Real Estate/ Municipal Law

A Working Guide to Municipal Procurement in New York State

Whenever public funds are in play, specific rules govern municipal procurement, or purchase of goods, services and construction. The ground rules are primarily set forth in the General Municipal Law ("GML") and the Finance Law ("SFL"). Other laws and regulations are equally important when federal or state funds are utilized in combination with a municipality's own funds, or when federal or state funds are the sole source of funding for municipal procurement.[1]

Martha Krisel

Municipal procurement rules, however, do not require a municipality to select the least expensive vendor. Public funds are protected through adherence to procedures based on law that are formulated to protect the public from collusion and the municipality from incompetence.

The Bidder

The business or individual responding to a Request for Proposal ("RFP") is referred to as a "bidder," "respondent," "offeror," "proposer" or "vendor." Any writing, from the initial decision on the method of procurement up to the decision to award, is part of the municipality's procurement record, which includes notes, memos, and emails, no matter how informal.

A responsible bidder demonstrates the requisite financial ability, legal capacity, integrity and past performance record. A responsive bidder demonstrates that it has the minimum specifications or requirements spelled out in the RFP.

State Government Guidance and Controls

In New York State, the Office of the State Comptroller ("OSC") factors heavily into procurement. Proactively, its guidance is widely available, including a crystal clear reference chart that sets out thresholds and triggers.[2]

The OSC chart explains that GML §103 controls advertising for bids and offers and letting of contracts, and that GML § 104-b controls procurement policies and procedures and is applicable to professional services procurement. Competitive bidding, in accordance with GML §103, is required for purchase contracts in excess of $20,000.00 and public works contracts in excess of $35,000.00. Although professional services are not subject to competitive bidding, they must be procured in accordance with specific policies and through documented decision making.

Municipal Audits

In addition, OSC routinely audits municipalities, issuing findings not only as to the validity of procurements but also as to the adherence to the procurement policy. These audits are *not* annual but rather are performed on a seemingly random basis; each week, about a dozen audits are published on the OSC website.

The scope of the audits is not limited to procurement, but procurement is a frequent area for findings, to which an audited municipality must respond.

The OSC is particularly critical when a municipality deviates from its own policies and procedures and when employees move forward with procurement without authorization.[3] OSC audits criticize a lack of documentation in support of an award as well as sloppy or incomplete documentation. OSC does provide an audited municipality an opportunity to respond to its findings. Then, OSC requires compliance through revised policies and practices.

Recent amendments to GML § 103 allow awards on the basis of "best value" for purchase contracts. Municipalities must opt into the best value selection criteria to take advantage of this standard. Unless a municipality has a population of one million, opting into "best value" requires a public hearing to adopt a local law authorizing procurement in this manner. OSC issued an explanatory guide to this change in 2013.[4]

Municipal Procurement Policies

A municipality should review, amend as necessary and, at a minimum, readopt its procurement policy annually at its organization meeting along with assorted other policies (EEO, FOIL, Investment, official newspaper, etc.). Some municipalities adopt procurement policies through resolutions. Some adopt local laws after public hearings that explicitly govern procurement and purchasing.[5]

Since adoption by local law requires a legal notice, at least one public hearing and publication of the code, it is a more expensive and time consuming process. Local laws are frequently clarified or expanded upon through supplemental internal policies.

Steps in the Procurement Process
Adopt internal procurement policies and procedures. GML § 104-b(1).
Prescribe a procedure for determining when to competitively bid and document a decision that a procurement is not subject to competitive bidding. GML § 104-b(2)(a).
Distribute RFPs and obtain proposals from bidders. GML § 104-b(2)(b).
Adequate documentation that justifies selection is crucial. GML § 104-(2)(d),(e).
The name and title of the decision maker must be included in the policy. § GML 104-b(f).

Obtaining Professional Services Through RFPs

Although § 104-b addresses procurement of "goods and services," it does not expressly use the term "professional services." The ability to procure professional services without being bound by the lowest price has been recognized in New York State court decisions, however, and is legally acceptable for the procurement of services that require skills, training, professional judgment, and creativity.

In 2008, for example, the Court of Appeals noted that,

See KRISEL, Page 11

Constitutional Restraints on Governmental Power to Abate Public Nuisances

Most cities, towns, and villages in New York State have enacted local laws requiring private-property owners to maintain their properties in good order and keep them from free from nuisance-like conditions which threaten public health and safety. These property maintenance laws generally address property conditions such as the outdoor storage of junk, rubbish or debris on private property, as well as the cutting, trimming or removing of brush, grass or weeds.[1]

Jon Ward

Many local laws adopted by cities, towns, and villages also empower local code-enforcement officers to investigate and, when appropriate, summarily abate nuisance conditions. As one court stressed many years ago, however, a municipality "acts at its peril in making . . . [a] determination and proceeding to abate . . . [a] nuisance."[2] Accordingly, government actors should proceed cautiously when investigating and deciding to abate public nuisances on private property, especially since their conduct could run afoul of important constitutional restraints on their powers.

