the open market. Effective for agreements entered into on or after September 1, 2018, the portion of any water tank maintenance work that includes "sale or purchase of supplies, materials, equipment or the rental thereof, or the construction, alteration, repair, or maintenance of real or personal property" must go through competitive bidding or best value contracting.

RELEVANT LINKS:

Minn. Stat. § 471.3455.

- **Public safety equipment.** A city may acquire by purchase or lease used public safety equipment without competitive bids 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. "Public safety equipment" is defined as vehicles and specialized equipment used by a fire department in firefighting, ambulance, and emergency medical treatment services, rescue, and hazardous materials response.

Minn. Stat. § 469.015, subd. 4.

- **HRA exceptions**. Under certain circumstances, a housing and redevelopment authority does not need to comply with competitive bidding requirements.

Minn. Stat. § 462.358, subd. 2a.

- **Public improvements made by a subdivider.** The construction and installation of public improvements made by a subdivider or a subdivider's contractor do not need to comply with competitive bidding requirements.

II. Procedure

The competitive bidding process generally includes the following steps:

- Preparation of bid specifications.
- Publication of bid advertisement.
- Opening and tabulation of bids.
- Investigation of bids.
- Disposition of bids.

See Section II-F.

Cities may have additional requirements to follow, depending upon city policies, charter provisions, or the specific nature of the contract. In addition, city officials should be aware of how the information they receive is classified under the Minnesota Government Data Practices Act (MGDPA).

A. Preparation of bid specifications

Coller v. City of St. Paul, 223 Minn. 376, 26 N.W.2d 835 (1947).
A.G. memorandum to public officials (Feb. 22, 1974).

Before seeking bids, the city must prepare plans and specifications. The specifications should provide bidders a basis on which to bid that attracts as many bidders as possible and treats all of them fairly. Cities should keep the following general rules in mind when preparing specifications:

Davies v. Village of Madelia, 205 Minn. 526, 287 N.W. 1 (1939).

- The specifications must be sufficiently definite to give prospective bidders a "reasonable basis" on which to bid. Whether specifications are sufficiently definite is determined on a case-by-case basis.

RELEVANT LINKS:

Minn. Stat. § 471.35.
Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951).

- The specifications may not be drawn in such a way as to exclude all but one type or kind of supplies or equipment. The specifications must permit free and unrestricted bidding. However, this does not mean the specifications must be drawn to include every possible bidder.
- In situations where drawing tight specifications would have the effect of unreasonably limiting competition, the city may draw the specifications so as to include a variety of more or less comparable equipment so officials can evaluate the resulting submissions based on overall value. If this kind of procedure is used, it is a good idea to include a statement to that effect within the specifications. This will tell bidders how the bids will be evaluated and what factors will be considered in addition to price. In this type of situation, the specifications should spell out the minimum functions the equipment must perform to be acceptable.

1. Bids and proposals

Minn. Stat. § 16C.02, subds. 11, 12.

See Appendix A, Outline of a Request for Proposal.

Ad for Sealed Equipment Bid, LMC Model Form.
For construction projects see Section II-B-1, Content – *Responsible contractor requirements.*

While often used interchangeably, there are differences between a request for proposals (RFPs) and a request for bids (often referred to as a "bid advertisement" or "advertisement for bids"). A bid advertisement is used to obtain sealed bids that indicate the price for which a bidder is willing to perform a contract that was specifically defined by the city. In contrast, an RFP broadly defines the scope of the contract, and asks interested persons for proposals that specifically define the services that will be offered and the amount they will cost. RFPs are commonly used for contracts that are not required to be competitively bid, such as contracts for professional services.

Minn. Stat. § 16C.28, subd. 1(c).
Minn. Stat. § 16C.02, subd. 12.
See Section I- D, *Best value contracting.*

The best value contracting alternative uses RFPs in the solicitation and selection process. Otherwise, the competitive bidding law does not provide for the use of a "request for proposal."

2. Noncompetitive supplies and equipment

Minn. Stat. §§ 471.35-.37.
Major Indus., Inc. v. Krech, Ojard & Associates, Inc., No. A04-1052 (Minn. Ct. App. Dec. 21, 2004) (unpublished opinion).

State law makes it a gross misdemeanor to draft specifications to exclude all but one type of supplies or equipment. However, there is an exception for noncompetitive supplies and equipment. Just what would be considered "noncompetitive" supplies or equipment is not clear. Even though noncompetitive supplies or equipment are an exception from the requirement concerning specifications, they are still subject to the other competitive bidding requirements.

3. Restrictive specifications

Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951).

Minnesota courts have recognized that some items are not capable of precise specifications.

RELEVANT LINKS:

Otter Tail Power Co. v. MacKichan, 270 Minn. 262, 133 N.W.2d 511 (1965). A.G. Op. 707a-12 (May 23, 1962).

Hendricks v. City of Minneapolis, 207 Minn. 151, 290 N.W. 428 (1940).

While the city will be allowed some latitude in specifying features of a complicated piece of equipment, it must have a clear reason for restrictive specifications. Where reasons for such restrictions cannot be shown, they are considered to stifle competition and will not be upheld.

A city can, within reason, require specific materials or particular methods of financing as long as the requirements are in the best interests of its inhabitants, even if such restrictions may limit the number of possible bidders.

4. Terms and conditions

A.G. memorandum to public officials (Feb. 22, 1974).

The attorney general has suggested that cities should take great care in identifying the contractual obligations of both parties in the specifications. Cities should address:

- The city's right to reject all bids.
- What the city views as the most important award factors.
- The where and when of delivery.
- Any necessary patent protection.
- Liquidated damages.
- Any required maintenance and related services.
- The provisions of any warranties.
- How training on the use of equipment will be provided.
- How conflicts will be resolved if a dispute arises regarding the contract.
- Time of delivery.
- The specifics of acceptance.
- Whether the city is purchasing on a unit or lot basis, and the reasons why the plans and specifications are restrictive (if they are).
- The period of time for which the vendors bid is to be firm.
- Any other special conditions relating to the items to be purchased.

These obligations should be dealt with clearly in the plans and specifications. Spelling out the terms and conditions will give both the city and any prospective bidders a fuller understanding of their rights and responsibilities. It can also help to minimize controversies and inefficiencies in the performance of the contract.

5. Vendor assistance

See LMC information memo, *Official Conflict of Interest*.

Vendors often assist cities in drafting contract specifications. In these situations, cities should seek an agreement from these individuals not to bid on the project for which they have drawn the specifications. Otherwise, the vendor may have an unfair advantage when bidding on the contract.

RELEVANT LINKS:

6. Pre-qualification of bidders

When preparing specifications, cities are sometimes interested in the possibility of evaluating contractors before bids are submitted. The authority of cities to require bidders to pre-qualify before allowing them to bid on a contract is unclear.

See Section II-D, *Investigation of bids*.

Requiring bidders to meet minimum qualifications in advance would potentially eliminate irresponsible bidders and reduce the total number of bids the city will need to consider. It also may give potential bidders an idea of the criteria the council will use to determine the responsibility of the bidders.

Although it is arguable that a pre-qualification requirement is within a city's powers, it is not possible to cite any direct authority for such a practice. However, decisions in cases from other states suggest that pre-bid criteria are permissible when established under a state policy. Cities may want to have their city attorneys consider any pre-qualification criteria that are being considered for bidders.

Westra Constr., Inc. v. City of Minnetonka, No. A03-50 (Minn. Ct. App. Dec. 30, 2003) (unpublished opinion).

In an unpublished decision, the Minnesota Court of Appeals upheld the use of bid-evaluation criteria by the City of Minnetonka (a home rule charter city). The criteria were not used as true pre-qualification criteria because they were not used to exclude anyone from bidding. Instead, they were used to determine which bidders were eligible to be considered for the contract award. Bidders were given scores based on criteria including their history for doing similar projects on time and on budget. Only bidders with a 10-point minimum score were eligible to be considered for being awarded the contract.

7. Bid preference for veteran-owned small businesses

Minn. Stat. § 471.3457.
Minn. Stat. § 471.345.
Minn. Stat. § 375.771.

Cities may implement programs to provide designated veteran-owned small businesses with a bid preference when awarding contracts for the sale, purchase, or rental of supplies, materials, or equipment or for the construction, alteration, repair, or maintenance of real or personal property or for services.

