

Missouri Municipal League Annual Conference

Fundamentals of Municipal Contracting

September 12, 2017

Nathan M. Nickolaus, Esq. - Presenter
Cunningham, Vogel & Rost, P.C.
legal counselors to local government
333 S. Kirkwood Road, Suite 300
St. Louis, Missouri 63122
314.446.0800
nathan@municipalfirm.com
www.municipalfirm.com

Presentation Summary

I. INTRODUCTION

- A. Major Types of City Contracts

II. LEGAL REQUIREMENTS IN DRAFTING

- A. Minimum Statutory Requirements
- B. Immigration Status
- C. Confidentiality Provisions
- D. Purchasing Requirements
- E. Preference Statutes
- F. Public Works Contracts

III. SELECTION AND ADMINISTRATION

- A. Conflicts of Interest
- B. Bidding
- C. Extra Compensation
- D. Annual Appropriation

IV. KEY CONTRACT TERMS AND NEGOTIATION TIPS

Conflicting Goals of Public Procurement

- Obtain goods and services
- Transparency
 - Preventing fraud
 - Maintaining an appearance of fairness
 - Preventing graft and cronyism
- Influence the economy
- Achieve social and political goals

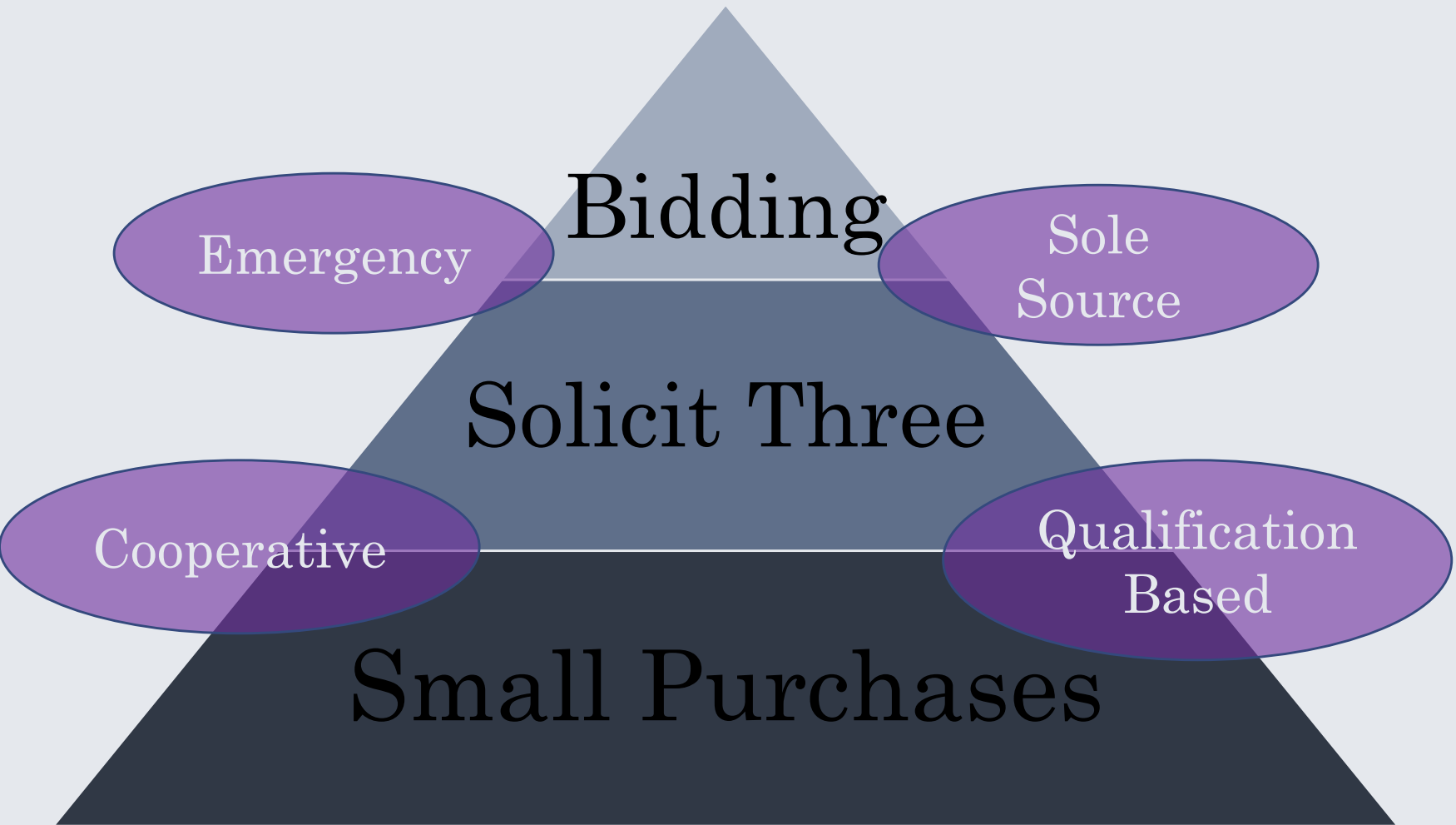
Each of these is Co-Equal

I. INTRODUCTION

A. Major types of Municipal Contracts:

1. Goods
2. Services
3. Professional Services (Architects and Engineers)
4. Public Works (special requirements)

B. Typical Procurement



II. LEGAL REQUIREMENTS

A. Minimum Statutory Requirements

- Statute § 432.070 RSMo. sometimes called the **Municipal Statute Of Frauds** sets minimum requirements:
 - Must be in writing
 - Must be within city's authority
 - Must be for consideration wholly performed after contract signed
 - Must be signed and dated

A. Minimum Statutory Requirements

- Contracts not in compliance are **VOID**, not *voidable* but void (*Fulton v. City of Lockwood*, 269 S.W.2d 1 (MO 1954))
- Persons dealing city are responsible for knowing this and protecting themselves. (*Bride v. City of Slater*, 263 S.W.2d 22, 26 (Mo. 1953))
- Applies even if contractor has already done the work