Last year, in *Ferreira v. Town of East Hampton*, District Court Judge Joseph F. Bianco of the Eastern District issued an instructive opinion analyzing the nature and scope of various constitutional restraints on the power of local governments to summarily abate nuisances.[3] In the new age of "zombie houses" left behind by their owners in many Long Island communities in the wake of the 2008 financial crisis, many of which have, or are in the process of developing into nuisance conditions, government actors should consult Judge Bianco's opinion in *Ferreira* before taking any action to abate such conditions on their own.

Ferreira: Public Nuisance on Private Property

In *Ferreira*, the plaintiff, a self-employed mechanic, operated an automobile repair shop on family-owned private property in Montauk. He stored many unregistered and inoperative motor vehicles on the property. In an attempt to get the plaintiff to clean-up the property, the Town of East Hampton issued numerous summons to the plaintiff returnable in town justice court. When the criminal prosecutions stalled in town court and failed to produce their intended effect, *i.e.*, the clean-up of the property, town officials searched for other mechanisms in their local laws and turned to a provision of the town code which authorized the town to clean-up litter on property after providing a property owner with ten days' prior notice of the condition. The town board adopted a resolution finding the plaintiff's property violated this provision of the town code, which resolution was sent to the plaintiff. After the plaintiff still refused to clean-up the property, the town hired private contractors who went to the property and removed numerous unregistered vehicles and debris.

In response to the town's actions, the plaintiff commenced an action in federal court under 42 USC § 1983 alleging town officials violated his constitutional rights in entering onto his property and taking his property, including, without limitation, his Fourteenth Amendment right to procedural due process, and his Fourth Amendment right to be protected from unreasonable searches and seizures. The municipal defendants moved for summary judgment, contending the undisputed facts showed no constitutional violations had occurred. Judge Bianco disagreed, finding there were genuine issues of material fact whether the town and its officials violated the plaintiff's procedural due process rights and privacy rights in effecting the clean-up of his property.

Requirements of Due Process and Reasonableness

With respect to plaintiff's due process claim, the court held "[n]otice and an opportunity to be heard are the hallmarks of due process," and "[o]rdinarily, the Constitution requires some kind of hearing *before* the State deprives a person of liberty or property."[4] According to the court, however, "[t]he existence of an emergency may . . . excuse the need to provide a pre-deprivation hearing."[5] Synthesizing these principles, the court concluded "the existence of a public nuisance may excuse the failure to hold a pre-deprivation hearing if there was competent evidence allowing an official to believe reasonably that an emergency did in fact exist, and the official did not abuse her discretion in invoking an emergency. Absent such evidence, however, the failure to afford a pre-deprivation hearing would constitute a violation of the constitutional right to procedural due process in this case."[6]

Applying these principles to the facts of this case, the court found since the

See WARD, Page 11

CASOLARO ...

Continued From Page 7

part since the mayor was the subject of the alleged smear, even though the statute requires for the mayor to decide removal or not. In the interest of justice and to avoid allegations of collusion and politics, the mayor recused himself and the board voted to authorize the deputy mayor to determine if cause was established. Tangentially, this raised a myriad of other issues, since it was not altogether clear that the deputy mayor could assume the role of decider under the statute, but that is a separate issue for another day.

In the end, the village withdrew its complaint, because it determined that the "cause" element could not be satisfied. "Cause" must be more than mere subterfuge designed solely to remove a member of a board. A member of a board, once appointed, does not forgo his or her rights to free speech, expression or association, no matter how distasteful it is or may appear to be. Rather, and more pointedly, "cause," as it would appear from the courts, must be directly related to a member's ability to discharge the duties of the office he holds. Larceny of public funds is an act authorizing removal of a public officer.[8]

A town board member who was found to have violated a town's ethics code for holding a political office concurrently with his being a town board member, sufficiently formed a basis for "for cause" removal of town zoning board of appeals members.[9] Of course, there are more blatant examples of "cause," such as the case of a village mayor's conviction of the crime of official misconduct which arose after the mayor allegedly used his official capacity to influence the testimony of a witness, which was sufficient to demonstrate intentional wrongdoing, and moral turpitude within the meaning of the Public Officers Law and warranted his removal from office.[10]

Conclusion

Although it is rare for an elected official to be removed from a board, it does occur, and it is recommended that villages pass into law policies and procedures establishing disciplinary procedures. The high bar to be met for impeachment or removal is a necessary element as the people's democratic choice should not be easily cast aside. However, the impeachment of a wayward elected or appointed official is at times needed to ensure the constitutional protection of a village and its citizens.

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1. Village Law §3-302 and Op. Atty. Gen. No 74-198.
2. Village Law §4-400, with the exception of a deputy mayor and the appointment of individuals to fill vacancies in both elected and non-elected positions when a vacancy occurs before the term is expired. Under that circumstance, the mayor does not need approval from a Board of Trustees.
3. Id. and Village Law §7-712, et seq.
4. See, generally, NYCOM's Handbook for Village Officials (2012), Chapter 4, Term of Office as well as Public Officers Law §36, et seq.
5. Village Law §7-712(9).
6. *Gersh v Village of Tuckahoe*, 23 A.D.2d 258 (2d Dept. 1965) (citations omitted).
7. To protect identities, the name of the village is not mentioned.
8. *Application of Abare*, 21 A.D.2d 84 (3d Dept. 1964).
9. *Belle v. Town Bd. of Town of Onondaga*, 61 A.D.2d 352 (4th Dept. 1978).
10. *Smith v. Perlman*, 105 A.D.2d 878 (3d Dept. 1984).