B. Publication of bid advertisements

Cities provide public notice when they are going to award a contract through the competitive bidding process. The following discusses the minimum requirements. Cities may choose to provide additional notice. A longer period of advertising can increase the number of bidders and improve the chances of achieving better contract terms.

RELEVANT LINKS:

In addition, the city may want to mail an invitation or personally contact those contractors it thinks might be interested in submitting a bid.

LMC Marketplace.

The League will post, at no cost to member cities, bid advertisements on its website.

1. Content—Responsible contractor requirements

The published notice should contain the following information:

Ad for Sealed Construction Project Bid, LMC Model Form.

- A description of the project or purchase being sought.
- The availability and location of specifications.
- Bid requirements (such as sealed bids or accompanying security).
- Where bids must be submitted.
- The deadline for submitting bids.
- The time and place of the bid opening.
- The city officers who will be present for the opening.
- A statement indicating that the city may delay the award until certain events occur.
- A statement indicating that the city reserves the right to reject all bids submitted.

Ryan v. City of Coon Rapids, 462 N.W.2d 420 (Minn. Ct. App. 1990).

Minn. Stat. § 16C.285.

See responsible contractor clause for bid solicitation in *Ad for Sealed Construction Project Bid*, LMC Model Form.

Effective Jan. 1, 2015, specific content must appear in the solicitation document for a public construction "project" that is estimated to exceed $50,000 and is awarded pursuant to a lowest responsible bidder selection method or a best value selection method. The amount of any tax increment financing must be excluded in determining whether a construction contract exceeds $50,000. A "project" means "building, erection, construction, alteration, remodeling, demolition, or repair of buildings, real property, highways, roads, bridges, or other construction work performed pursuant to a construction contract."

Minn. Stat. § 16C.285. (A "responsible contractor" must verify compliance with various state and federal requirements, including tax, workers' compensation, unemployment insurance, wage, and safety requirements).

First, the solicitation document shall state that any prime contractor, subcontractor, or motor carrier that does not meet the minimum criteria established for a "responsible contractor" as defined in Minn. Stat. § 16C.285, subd. 3 or fails to comply with the verification requirements is not a responsible contractor and is not eligible to be awarded a construction contract for the project or to perform work on the project. Second, the solicitation document shall provide that a false statement under oath verifying compliance with any of the minimum criteria shall make the prime contractor, subcontractor, or motor carrier that makes the false statement ineligible to be awarded a construction project and may result in termination of a contract awarded to a prime contractor, subcontractor, or motor carrier that submits a false statement. Third, the solicitation document shall state that a prime contractor shall include in its verification of compliance a list of all of its first-tier subcontractors that it intends to retain for work on the project.

RELEVANT LINKS:

Minn. Stat. § 16C.285.

See sample Responsible Contractor Verification and Certification of Compliance, Minnesota Department of Transportation.

Minn. Stat. § 325L.02 (h).

A responding contractor shall submit to the city a signed statement under oath by an owner or officer verifying compliance with the required minimum criteria at the time that it responds to the solicitation document. A city may accept a signed statement as sufficient to demonstrate that a contractor is a responsible contractor and shall not be held liable for awarding a contract in reasonable reliance on that statement. A verification of compliance does not need to be notarized. An electronic verification of compliance made and submitted as part of an electronic bid shall be acceptable verification of compliance if it contains an electronic signature that complies with the definition in state law.

Minn. Stat. § 16C.285, subd. 5.

Before execution of a construction contract, a prime contractor shall submit a supplemental verification under oath confirming that all subcontractors and motor carriers that the contractor intends to use to perform project work have verified to the prime contractor, through a signed statement under oath by an owner or officer, that they meet the minimum criteria for a responsible contractor. In addition, each contractor or subcontractor shall obtain from all subcontractors with which it will have a direct contractual relationship a signed statement under oath by an owner or officer verifying that they meet the minimum criteria before execution of a construction contract with each subcontractor.

Minn. Stat. § 16C.285, subd. 4.

A city shall not be liable for declining to award a contract or terminating a contract based on a reasonable determination that the contractor failed to verify compliance with the minimum criteria or falsely stated that it meets the minimum criteria.

2. Time

Several factors must be considered when deciding how long an advertisement for bids must be published. It is important to consider the type of contract being advertised.

Depending upon the particular city and its policies or charter requirements, there may be special advertising requirements.

a. General publication requirements

Minn. Stat. § 412.311.

In statutory cities, bids must be solicited by notice published once in the official newspaper at least 10 days before the last day for submission of a bid.

Minn. Stat. § 410.33.

Home rule charter cities should consult their charters for any special advertisement requirements. If the charter is silent with regard to this matter, a city may utilize the requirement for statutory cities of advertising by published notice in the official newspaper at least 10 days before the last day for submitting bids.

RELEVANT LINKS:

b. Local improvement contracts

Minn. Stat. § 429.031, subd. 1.
Minn. Stat. § 429.041, subd. 1.
See LMC information memo, *Special Assessment Toolkit.*

If a city is making a contract for a local improvement under the special assessment statutes, there are special public notice and hearing requirements. Since these requirements must be met prior to advertising and awarding the contract, they are not addressed in this memo.

There are two possible advertisement requirements when seeking bids for this type of contract:

Minn. Stat. § 429.041, subd. 1.
Minn. Stat. § 331A.01, subd. 11.
Minn. Stat. § 412.311.

- **Bids for a local improvement contract estimated to exceed $175,000.** The city must advertise for bids in the official newspaper or in a recognized trade journal for the length of time the council may deem advisable. (Statutory cities must still meet the 10-day minimum advertising requirement.)

Minn. Stat. § 429.041, subd. 1.
Minn. Stat. § 331A.01, subd. 11.

- **Bids for improvement contracts estimated to exceed $350,000.** If the estimated cost of the contract exceeds twice the $175,000 threshold, or $350,000, the publication must be made at least three weeks before the last day to submit bids. The advertisement must be published at least once in the official newspaper and at least once in a newspaper that is published in a First Class city or in a recognized trade journal.

Minn. Stat. § 429.041, subd. 1.

The advertisement must specify the work to be done and state the time when the council will publicly open the bids for consideration. The advertisement must require that the bids be sealed (unless the city authorizes electronic bids), filed with the clerk, and accompanied by a cashier's check, bid bond, or certified check made payable to the clerk.

3. Alternative notice

Minn. Stat. § 331A.03.
See LMC information memo, *Newspaper Publication.*

Under certain circumstances, cities are authorized to use two alternative means of providing notice for bid advertisements either in addition to, or as an alternative to, the statutory requirements for newspaper publication.

The two alternative means of providing notice are on the city's website or in a recognized trade journal.

Minn. Stat. § 331A.03.

There are conditions that must be met when a city uses an alternative means of dissemination:

- The alternative dissemination must be in substantially the same format and for the same period of time as required for newspaper publication.
- The city must simultaneously publish, either as part of its regular meeting minutes or in a separate notice, a description of all the solicitations being disseminated through alternative means.

RELEVANT LINKS:

- For the first six months after a city designates an alternative means of dissemination, it must continue to publish bid advertisements in the official newspaper in addition to the alternative method. The newspaper publication must indicate where to find the designated alternative method.

After the expiration of the six-month period, an alternative means of dissemination satisfies any publication requirements.

C. Opening and tabulation of bids

Bids should be kept unopened by the clerk until after the closing time for receiving them. At the time set by the council in the advertisement, the bids should be opened publicly in the presence of the officials named in the bid notice. All bids should be opened and tabulated at a public meeting by the council or in advance of the council meeting by designated officials.

Generally, bids should be opened prior to the meeting at which the council will consider them, preferably on the same day. This enables the engineer or clerk to tabulate each bid in advance, which will reduce the time spent on the matter during the council meeting.

1. Bids received electronically

Minn. Stat. § 471.345, subd. 18.

Cities are authorized to allow bidders to submit bids electronically. Cities are also authorized to allow bid, performance, and payment bonds, as well as other security, to be furnished electronically. The bid advertisement should specify the form and manner required for electronic submission.

Cities should also consider adopting policies for how the "opening" of electronic bids will be handled. For example, cities may want to designate a staff person to receive the electronic bids and be responsible for printing a hard copy of them.

Cities may also want to designate a staff person to be responsible for keeping the amount and terms of the electronic bids private until the time and date specified in the solicitation that bids are due, at which time the name of the bidder and the dollar amount specified in the response become public.