- City may even recover money already paid

Examples

- City was prohibited from paying supplier of materials for City road project because the amount of the materials exceeded the limit contained within its City Charter allowing purchases without bidding. *Riney v. City of Hannibal*, 712 S.W. 2d 49 (Mo. App. E.D. 1986).
- Architect with contract signed by mayor and attested by clerk not entitled to be paid for work already done when council had not authorized mayor to sign. (*Fulton v. City of Lockwood*).
- Contract was not validly authorized where no single written approval but rather only a piecemeal majority of the governing body consenting separately. *Moynihan v. City of Manchester*, 265 S.W. 3d 350 (Mo. App. E.D. 2008)

Common Procedural Questions

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

B. Immigration Status – Proof of Lawful Presence

- § 208.009 RSMo. (2008): Any person receiving a public benefit must provide affirmative proof “that the applicant is a citizen or a permanent resident of the United States or is lawfully present in the United States.”
- Proof of ID Applies to:
 - Any “public benefit” - Any contract, grant or loan
- Does not apply to:
 - Business license
 - City permits
 - Utility provider contracts with customers
- Simply put copy of applicant’s driver’s license in file
- Exhibit 4 - Use this affidavit only when applicant cannot provide written proof (e.g., driver’s license)

B. Immigration Status

2. E-Verify Law (§ 285.530 RSMO)

- City contracts over \$5,000 for must require:
 - Contractor provides proof of enrollment in E-verify
 - Contractor affirms it does not knowingly employ any unauthorized alien in connection with the contracted services
 - E-Verify is the only qualifying program
- Applies to tax abatements, tax credits, and loans.
- EXCEPTIONS:
 - Does NOT apply to contracts solely for goods or products
 - Only need affirmation on annual basis