2. Bids received by facsimile

Minn. Stat. § 471.345, subd. 3.

It appears cities cannot accept a bid sent to them through a facsimile machine. According to the competitive bidding law, bids generally must be "sealed." Facsimile bids would not meet this requirement.

RELEVANT LINKS:

D. Investigation of bids

After all bids have been opened, the council should investigate them. Information should be obtained to help the council evaluate each of the bidders. This may be carried out by the city engineer, purchasing agent, clerk, or other designated person. The following elements are usually considered during the evaluation process:

- The responsibility of the bidder and the probability of the bidder's adequate performance.
- Compliance with specifications.
- Reasonableness (including how the bids compare to cost estimates).
- Any other relevant factors.

1. Lowest responsible bidder

Minn. Stat. § 412.311, subd. 1.
Minn. Stat. § 429.041, subd. 2.

Statutory city contracts and contracts of all cities for improvements under the local improvement code must generally go to the "lowest responsible bidder." Most home rule city charters contain similar requirements, with terms such as "lowest bidder" or "lowest and best bidder" describing their selection process.

Coller v. City of St. Paul, 223 Minn. 376, 26 N.W.2d 835 (1947). *Foley Bros., Inc. v. Marshall,* 266 Minn. 259, 123 N.W.2d 387 (1963).

The phrase "lowest responsible bidder" does not mean the lowest bidder, but the lowest bidder who is most likely to do faithful, conscientious work and promptly fulfill the contract according to its letter and spirit. In determining who the lowest responsible bidder is, the courts have said that the council has reasonable discretion.

State v. Snively, 175 Minn. 379, 221 N.W. 535 (1928). *Kelling v. Edwards*, 116 Minn. 484, 134 N.W. 221 (1912).

The successful bidder must be considered "responsible" to perform the proposed contract. "Responsibility" includes such things as the bidder's financial responsibility, integrity, ability, skill, and likelihood of providing faithful and satisfactory performance.

Nielsen v. City of St. Paul, 252 Minn. 12, 88 N.W.2d 853 (1958).

In determining the lowest responsible bid, the council may take into consideration not only the lowest price offered, but also the actual capability of a given vendor to perform the proposed contract and whether the bidder has adequately met the terms and conditions of the bid specifications.

Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951).

The council has somewhat more latitude in purchasing items of equipment that are not capable of exact specifications. In making such a purchase, a council may exercise reasonable discretion in determining the lowest responsible bidder. In addition to the bid price, it may consider the quality, suitability, and adaptability of the equipment.

Otter Tail Power Co. v. Village of Wheaton, 235 Minn. 123, 49 N.W.2d 804 (1951).

In some situations, the council may decide what weight to give to various factors and accept what it deems to be the lowest responsible bid.

RELEVANT LINKS:

Such a situation occurred when plans and specifications for the construction of a power plant demanded the consideration of several factors and no single bid was the lowest in all the factors. The court agreed the city council could use its discretion to determine which elements were the most important and said that such a contract will not be set aside without an abuse of discretion.

A.G. Op. 707a-15 (Oct. 25, 1966).

In awarding a contract for the purchase of an item, such as a police car, a council may be able to consider the proximity of repair and service facilities in addition to the bid's price.

Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951). *Leskinen v. Pucelj*, 262 Minn. 461, 115 N.W.2d 346 (1962).

In extreme situations, time and certainty of delivery may be grounds for not choosing the lowest bidder. However, when a city is awarding a contract on a basis other than the lowest bid, it should be able to justify its decision.

2. Conformity to plans and specifications

A successful bid must conform to the bid specifications. Unless the bid responds to the specifications in all material respects, it is not a bid but a new proposition and, therefore, should be rejected.

Sutton v. City of St. Paul, 234 Minn. 263, 48 N.W.2d 436 (1951). *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204 (Minn. 1990).

Coller v. City of St. Paul, 223 Minn. 376, 26 N.W.2d 835 (1947). A.G. Op. 980-B (June 2, 1950). *Duffy v. Village of Princeton,* 240 Minn. 9, 60 N.W.2d 27 (1953).

A bidder who has deviated from the specifications may still be awarded the contract if it was not a material deviation. The general rule is that a variance is material if it gives a bidder a substantial advantage or benefit over other bidders. Whether a material variance exists is a fact question that must be dealt with on a case-by-case basis. The following deviations were found to be material:

Diamond v. City of Mankato, 89 Minn. 48, 93 N.W. 911 (1903).
Coller v. City of St. Paul, 223 Minn. 376, 26 N.W.2d 835 (1947).

- A difference in the contract's payment date that was four months earlier than the date provided for in the specifications.
- A stipulation that the equipment sold to the city be installed according to the company's specifications instead of those of the city, and failure of the bidder to agree to pay for a city inspector during the six-month trial period as called for in the specifications.
- Modification to allow a bidder earlier payment and a change of specifications to relieve the bidder from completion penalties if the delayed performance was due to circumstances beyond the bidder's control.
- Bidder's deviation by adding a 10-percent escalation clause.
- Submission of a single bid for an entire contract when the specifications asked for separate bids for the contract's four parts.
- Allowing a bidder to increase its bid because of a mathematical error and selecting the modified bid because even after the modification the increased bid was still the lowest.

LeTourneau v. Hugo, 90 Minn. 420, 97 N.W. 115 (1903).

A.G. Op. 707-B-7 (May 21, 1946).

A.G. Op. 707-a-4 (June 4, 1947).

Rochon Corp. v. City of Saint Paul, 814 N.W.2d 365 (Minn. Ct. App. 2012).

RELEVANT LINKS:

Foley Bros. v. Marshall, 123 N.W.2d 387, 390 (Minn. 1963).

Carl Bolander & Sons Co. v. City of Minneapolis, 451 N.W.2d 204, 207-08 (Minn. 1990).

Lovering-Johnson, Inc. v. City of Prior Lake, 558 N.W.2d 499, 503 (Minn. Ct. App. 1997).

- Variations that affect "price, quality, or quantity, or the manner of performance, or other things that go into the actual determination of the amount of the bid."
- Failure to comply with specification by listing a women-owned subcontracting firm with which the bidder would use best efforts to enter into a subcontract.
- Deleting a plus sign from a defective bid so it became the lowest bid.

Alternatively, minor irregularities and deviations are generally not viewed as material. This is especially true of technical irregularities where requirements are intended for the benefit of the city and do not injure other bidders. The following were not found to be material deviations:

Foley Bros., Inc. v. Marshall, 266 Minn. 259, 123 N.W.2d 387 (1963).
A.G. Op. 707-A-3 (May 6, 1953).
Nielsen v. City of St. Paul, 252 Minn. 12, 88 N.W.2d 853 (1958).

- Failure to submit a required non-collusion affidavit on a specified form when a similar non-collusion certificate was submitted instead.
- Submission of a personal check instead of the required certified check as bid security.
- Failure to describe bidder status properly.
- Failure to have a bid bond notarized.
- Neglect in sealing a bid.
- A few minutes delay in submitting the bid.

3. Changes and mistakes in bids

Griswold v. Ramsey County, 242 Minn. 529, 65 N.W.2d 647 (1954). A.G. Op. 161-A-8 (Jan. 5, 1965). *Duininck Bros., Inc. v. State*, C3-97-972 (Minn. Ct. App. Nov. 25, 1997) (unpublished opinion). *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499 (Minn. Ct. App. 1997). *Rochon Corp. v. City of Saint Paul,* 814 N.W.2d 365 (Minn. Ct. App. 2012).

Tunny v. City of Hastings, 121 Minn. 212, 141 N.W. 168 (1913). *Rochon Corp. v. City of Saint Paul*, 814 N.W.2d 365 (Minn. Ct. App. 2012).

Sometimes contractors will discover that their bids contain a mistake after bids have been opened. Generally, a bidder should not be allowed to alter his or her bid substantially after the bid opening since this would give the bidder a substantial advantage over other bidders. For example, courts have found that a price term and an ambiguous contract bid price were mistakes that could not be waived. If the bidder is the low bidder because of the mistake, and the bid has been accepted before the mistake is discovered, the city may not award the contract for the corrected amount. This is unfair to the other bidders.

However, if the council chooses to reject all bids and advertise again, a bidder may submit a new, corrected bid (not knowing, of course, whether his or her new bid will be low the second time).

In general, a bidder will be relieved of the obligation to enter into a contract because of a unilateral mistake if all of the following apply:

- The mistake is so substantial that it is unreasonable to suppose the contractor would have submitted the bid.
- The mistake was not the product of the bidder's gross negligence.
- The contractor gives prompt notice of the error to the city.

RELEVANT LINKS:

2 A.L.R.4th 991 (1980).

- The city has not changed its position in reliance on the bid and has suffered no damage other than the loss resulting from the bid mistake.

The contractor must sufficiently identify the error to permit the city to determine that the contractor is entitled to relief. The contractor is given relief when the error is obvious to the city when the bid is read.

A contract may be rescinded for a unilateral mistake. The mistake may stem from a clerical error, such as transposing numerals, from forgetting to include the amount for performing a segment of the work, or from a math error. For example, a court found that the omission of the structural steel to be used in church construction was such a mistake.

St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N.W. 500 (1916).

The mistake may also stem from an error of judgment concerning the nature of difficulties of the work, the quality of materials required, or other judgmental factors. Such a situation occurred where a contractor mistakenly bid based on earth excavation when, in fact, a large part of the excavation was through solid rock.

Tunny v. City of Hastings, 121 Minn. 212, 141 N.W. 168 (1913).

Lawsuits involving mistakes in bids may arise either in actions by the city against the contractor or bid-bond surety, or both. The city may ask for the amount of the bond, or the difference between the low bid and the second lowest bid.

City of Lonsdale v. NewMech Cos., Inc., Nos. A07-0105, A07-0107, A07-0108 (Minn. Ct. App. Jan. 22, 2008) (unpublished decision).

A contractor may also sue for the return of the bid bond. The city may relieve a mistaken bidder of the consequences of his mistake.

Minn. Stat. § 574.27.

When a mistaken bid is superseded or abandoned by the parties, the bidder is entitled to a return of the deposit or cancellation of the security.

When a low bidder refuses to sign a contract because of a material mistake in the bid, the city must decide whether to accept the second low bid or reject all bids and re-advertise. The city should also consider the time and expense involved in rebidding, as well as the possibility of higher bids on the second attempt. The delay may result in higher costs and less competition. The delay can also result in less favorable weather during construction. Generally, it is expensive for contractors to submit bids. Some contractors, having once bid a job and disclosed their price, may refuse to bid again.

E. Disposition of bids

A.G. Op. 707-a-1 (Mar. 28, 1955).

After investigation of the bids, the council may either accept one of the bids or reject all of them. If there are no bids, the council should re-advertise. Cities that find themselves in this type of situation may reach more potential bidders by revising the bid specifications or re-advertising in publications with a larger circulation.

RELEVANT LINKS:

Minn. Stat. § 429.041, subd. 2.

Generally, a lack of response from bidders does not eliminate the requirement to use the competitive bidding process. However, on a local improvement project under the special assessment statutes, if there are no bidders or if the only bids exceed the engineer's estimate, the council may choose to do the work by day labor.

1. Rejecting bids

Minn. Stat. § 429.041, subd. 2.

The local improvement code gives the city the right to reject any and all bids, even if the city doesn't include such a statement in the advertisement for a local improvement. The same is true of any city with a similar charter provision applying to other contracts.

Elec. Unlimited, Inc. v. Village of Burnsville, 289 Minn. 118, 182 N.W.2d 679 (1971).

In any other case, the city should reserve the right to reject any or all bids or to waive informalities or irregularities. It is possible that if the city has not reserved the right to reject any and all bids, a court action could compel the city to award the contract to the low bidder.

2. Delays in accepting bids

See Section II. A. *Preparation of bid specifications*.

In the bid specifications, the city may put bidders on notice that there may be a delay in accepting a bid until certain events occur.

For example, in a project that will be paid for with special assessments, a city may wish to delay awarding a bid until the time for appealing the special assessments has passed.

F. Data practices

Minn. Stat. ch. 13.

See LMC information memo, *Data Practices: Analyze, Classify, Respond*.

The Minnesota Government Data Practices Act (MGDPA) is a series of state laws that attempt to balance the public's right to know what their government is doing, individuals' right to privacy in government data created and maintained about them, and the government's need to function responsibly and efficiently. The MGDPA divides all government data into broad classifications that determine who can access the data.

1. Bid information

Minn. Stat. § 13.591, subd. 3(a).
Minn. Stat. § 13.37, subd. 2.

When cities use the competitive bidding process, sealed bids are not public until the time and date specified in the solicitation that bids are due, at which time the name of the bidder and the dollar amount specified in the response become public. All other data in a bidder's response to a bid is not public data until completion of the selection process.

Minn. Stat. § 13.591, subd. 3(a).

"Completion of the selection process" means the city has completed its evaluation and has ranked the responses.

RELEVANT LINKS:

Minn. Stat. § 13.37.
DPO 08-021.

After a government entity has completed the selection process, all remaining data submitted by all bidders is public (with the exception of anything that might be considered a "trade secret" under the law).

Minn. Stat. § 13.591, subd. 3(a).

If all bids are rejected prior to completion of the selection process, all data (other than the name of the bidder and the dollar amount specified in the response) remains not public until either:

- The selection process is completed after a re-solicitation of bids.
- The city decides to abandon the purchase.

Minn. Stat. § 13.591, subd. 3(a).

If the rejection occurs after the completion of the selection process, the data remains public. If a re-solicitation of bids does not occur within one year of the bid opening date, the remaining data becomes public.

2. Proposals

Minn. Stat. § 13.591, subd. 3(b).

Data submitted by a business to a city in response to an RFP are not public data until the time and date specified in the solicitation that proposals are due, at which time the name of the responder becomes public. All other data in a response to an RFP are private or nonpublic data until completion of the evaluation process. "Completion of the evaluation process" means that the city has completed negotiating the contract with the selected vendor.

Minn. Stat. § 13.591, subd. 3(b).

After the city has completed the evaluation process, all remaining data submitted by all responders are public, with the exception of trade secret data.

Minn. Stat. § 13.591, subd. 3(b).

If all responses to an RFP are rejected prior to completion of the evaluation process, all data, other than the names of the responders, remains not public until either:

- The selection process is completed after a re-solicitation of proposals.
- The city decides to abandon the purchase.

Minn. Stat. § 13.591, subd. 3(b).

If the rejection occurs after the completion of the evaluation process, the data remains public. If a re-solicitation of proposals does not occur within one year of the proposal opening date, the remaining data becomes public.

DPO 03-014.

A business submitting a proposal may give written consent to the release of non-trade secret data prior to the opening of all proposals, so long as a city informs the business of the possibility that such data could be released during the time that the statute classifies the data as not public.

3. Proprietary information

5 U.S.C. § 552(b)(4).

A statement that data submitted in support of a bid or proposal is copyrighted, "proprietary," or otherwise protected is insufficient to prevent public access to the data contained in the bid.

RELEVANT LINKS:

Nat'l Council on Teacher Quality v. Minnesota State Colleges & Univs., 837 N.W.2d 314 (Minn. Ct. App. 2013).

Minn. Stat. § 13.37, subd. 2.

Minn. Stat. § 13.37, subd. 2.

This is important because, while the Federal Freedom of Information Act does allow data to be withheld if marked "proprietary," Minnesota state law is more restrictive. However, the Minnesota Government Data Practices Act cannot be interpreted to require a government body to violate the Federal Copyright Act.

When issuing a request for bids or proposals, a city may indicate the distinction between state and federal law and the need to mark any data claimed to be a trade secret. Potential respondents can be instructed to submit a separate letter to the responsible authority explaining how the data they claim is trade secret data meets the criteria. It is then the duty of the responsible authority to determine the appropriate classification.

III. Contracts

Minn. Stat. § 412.691.

Generally, only the council may enter into contractual agreements on behalf of the city; individual councilmembers, council committees, and city administrative officers do not have that authority. However, city managers of Plan B statutory cities may let contracts when the amount does not exceed $20,000. Home rule charters often provide similar limited authority as well.

Minn. Stat. § 412.201.

State ex rel. Kron v. Hodapp, 104 Minn. 309, 116 N.W. 589 (1908).