C. Confidentiality Provisions

- Generally, executed contracts are open records under Missouri Sunshine Law – RSMo. 610
 - Which means: City generally cannot agree to unqualified confidentiality agreement
 - *See John P. Strake v. Robinwood West Community Improvement District*, No. SC94842 (Mo. Nov. 10, 2015) (knowing violation of sunshine law where district refused to disclose settlement agreement which contained confidentiality provision but had *not* been closed by court order)
 - *See Calvert v. Mehlville School District*, 44 S.W.3d 455, 458 (Mo. App. 2001) (school district not liable for breaching confidentiality provision in a settlement agreement because sunshine law required disclosure)

C. Confidentiality Provisions

Exceptions

- Contracts under negotiation - closed until contract is finalized or all proposals rejected
§ 610.021(12)
- Bid Specs - closed until released or published
§610.021(12)
- Sealed bids – closed until opened
§ 610.021(12)
- Real Estate Contracts/Leases – closed until deal is signed
§ 610.021(2)
- Even if contract is open, parts may be subject to redaction

D. Preferences

Who's on First?

- Buy American Act
 - Not Mandatory
 - Except mandatory if Fed \$\$
- Missouri's Buy American Act
 - Mandatory (constitutional?)
- Buy Missouri Act
 - Mandatory but unconstitutional
 - Prohibited when Fed \$\$ involved
- Excessive Unemployment
 - §§ 290.550 – 290.580 RSMo.
 - Struck down by Courts
- Local First!



E. Public Works Contracts

*See Exhibit 5 for full list of supplementary requirements

1. Prevailing Wage – § 290.210 RSMo., et seq.
2. OSHA Training – § 292.675 RSMo.

E. Public Works Contracts

3. Payment Bond – § 107.170 RSMo.

- No mechanics liens against public projects
- Bond to be furnished by contractor, to pay subcontractors, employees, and suppliers
- Required by law for projects over \$50,000

4. Prompt Payment Act – § 34.057 RSMo.

- Must make payments monthly based on percentage complete or lump sum if provided in contract.
- Can retain 5% on contracts over \$50,000; 10% if under

III. Selection and Administration

A. Conflicts of Interest

- Be Careful To Avoid Conflicts of Interest in Selection Process
 - Three main statutes describe prohibited transactions: §105.452; §105.454; §105.458 RSMo.
 - Applies to elected or appointed officials and employees
 - Or to benefit family or business partners
- Prohibited Activity:
 - **Sell, rent, or lease any property, or perform any service, to the city in excess of \$500 per transaction or \$5,000 per year**
 - **Exception unless competitively bid and awarded to lowest bidder**
 - Use or disclose confidential information in any manner with intent to result in financial gain
 - Use decision making authority for financial gain
 - Take anything of value in exchange for official action or inaction (a bribe)
 - Favorably act on any matter for personal monetary benefit

B. Bidding

1. When Required

- No general statutory requirement that cities use competitive bidding generally, but there are exceptions:
 - Construction Management Services – § 8.679 RSMo.
 - Health and Life Insurance for Employees – § 67.150 RSMo.
 - Construction of Initial Waterworks – § 91.170 RSMo.
 - City Depository Services (3rd class cities) – § 95.280 RSMo.
 - Insurance contracts – § 376.696 RSMo.
 - Contracts with officials and employees of political subdivision over \$500 per transaction or \$5,000 per year – § 105.454/.458 RSMo.
 - Federal and state grants, loans, or credits – See specific provisions and applicable law
- Local ordinance may dictate other situations

B. Bidding

2. Key Terms

- Key Terms Providing Flexibility:
 - Allow governing body to accept all bids, reject all bids or to negotiate and modify bids.
 - Allow governing body to waive any technical deficiencies in any bid.
 - Clearly state City is not required to accept lowest bid or any bid.
 - Include language that submitted bids are irrevocable offers, valid for a set time while the City evaluates the bids

B. Bidding

3. Examples

“The City intends to award a contract for the Project based on the bid that, in the City’s sole discretion, best meets the interests and requirements of the City. The City reserves the right in the City’s sole discretion to reject any and all bids, to waive technicalities or deficiencies in any or all bids, to negotiate with any or all bidders or others for more favorable terms or prices, and to award a contract to other than the bidder submitting the lowest cost bid proposal, with or without negotiation. The City reserves the right not to open a sole bid.”