The council should approve every contract by resolution. In addition, in statutory cities, the mayor and the clerk (or the manager in Plan B cities) must sign and affix the city seal to the contract. As long as the contract expresses an agreement of the council as a whole, and as long as there is no other reasonable doubt concerning the contract's legality, these officials may not, based on their own judgment, refuse to execute the contract.

A. Delivery methods

The following is an overview of some of the different types of contract delivery methods.

1. Design/bid/build contracts

See *Primer on Project Delivery* (2nd ed. 2011), The American Institute of Architects and The Associated General Contractors of America.

The design/bid/build delivery method is the most traditional type used for building construction. With this process, the city contracts with an architect who designs the building. The architect's drawings are then used as the specifications to advertise for bids on the construction of the building. The winning bidder is contracted with to build the building.

The strength of this method is that it allows the city to plan the entire building before construction begins. It also allows for some follow-up between the contractor and the architect. The weakness of this type of contract is that disagreements can arise between the city, the architect, and the general contractor because of competing interests.

RELEVANT LINKS:

For example, the architect may not be aware of the most current cost of materials and procedures, or the costs could change significantly between the time the building was designed and the time the construction begins. This procedure is slow because the project must be entirely planned out and bid before the construction costs can be fixed.

2. Construction manager

See *Primer on Project Delivery* (2nd ed. 2011), The American Institute of Architects and The Associated General Contractors of America. Handbook, Expenditures, Purchasing, and Contracts (pg. 41).

With this method, the city hires a construction manager, who is responsible for overseeing the contractor or advising the city if the city is acting as the general contractor. Often, the city will take the responsibility for purchasing the construction materials.

The strengths with a construction manager are that the city can avoid contractor mark-ups on the cost of materials, and the city can have additional supervision and feedback on the architectural design and construction.

Weaknesses include the possibility of higher administrative costs for the city and possible delays because the responsibility for purchasing materials is not that of the contractor. There also can be more opportunities for disagreements between the city, architect, and contractor.

Note – Occasionally, the League is asked about whether cities can utilize a Construction Manager- At Risk project delivery method (often referred to as "CMAR" or "CM/GC"). A traditional Construction Manager at Risk method (where the Construction Manager awards the subcontracts) is not possible for cities because it does not comply with competitive bidding laws. It may be possible to conduct a modified form of Construction Manager- At Risk where the city itself conducts competitive bidding on the subcontracts or prime contracts. However, drafting these documents and utilizing this method requires involvement of experienced construction attorneys.

3. Design/build

W.V. Nelson Constr. Co. v. City of Lindstrom, 565 N.W.2d 434 (Minn. Ct. App. 1997). See *Primer on Project Delivery* (2nd ed. 2011), The American Institute of Architects and The Associated General Contractors of America.

With design/build, the city hires a firm whose architect and contractor design and construct the building. The design/build construction method does offer advantages over other construction methods, but it is not suited to every construction project. In addition, design/build contracts must still comply with competitive bidding laws. Currently, only the state of Minnesota is expressly authorized to use the design/build process (although it has been authorized for local governments in the past as part of a pilot project). These types of contracts are complex and fact-specific. Cities considering using this method should consult with their city attorney.

RELEVANT LINKS:

The strengths of the design/build delivery method are that the construction and design costs are established early and the responsibility for the entire project is with one firm. As a result, the architect and the contractor work together on the project. This type of procedure may also be faster because the construction can begin while the final design is still being finished.

The weaknesses of the design/build method are that the project may not be completely planned in advance, and the city may have less access to and control over the architect. Additionally, there is often little opportunity for outside checks and balances by other professionals because the responsibility for the project rests with one organization.

4. Lease purchase agreements

Minn. Stat. § 465.71.

Cities may lease real or personal property with an option to buy under a lease purchase agreement. For the purpose of the bid requirements, the amount of the contract must include the total of all lease payments for the entire term of the lease. The city must have the right to terminate a lease-purchase agreement at the end of any fiscal year during its term and should be certain that any lease-purchase agreement contains language that gives it this right.

5. Conditional sales contract

Minn. Stat. § 412.221, subd. 2.

Statutory cities may purchase personal property under a conditional sales contract. The purchase price must be paid within five years. The seller is limited to the recovery of the property in the case of nonpayment.

Minn. Stat. § 412.221, subd. 2.

The city must publish a resolution stating its intent to enter into a conditional sales contract for a purchase if the contract price exceeds 0.24177 percent of the estimated market value of the city. The publication must occur at least 10 days before the city makes the contract.

If 10 percent of the number of voters who voted in the last regular city election submits a petition asking for an election, the city cannot enter into the contract until the purchase is approved at an election.

Minn. Stat. § 410.33.

Home rule charter cities may enter into a conditional sales contract even if their charters are silent on this matter.

6. Total cost bidding

Traditional bidding on an item of equipment has focused exclusively on the purchase price. This method has the advantage of simplicity and in many cases is adequate to ensure the lowest overall cost. In making some purchases of equipment, however, lowest purchase price bidding may ignore other important elements of the cost.

RELEVANT LINKS:

To take account of these costs, some cities have used a method known as total cost bidding. Under this system, the city considers all of the costs of purchasing, owning, operating, and maintaining the equipment it will purchase. Specifications require vendors to bid not only the initial price of the equipment, but also a number of minimum after-purchase costs for a specific period, such as maintenance. The bid is generally backed by a bond to ensure performance by the vendor.

Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951).

Total cost bidding is not specifically authorized by statute in Minnesota. Arguments have been made that such bidding violates competitive bidding requirements because it restricts competition.

Otter Tail Power Co. v. Village of Wheaton, 235 Minn. 123, 49 N.W.2d 804 (1951).

The Minnesota Supreme Court has never considered the validity of such bidding, although it has held that a council has reasonable discretion in determining the lowest responsible bidder.

A.G. Op. 707a-7 (Jan. 9, 1968).
A.G. Op. 707a-7 (June 12, 1967).

The attorney general has issued mixed opinions regarding total cost bidding. It was upheld in a situation where bidders were required to include both a provision for a guaranteed minimum repurchase price and for a guaranteed maximum repair cost. The reason behind this conclusion was that such specifications were reasonably designed to give all contractors an equal opportunity to bid. In addition, the specifications seemed to ensure taxpayers would get the best bargain for the least money. In an earlier opinion, the attorney general had disapproved of total cost bidding.

7. Cost-plus contracts

A.G. Op. 707-a-6 (Aug. 21, 1950).

Cities may not make cost-plus contracts for construction work of any kind. Cost-plus contracts are those in which the governing body agrees to pay the contractor for all costs the contractor incurs on the project plus some additional sum of money. In effect, there is no competition on the cost of labor or materials and no indication of how much work is required or will be done. As a result, there is no basis for comparing the bidders except on the percentage for overhead and profit.

The attorney general has advised that a bid on a cost-plus basis does not meet the statutory provisions for competitive bidding.

A.G. Op. 707-D-6 (Aug. 9, 1946). A.G. Op. 707-B-7 (Nov. 14, 1947). A.G. Op. 707-B-7 (July 22, 1947). A.G. Op. 707-B-7 (May 21, 1946). A.G. Op. 707-B-7 (July 16, 1946).

An alternative to the cost-plus system in times of labor and material shortages, and possible rising prices, is to use an escalator clause in advertising for bids. Under such a clause, contract prices go up automatically with inflation according to a fixed formula prescribed in the contract. The attorney general has issued mixed opinions on the use of escalator clauses.

RELEVANT LINKS:

B. Bonds

While some bonds are specifically required by statute, others are not. Cities often choose to require them to protect the city from costs that it may incur resulting from these contractual relationships.

1. Performance and payment bonds

Minn. Stat. § 574.26.
Minn. Stat. § 471.345, subd. 3.

Goodin Co. v. City of Prior Lake, No. A14-1144 (Minn. Ct. App. Mar. 9, 2015) (unpublished opinion).

Before any contract for public work over $175,000 becomes binding, the contractor must provide a performance bond and a payment bond to the city. (Cities may choose to waive these bonds for projects of $175,000 or less.) Whether a contract is one for doing of public work "depends on ownership of project, funding of project, scope of municipality's participation in project, and extent project is put to public use."

Green Elec. Systems, Inc. v. Metropolitan Airports Com'n, 486 N.W.2d 819 (Minn. Ct. App. 1992).

Local Oil Co., Inc. v. City of Anoka, 303 Minn. 537, 225 N.W.2d 849 (1975).

The bond amounts must each be in at least the amount of the contract. The performance bond is to guarantee that the contractor will complete the contract according to its terms and conditions and to protect the city from all costs and charges that may accrue in the course of completing the work. The payment bond is to ensure that all workers, subcontractors, and persons furnishing materials are paid.

Minn. Stat. § 574.29.
Collins Elec. Systems, Inc. v. Redflex Traffic Systems, Inc., No. A07-0675 (Minn. Ct. App. Apr. 8, 2008) (unpublished opinion).

If a city fails to get a payment bond from a contractor, it can be held liable for losses to any workers, subcontractors, and persons who furnish materials if the contractor doesn't pay them. The city should make sure all subcontractors and material suppliers have been paid by the contractor before making final payment to a contractor.

Although a payment bond and a performance bond are not required for contracts that are $175,000 or less, cities may want to require these bonds for all contracts.

Minn. Stat. § 574.26, subd. 3.
Office of the State Auditor, Statement of Position: Contract Change-Orders and Contractor's Bonds, Revised May 2019.

If the contract price for public work increases due to change orders, unforeseen conditions, cost overruns, or any other reason after the contract is signed, the governing body has the option of increasing the amount of the contractor's payment bond or performance bond.

2. Bid bonds

Minn. Stat. § 574.27.

Cities may require bidders to submit a bid bond with their bids. Generally, a bid bond ensures the city does not waste its time with a frivolous bid. It guarantees the bidder will enter into a contract with the bid that was submitted and provide the required bonds and insurance.

RELEVANT LINKS:

Minn. Stat. § 429.041, subd. 1.

There is no statutory requirement that bidders must submit a bid bond on contracts. However, bidders on projects made under the special assessment statutes must submit a cash deposit, cashier's check, bid bond, or certified check payable to the clerk for such percentage of the amount of the bid as the council specifies. Some home rule charters contain similar provisions that require bid bonds.

Minn. Stat. § 574.27.

If a city requires bidders to submit bid bonds, it is responsible for returning the bid bonds to the bidders whose bids were not accepted. The city must also return the bid bond to the winning bidder after he or she has entered into the contract and provides acceptable security.

C. Miscellaneous considerations

The following is a brief overview of some of the more important considerations when making contracts. It is not intended as a complete list, and a city should have its attorney review any contract prior to its execution.

1. Workers' compensation

Minn. Stat. § 176.182.

A city may not enter into a contract for any public work until it has received from all other contracting parties proof of compliance with the workers' compensation insurance requirements. This means the contractors must show they are self-insured, carry workers' compensation insurance for their employees, or are exempt from having to provide such insurance. Proof of compliance should be kept by the city but does not need to be filed or reported to any state agency.

2. Income tax withholding

Minn. Stat. § 290.92.
Minn. Stat. § 270C.66.
Fact Sheet 13 *Construction Contracts with State or Local Government Agencies,* Minnesota Revenue, Rev. Dec. 2017.
Form IC-134.

Cities may not make final payment to a contractor until the contractor has shown proof of compliance with the state income tax withholding requirements. The Department of Revenue requires all contractors and subcontractors to file a Form IC-134 to show compliance with the withholding requirements. This certificate is the contractor's proof of compliance. A city should request a copy of this document from contractors before making the final payment on a contract.

3. Audits

Minn. Stat. § 16C.05, subd. 5.

A contract must include an audit clause that provides that the books, records, documents, and accounting procedures and practices of the contractor relating to the contract are subject to examination by the city and the state auditor for a minimum of six years.

RELEVANT LINKS:

4. Data practices compliance

Minn. Stat. § 13.05, subd. 11.

When a city contracts with a private person to perform governmental functions, it must include language in the contract stating that all of the data created, collected, received, stored, used, maintained, or disseminated in performing the governmental functions are subject to the requirements of the Minnesota Government Data Practices Act, and that the private person must comply with those requirements as if it were a governmental entity. A city's failure to include this data practices language in a contract does not invalidate the application of these requirements.

5. Prompt payment of subcontractors

Minn. Stat. § 471.425, subd. 4a.

A city contract must require the prime contractor to pay:

- Subcontractors for undisputed services within 10 days of the prime contractor's receipt of payment from the city.
- Interest of 1.5 percent to the subcontractor if the payment is late.
- A minimum monthly interest penalty payment of $10 for an unpaid balance of $100 or more.

6. Indemnification

Minn. Stat. § 337.05.
LMCIT staff can assist in reviewing city contracts, especially provisions related to insurance and liability. For more information, contact Chris Smith, Risk Management Attorney, at csmith@lmc.org or 651-281-1269

Indemnification agreements generally provide that the contractor promises to defend, indemnify, and hold the city (and its agents and employees) harmless from any and all damages arising out of the contract. These clauses are enforceable in some limited circumstances, such as where the contractor fails to comply with a contract provision to furnish a bond or insurance policy that would protect the city from liability arising out of the project.

Minn. Stat. § 337.02.
Minn. Stat. § 337.05.

However, in other instances, indemnification agreements may have limited enforceability. For example, they are unenforceable in construction contracts except to the extent that:

- The underlying injury or damage is attributable to the negligence or other wrongful act of the contractor or its independent contractors, agents, employees, or delegates.
- The city agrees to indemnify the contractor with respect to strict liability under environmental laws.

A city should also have the contractor name the city as an additional insured under the contractor's insurance policy. The city should require the contractor to provide a copy of this endorsement, as well as any appropriate certificates of insurance.

RELEVANT LINKS:

7. Non-discrimination

Minn. Stat. § 181.59.
Borom v. City of St. Paul, 289 Minn. 371, 184 N.W.2d 595 (1971).

All public contracts for materials, supplies, or construction must contain a statement where the contractor promises not to discriminate against prospective employees because of race, creed, or color. In addition, many state and federal grants contain requirements that construction contracts include language to ensure contractors do not discriminate with regard to age, race, sex, religion, nationality, and disability.

8. Prevailing wage

The wages paid to those working on city projects may also be a concern.

a. Minnesota law (Little Davis Bacon)

Minn. Stat. §§ 177.41-44.
A.G. Op. (Jan. 14, 1988).
A.G. Op. (July 15, 1988).

The wages of laborers, workers, and mechanics on projects financed in whole or in part by state funds should be comparable to wages paid for similar work in the community as a whole.

There is no clear definition of what constitutes "state funds" for the purpose of this requirement. Certainly, the definition would include any specific state grants a city might get for a particular project. It also may include such things as local government aid and other state aids.

Some have claimed money that has been kept in the same fund with any of these types of aids would qualify as state funds since it has commingled with such funds.

NewMech Co. v. Indep. Sch. Dist. No. 206, 540 N.W.2d 801 (Minn. 1995).

However, the Minnesota Supreme Court found that Debt Service Equalization Aid (DSEA) and Homestead and Agricultural Credit Aid (HACA) did not trigger the prevailing wage requirements in a school construction contract. The reasoning behind this decision was that these aids lacked a direct relationship to the project.

If a city has any doubts, it will probably want to be sure that at least the prevailing wages are paid. Otherwise, a city may want to be certain only non-state funds, or money that has been kept separate from anything that might be seen as state funds, are used to pay for the project.

b. Federal law (Davis Bacon)

40 U.S.C. §§ 3141-3148.

There is a similar federal prevailing wage requirement for all public work contracts in which the United States or the District of Columbia is a party.

9. Project labor agreements

A project labor agreement (PLA) is an agreement between the city's contractor and a union that is sometimes required by cities.

RELEVANT LINKS:

Under this type of agreement, the project's contractor agrees to designate a particular labor organization as the exclusive bargaining representative for all employees working on the project. In addition, the contractor agrees to employ only contractors and subcontractors who agree to abide by the terms of a specific collective bargaining agreement. In return, the union agrees there will be no strikes, picketing, slowdowns, or similar disruptions during the project.

Queen City Constr., Inc. v. City of Rochester, 604 N.W.2d 368 (Minn. Ct. App. 1999).

The Minnesota Court of Appeals appears to support the ability of cities to require PLAs. In a 1999 decision, the Minnesota Court of Appeals found that nothing in Minnesota law prevents a public entity from imposing a bid specification that requires successful bidders to sign a PLA.

Minn. Chapter of Associated Builders and Contractors, Inc. v. Minnetonka Indep. Sch. Dist. No. 276, C2-99-837 (Minn. Ct. App. Dec. 28, 1999) (unpublished opinion).