4. Rejecting Bids

- Most common reasons:
 - bid is non-responsive,
 - bidder not responsible
 - owner rejects all bids and solicits new bids or abandons the project
- Bids containing a material variance from the bid invitation must be rejected
 - Material variance is one that gives one bidder a substantial advantage or benefit not enjoyed by other bidders. Examples include:
 - Proposals that include products that are different than those specified in the bids
 - Proposals that change or delete contract terms or conditions specified in the bidding documents
 - Proposals that contain a conditional offer

4. Rejecting Bids

- Where the authority requiring competitive bidding provides the owner the right to —reject any or all bids, Missouri Courts hold that the owner has an unconditional right to reject any one bid, including the low bid.
 - A public body can reject all bids and start over
 - Public body must act in good faith and without favoritism or improper motives in making bid selection.



5. Bid Protests

- Disappointed Bidder Doctrine
 - Rejected bidder has no vested or protectable interest in the award of a public works contract
 - Since no property right incurred in submission of a bid, due process does not require a hearing to establish
 - the exercise of reasonable discretion in bid decision
- Bias or unequal treatment in the process can cause liability

C. Extra Compensation

1. No Extra Compensation for Work Already Performed

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

Extra Compensation Examples:

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

D. Annual Appropriation/Debt

- Mo. Const. Art. VI, § 26(a): prohibits cities from entering into any contract requiring the City to pay more than “income and revenue provided for such year plus any unencumbered balances from previous years...” (without voter approval)
- Practical Meaning:
 - Cannot contract to spend more than your current year revenues + unencumbered cash
 - Multi-year contracts should include “annual appropriation” clause limiting future payments if not “appropriated” by governing body
- See Form Contract (EX. 1)

Annual Appropriation/Debt Examples:

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

IV. KEY CONTRACT TERMS AND NEGOTIATION TIPS

A. Indemnification OF City

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

Example

“To the fullest extent permitted by law, the Consultant agrees to **defend with counsel selected by the City**, and **indemnify and hold harmless** the City, its officers, engineers, representatives, agents and employees from and against any and all liabilities, damages, losses, claims or suits, **including costs and attorneys' fees**, for or on account of any kind of injury to person, bodily or otherwise, or death, or damage to or destruction of property, or any other circumstances, sustained by the City or others, **arising from breach of the Contract or out of services and operations negligently performed hereunder by the Consultant**, or claims relating thereto, and including but not limited to the City's reliance on or use of the services or products provided by the Consultant under the terms of this agreement. The Consultant shall not be liable for any loss or damage **attributable solely** to the negligence of the City. To the extent required by law to enforce this provision, **Consultant agrees that this indemnification requires Consultant to obtain insurance in amounts specified herein** and that Consultant has had the opportunity to recover the costs of such insurance in the Compensation set forth in this Agreement.”

(See **Exhibit 1** – Form Contract)

B. Indemnification BY City

- Avoid this – Use Exhibit 6 (AG Opinion)!
- No authority to indemnify:
 - “To agree to the underlined terms [defend, indemnify and hold harmless], is to waive the state’s sovereign immunity, that is, the legal prohibition against the state being sued in its own courts for damages from the torts of its officers and agents. *Only the legislature can waive this immunity.*” Op. Atty. Gen. No. 138-87, Webster, 12-18-1987

C. Insurance

- Seek to receive not less than Sovereign Immunity Limit:
 - § 537.610 RSMo. – sets sovereign immunity limit
- City may contract to purchase insurance that “shall not exceed:”
 - 2015 single event \$409,123.00, aggregate claim \$2,727,489.00
- City can require private parties to obtain any reasonable amount
- Tips:
 - MAKE SURE YOU ACTUALLY GET COPY OF THE CERTIFICATE!
 - Require City to be listed “additional insured” not just “certificate holder”
 - Contract for specific \$ amount “but not less than” 537.610 amount
 - Statute appears to prohibit buying insurance OVER that amount

D. Local Ordinance Requirements

Typical Ordinance Provisions:

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

Waiver of Purchasing Procedures - **Example Code**

Language: “Nothing herein shall be construed to require the Board of Aldermen to accept the lowest bid and the Board of Aldermen **may** reject all bids, **negotiate** for more favorable terms or **waive** any purchasing requirement herein as may be determined in the public interest.”