In a challenge to a school district's PLA requirement on a construction project, the contractor claimed the PLA had an anti-competitive effect. However, in an unpublished decision, the court found that a PLA would not have an anti-competitive effect because Minnesota's prevailing wage law would require contractors on a project to pay wages essentially equivalent to union wages.

D. Contractual changes after award

Sometimes, changes to a contract are considered after the contract has been awarded.

1. Adding on to contracts

A.G. Op. 707a-15 (Oct. 8, 1945).

When one construction job is the subject of competitive bidding and the contract has been let, another job may not be added to the contract at a later time. This would give the contractor an unfair advantage since other prospective contractors did not have an opportunity to bid on the second job. However, cities may combine two or more improvements in one advertisement and in one contract, if the contract is made under the special assessment statutes.

Minn. Stat. § 429.041, subd. 1.

See Section I. E. *Exemptions, exceptions, and alternatives*.

A change to add new work to a contract may not need to be competitively bid if the total added cost is $175,000 or less. Because the cost is below the competitive bidding threshold, it is arguable that bidding would not be mandatory. However, cities should exercise caution in this area.

Minn. Stat. § 429.041, subd. 7.

A city council may authorize changes in a unit price contract that is made under the special assessment statutes.

After the work on a unit price contract has begun, the council may authorize additional units of work at the same unit price, as long as the total contract price does not increase by more than 25 percent. The city may do this without re-advertising for bids.

RELEVANT LINKS:

Village of Excelsior v. F.W. Pearce Corp., 303 Minn. 118, 226 N.W.2d 316 (1975).

In applying this provision, a court approved the addition to the contract of one political subdivision of units of work to be done by another political subdivision, as long as the 25 percent restriction was not exceeded. The court found the variable in the contract was the total estimated number of units and the constant was the unit price. Therefore, no harm resulted from amending a factor that may change under many different circumstances. The harm to protect against was an unreasonable unit price, and that factor was not a proper subject of the contract modification.

2. Changes in work

Carson v. City of Dawson, 129 Minn. 453, 152 N.W. 842 (1915).

A city may be able to make alterations or require extra work because of errors in plans, unforeseen conditions, or other similar reasons.

Construction contracts often contain language that authorizes these types of necessary changes. Such provisions may permit a city to make some minor changes in the work, if the changes are ordered in writing. However, cities should use caution when ordering changes in work since this type of requirement has given rise to a considerable amount of litigation.

Buchman Plumbing Co., Inc. v. Regents of the Univ. of Minn., 298 Minn. 328, 215 N.W.2d 479 (1974).

Sometimes these provisions include a requirement that estimates must accompany or precede the order. These provisions are generally valid. A provision requiring written notice to the city of claims for extra cost is similar in effect.

Lundstrom Constr. Co. v. Dygert, 254 Minn. 224, 94 N.W.2d 527 (1959).

Such provisions are intended as a check on the contractor, and, being for the benefit of the city, may be insisted upon or waived depending upon what best suits the city's needs.

Shaw v. First Baptist Church of Winona, 44 Minn. 22, 46 N.W. 146 (1890).

When the contract with the principal contractor contains such a notice provision, it is applicable to both the principal contractor and any subcontractors involved on the project.

Carson v. City of Dawson, 129 Minn. 453, 152 N.W. 842 (1915).

What constitutes "extras" has also been the subject of litigation. For example, a city contract provided that the city had the right to make alterations in extent, dimensions, form of plans, or location of the work, and also provided that no claims for extra labor or material were allowed unless ordered in writing by the city. Here, the court found these provisions to be independent. As a result, when the changes that were made increased the expense, the contractors could recover the value of the necessary labor and material even though no written order had been given.

If the "extras" are needed because of errors in the specifications or unforeseen conditions, the contractor may have a right to recover because of misrepresentation. In this type of situation, a written order would not be necessary.

RELEVANT LINKS:

Minn. Stat. § 574.26.
Office of the State Auditor, Statement of Position: Contract Change-Orders and Contractor's Bonds, Revised May 2019.

If the contract price increases due to change orders, unforeseen conditions, cost overruns, or any other reason after the contract is signed, the governing body has the option of increasing the amount of the contractor's payment bond or performance bond.

3. Different conditions

Often a contractor finds that the conditions, such as underlying soil, rock, or water, are different from those in the specifications. Sometimes conditions have changed since the contract was let. These are among the most common causes of disputes between a contractor and a city.

McCree & Co. v. State, 253 Minn. 295, 91 N.W.2d 713 (1958).

If the specifications assume conditions different from the actual conditions, and, as a result, it costs more to perform the contract, the contractor may recover damages sustained as a result of having relied on the specifications.

Stanton v. Morris Constr. Co., 159 Minn. 380, 199 N.W. 104 (1924).

If the discrepancy is discovered before performance begins, the contract might be voided. In one case, the court found that a bidder on a highway contract could recover losses from having relied on inaccurate specifications, even though the specifications included a warning that they could differ from the true conditions.

Stees v. Leonard, 20 Minn. 494 (1874).
Friederick v. Redwood County, 153 Minn. 450, 190 N.W. 801 (1922).

On the other hand, a contractor who makes an absolute and unqualified contract to perform a given undertaking assumes the risks. As a result, the contractor is liable for any failure to perform the contract even though costs may be much more than contemplated. In an extreme case, a contractor had twice built part of a building that fell down because of alleged quicksand. The court said that no difficulty short of absolute impossibility would excuse the contractor from doing what he expressly agreed to do.

Specifications and contracts that include a provision for making adjustments for unknown difficulties may result in lower bids when there is a possibility of such difficulties. Without such a provision, cities may find the bids will be higher because bidders have to anticipate possible bad site conditions.

IV. Violations

Minn. Stat. § 471.345, subd. 14. *Rochon Corp. v. City of St. Paul,* 831 N.W.2d 651 (Minn. Ct. App. 2013).

An unsuccessful bidder may challenge the validity of a contract in court. If the contract was made without following the competitive bidding requirements, the contract is void and the unsuccessful bidder may be awarded the costs of preparing the unsuccessful bid. A court may not award an unsuccessful bidder damages or attorney fees.

Kotschevar v. North Fork Township, 229 Minn. 234, 39 N.W.2d 107 (1949).
Buffalo Bituminous, Inc. v. Maple Hill Estates, 311 Minn. 468, 250 N.W.2d 182 (1977).

When a contract is found to be void, it is no longer a legally enforceable agreement. However, this does not mean the supplier of the goods or services has no remedy. Minnesota courts have held that cities are liable to the seller or contractor for the benefit received by the city.

RELEVANT LINKS:

Williams v. Nat'l Contracting Co., 160 Minn. 293, 199 N.W. 919 (1924).

The reasoning behind this conclusion is that it would be unfair for the city to use the supplier's goods or services and not pay for what it has received because of its violation of the competitive bidding law. However, this is generally only the case if the contract was entered into in good faith and was a contract the city had the power to make.

Fargo Foundry Co. v. Village of Calloway, 148 Minn. 273, 181 N.W. 584 (1921).

A foundry was permitted to recover the value of the benefits received by the village under a contract to rebuild and repair a water tower and steam-heating system. The contract itself was unenforceable because of the failure to advertise for bids. Recovery was not permitted for the value of the material and cost of labor. However, the contractor did recover payment for the amount of benefit actually received by the village.

This rule for recovery based on benefits received applies only when the contract has been performed or partly performed. Before its performance, the contract may be set aside or found void through a court action. Once a contract is void, the city may not compel its performance.

Elec. Unlimited, Inc. v. Village of Burnsville, 289 Minn. 118, 182 N.W.2d 679 (1971).

When an item to be purchased is capable of exact specifications, the court may prevent the award to a bidder where there is evidence that another bidder with a lower bid met the advertised specifications in all material respects. However, because the council has reasonable discretion, a court will not require the city to award a contract to a particular bidder.

Major Indus., Inc. v. Krech, Ojard & Associates, Inc., No. A04-1052 (Minn. Ct. App. Dec. 21, 2004) (unpublished opinion).

In an unpublished decision, the Minnesota Court of Appeals held that the statute prohibiting specifications that exclude all but one type of supplies or equipment does not authorize private actions by individuals for damages. In this case, the Court dismissed a claim by a skylight manufacturer against a school district for damages based on its claim that the school district had violated the statute by using specifications that required a particular manufacturer and type of skylight for a construction project.

Sanborn v. Neal, 4 Minn. 126 (1860).

Generally, a councilmember who makes a contract on behalf of the city without advertising for bids would not be personally liable for damages resulting from the illegal contract, if acting in good faith. Of course, if the action is a deliberate evasion of the bid requirement, the councilmember may be criminally liable since the cases that have exempted council-members from civil liability have been limited to instances in which the official acted in good faith.

V. Limited sales tax exemption for construction projects

Minn. Stat. § 297A.70, subd 2.

The Minnesota Legislature has granted a limited sales tax exemption to cities for certain construction projects. Materials for a city's construction projects are generally tax-exempt if the city purchases them directly.

RELEVANT LINKS:

Minnesota Department of Revenue Notice #17-10, December 4, 2017.

However, if the city contracts out the labor and purchase of materials separately, the tax exemption is not automatically available.

The sales tax exemption is only available if a city or its contractor purchases construction materials to be used in constructing buildings or facilities used principally by the city.

The tax exemption does not apply to sales of materials if purchased by a contractor or subcontractor for building, construction, or reconstruction if part of a lump-sum contract, or similar type of contract, with a guaranteed maximum price covering both labor and materials. Therefore, a combined labor and materials guaranteed maximum contract (or similar type of contract) will not benefit from the sales tax exemption.

The alternative to lump-sum contracts is to solicit bids on two separate contracts—one for materials and one for labor—and to designate a contractor as the city's purchasing agent. If done properly, the city will not have to pay sales or use tax on the materials for the contracted project.

A. Soliciting bids on two contracts

Minnesota Department of Revenue Notice #17-10, December 4, 2017.

When soliciting two separate contracts to obtain the sales tax exemption, a city must:

- Initially advertise for separate bids for materials and labor.
- Reserve the right to accept only one bid without accepting both bids from any one contractor.
- Award separate contracts for materials and labor.

The Department of Revenue extends this separation of labor and materials requirement to contracts with subcontractors as well.

B. Purchasing agent agreements

Minnesota Department of Revenue Factsheet #111 – Schools: Sales and Purchases.

To receive the tax exemption, a city must also formally authorize the contractor providing the materials as its purchasing agent. Minnesota schools and towns and their contractors benefited from the sales tax exemption before Minnesota cities. The Department of Revenue has published fact sheets for those entities that can be used to guide cities when designating a purchasing agent.

Minnesota Department of Revenue Factsheet #142 – Sales to Governments.

Purchasing Agent Agreement, LMC Model Contract.

Using a proper form for designating a purchasing agent agreement is important because using an improper form could deprive a city of its intended sales tax exemption. The purchasing agent agreements have many requirements, which are described below.

RELEVANT LINKS:

1. Agreements for contractors

The purchasing agent agreement between the city and the city's materials contractor must specify that:

Minn. R. 8130.1200, subp. 3 D.

- The city has appointed a purchasing agent.
- When the purchasing agent delivers the materials to the city, the city becomes the owner of the materials. The city takes on the risk of loss with respect to such materials.
- The city, and not the purchasing agent, shall have responsibility for all defective materials and supplies, including those incorporated into realty purchased in such manner.

Minnesota Department of Revenue Notice #17-10, December 4, 2017.

Minn. R. 8130.1200, subp. 3 D.

State administrative rule also requires the designated purchasing agent to "furnish adequate notification" to all vendors and suppliers of the agency relationship with the city and to make it clear to the vendors and suppliers that the city is the one responsible for paying and not the contractor-agent. This must be included in the purchase order between the purchasing agent and the retail vendor.

Minnesota Department of Revenue, Certificate of Exemption Form ST3.

This is re-emphasized when the contractor checks the box on a completed Certificate of Exemption Form ST3, indicating it has been appointed as a purchasing agent. The contractor-agent should provide the completed form, along with the purchase order, to the seller before the sales tax-exempt transaction is completed.

2. Agreements for subcontractors

A subcontractor can also make purchases tax-free as the city's purchasing agent if the subcontractor has also provided separate bids on materials and labor, and at the time of sale, the subcontractor:

Minnesota Department of Revenue, Certificate of Exemption Form ST3.

- Has a copy of the completed Certificate of Exemption Form ST3 showing the city is exempt from sales and use tax.
- Has a document appointing the subcontractor as purchasing agent for the city. This is usually provided by the primary purchasing agent whom the city has authorized to appoint subagents.
- Secures separate contracts for materials and labor (avoiding the lump-sum contract or similar guaranteed maximum contract for both materials and labor), or only obtains a materials contract.

VI. Federal anti-trust legislation

Anti-trust laws were passed to protect our economic system from the monopolization of businesses and the restraint of trade. These laws have been found to apply to the practices of cities as well as businesses.

RELEVANT LINKS:

It is important that cities keep these laws in mind when selling, purchasing, or making contracts.

The laws do not specify what damages may be awarded in a successful lawsuit against a city. However, a contract could be voided and a successful challenger could be awarded attorney's fees.

A. Anti-trust acts

The three most important anti-trust laws work in conjunction with one another.

1. The Sherman Act

15 U.S.C. §§ 1-7.

The Sherman Act prohibits monopolies and attempts (or conspiracies) to monopolize.

Agreements between buyers not to purchase from a particular seller may be a violation of the Sherman Act. An agreement among competing buyers to prevent competition in their purchasing or to control prices may also violate this act.

2. The Clayton Act

15 U.S.C. §§ 12, 13, 14-19, 22-27.

The Clayton Act generally prohibits price discrimination and certain mergers and acquisitions. It also prohibits the sale or lease of goods conditioned upon a buyer's agreement not to use the goods of a competitor. Such practices could result in substantially less competition or tend to create a monopoly.

3. The Robinson-Patman Act

15 U.S.C. §§ 13a, 13b, and 21a.

The Robinson-Patman Act was adopted to amend the price discrimination part of the Clayton Act. It prohibits sellers from setting unreasonably low prices for the purpose of driving out competitors. It also prohibits sellers from charging different prices for the same item based upon geographic location for the purpose of driving out competitors. In addition, the law makes it a crime for buyers to knowingly induce or receive an illegal discriminatory price.

B. Application to cities

City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 111 S. Ct. 1344 (1991).

Decisions made by the United States Supreme Court have made it clear that federal anti-trust laws can apply to cities. As a result, it is important for cities to keep these laws in mind when contracting and purchasing. The state's immunity from the federal anti-trust laws does not apply directly to local governments. However, a city may have immunity if acting under a clearly expressed state policy.

RELEVANT LINKS:

At a minimum, city officials should add an anti-trust mindset, like their current anti-discrimination mindset, to their mental checklist of considerations before acting and speaking about city purchases and contracts. They should resolve to act openly through formal meetings, and keep a well-documented record through minutes, formal findings, and resolutions setting out exactly what was done and why.

The following should be kept in mind to keep purchases and contracts free of anti-trust problems:

- Use competitive bids or quotations even when the law does not require them.
- Avoid using vendor-furnished specifications that might unnecessarily limit competitive bidding. When consultants prepare bid specifications, they generally should not bid on the contract.
- Avoid purchasing from a company in which a councilmember or other city decision maker in the purchasing process has an interest (this is also prohibited under the state's conflict of interest laws).
- Avoid informal, unrecorded communications with suppliers.
- Do not accept gifts from suppliers (something generally prohibited by the state gift law).
- Be sure that when performance bonds or bid bonds are required, they are either legally necessary or are for the purpose of ensuring responsible bidders. Bond requirements can serve as a restriction on bidders and may not be necessary when purchasing standard materials.
- Be wary of giving local vendors preference in public purchasing when it limits competition. This does not mean cities must avoid contracting with a local vendor when all other things are equal. Likewise, if the bidder's location has an impact on the contract's cost (such as for delivery charges or repairs), it may be an important factor to consider when determining the lowest responsible bidder.
- Emphasize non-restrictive specifications that facilitate competitive bidding.

See Section II. A. *Preparation of bid specifications*.

Minn. Stat. §§ 471.87-.89.
LMC information memo, *Official Conflict of Interest.*

Minn. Stat. § 471.895.

See Section II. D. 1. *Lowest responsible bidder*.