(See **Exhibit 7** – Sample Purchasing Policy)

City Administrator's Authority to Contract: In addition to any other authority that may be granted by the Board of Aldermen or specific ordinance, **the City Administrator is authorized to enter into contracts for and make purchases of goods or services on behalf of the City in an amount of liability to the City not exceeding** three thousand five hundred dollars (\$3,500.00), provided such goods or services are within the scope and remaining amount available from an authorized budget line item within the City Budget ordinance. Purchases shall be subject to compliance with sound purchasing policies including as provided in this Section. (See **Exhibit 7** – Sample Purchasing Policy)

1. Ownership of work-product/copyrights
2. Termination
3. No damages against city
4. Attorneys' fees (only to the city)
5. Daily/Liquidated damages for delay

See Exhibit 1 – Form contract

1. **Form contracts:**

- a. Use a City Form contract when possible (**Exhibit 1**)
- b. When third party insists on using their contract:
 - Use City Form on top and attach vendor contract
 - Sign only the City version

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

- Date
- Signatures
- Where is the written authority to sign?
- Special requirements (E-verify, etc.)
- **DO NOT FORGET THE ATTACHMENTS** (posting and signed version)

3. **Timing:** Vendors sign first (ensures attachments are final)
4. **Approval:** Resolution/Ordinance Approval Language (**Exhibit 3**)
5. **Indemnification** – See **Exhibit 6** – use the AG opinion to avoid indemnification of private parties
6. **Purchasing Policy – Exhibit 7:**
 - Small contract authority – Establish clear and useful administrator authority to contract (2,500 – 5,000 limit)
 - Waiver Procedure
7. **Changes:** Do not make changes after the Board approves – limited exceptions

Municipal Resources:

- MISSOURI MUNICIPAL LEAGUE

([HTTP://WWW.MOCITIES.COM/DEFAULT.ASP](http://www.mocities.com/default.asp))

- CVR MUNICIPAL ISSUE REPORTS

([HTTP://WWW.MUNICIPALFIRM.COM/MUNICIPALISSUEREPORTS.HTM](http://www.municipalfirm.com/municipalissuereports.htm))

- MUNICIPAL OFFICIALS TRAINING ACADEMY

([HTTP://MEMBER.STLMUNI.ORG/LEAGUE-TRAINING](http://member.stlmuni.org/league-training))

- ABA MODEL PROCUREMENT CODE

([HTTPS://WWW.NIGP.ORG/DOCS/DEFAULT-SOURCE/NEW-SITE/ACCREDITATION/2000_ABA_MODEL_PROCUREMENT.PDF?SFVRSN=2](https://www.nigp.org/docs/default-source/new-site/accreditation/2000_aba_model_procurement.pdf?sfvrsn=2))

- EAST-WEST GATEWAY COUNCIL OF GOVERNMENTS

([HTTP://WWW.EWGATEWAY.ORG](http://www.ewgateway.org))



Questions and Answers

CUNNINGHAM, VOGEL & ROST, P.C.

legal counselors to local government

For More Information

Visit Our Website:

www.municipalfirm.com

or contact us at

333 S. Kirkwood Road, Suite 300

St. Louis, Missouri 63122

314.446.0800

nathan@municipalfirm.com

These materials and the related presentation are intended for discussion purposes and to provide those attending the meeting with useful ideas and guidance on the topics and issues covered. The materials and the comments of the presenters do not constitute, and should not be treated as, legal advice regarding the use of any particular technique, device, or suggestion, or its legal advantages or disadvantages. Although we have made every effort to ensure the accuracy of these materials and the presentation, neither the attorneys presenting at this meeting nor Cunningham, Vogel & Rost, P.C. assume any responsibility for any individual's reliance on the written or oral information presented.