KRISEL ...

Continued From Page 9

[i]t has long been recognized that public work contracts that require the exercise of specialized or technical skills, expertise or knowledge are not subject to the sealed, competitive bidding requirements…under General Municipal Law Section 103 and may instead be awarded using the request for proposals (RFP) process set forth in General Municipal Law Section 104-b.[6]

Professional services procurement is acceptable for the selection of appraisers, attorneys, auditors, planners, architects and engineers, for specific projects, under New York State law. The selection method for professionals begins with distribution of a RFP. The RFP selection process is best handled by an internal evaluation team pre-identified by the municipality. Those with conflicts or potential conflicts cannot participate in the preparation or selection process, and those who participate in the preparation of the RFP are precluded from submitting a bid.

Although in selecting professionals the municipality is not bound by the lowest price responsive to its RFP, it must carefully document the selection process from start to finish, and that process must adhere to its lawfully adopted policy. Even with GML § 103 procurement of goods and public works, the municipality is not bound by the lowest price when the bid does not comply with specifications or when the proposal is not submitted by a responsible or responsive bidder.

Preparing for Protests and Complaints

Protests are written complaints objecting to the methods employed or decisions leading to the award of a contract. The protestor's goal is to prevent or overturn an award.

Decisions to reject bidders should be carefully documented in anticipation of protests and litigation, and should conform to the procedures set forth in the procurement policy. Although unintentional noncompliance does not necessarily void contracts or impose liability upon the municipality, it can lead to delays and complications in procurement, including protests against contractor/vendor selection.

A Fair Process

A municipality benefits from a policy that includes an in-place protest/complaint procedure. A rejected bidder must have an opportunity to respond to a determination that it is not responsible. Also, a rejected bidder must have an opportunity to protest/dispute an award to another bidder.

A municipality's policy is pivotal to its procurement of professional services. Under Municipal Law § 104-b of the GML, municipalities are required to adopt a procurement policy, re-adopt it annually, specify the name of the employee responsible for procurement and document adherence to the policy for each and every procurement decision. When competitive bidding is *not* required, § 104-b establishes a set of procurement rules to ensure that these goods and services are procured in a manner "so as to assure the prudent and economical use of public moneys in the best interests of the taxpayers…"[7]

Further, the goods and services acquired should be "of maximum quality at the lowest possible cost under the circumstances" with the objective of guarding against "favoritism, improvidence, extravagance, fraud and corruption."[8]

Regardless of the funding stream or method of selection, municipalities are required to ensure fair and open competition when procuring.

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1. *See, e.g.*, 24 CFR 85.36 for HUD procurement.
2. Appendix A to Seeking Competition in Procurement www.osc.state.ny.us/localgov/pubs/lgmg/seeking-competition.pdf
3. http://osc.state.ny.us/localgov/audits/typeindex.htm
4. http://www.osc.state.ny.us/localgov/pubs/piggybackinglaw.pdf
5. *See, e.g.*, the Code of the Town of Horseheads in Chemung County http://www.ecode360.com/6720737#6720737
6. *Omni Recycling of Westbury v. Oyster Bay*, 11 NY3d 868 (2008).
7. New York State GML § 104-b(1).
8. *Id.*

WARD ...

Continued From Page 9

municipal defendants had failed to provide the plaintiff with a pre-deprivation hearing before entering his property, the question before the court was whether the undisputed facts showed an emergency condition existed justifying the abatement of the nuisance prior to providing a pre-deprivation hearing. On this question, the court found there were triable issues of fact whether emergency conditions existed at the property. In particular, the court focused on the fact there was considerable delay (years) after town officials identified the problems on the property and when they acted to summarily abate them. The court found the existence of this delay could support a reasonable finding the town officials acted arbitrarily in declaring the conditions on the property to be an immediate danger to the public.[7]

Conclusion

Turning to the plaintiff's Fourth Amendment claim, the court noted the law is unclear whether a warrant is required to enter private property to abate a known public nuisance.[8] After reviewing United States Supreme Court rulings on administrative searches and the Fourth Amendment, and numerous federal circuit court decisions applying those rulings to the abatement of public nuisances by government actors, the court found, with the exception of the Ninth Circuit, all other federal circuit courts that have considered the issue have held governmental actors need not obtain a warrant before abating an established public nuisance.[9] Although the Second Circuit has yet to weigh in on the issue, the court stated, based on holdings the Second Circuit has issued in other cases, it is likely to follow the vast majority of circuit court decisions that have already found a warrant is not necessary to abate a known nuisance. Thus, the court concluded "a municipality need not necessarily obtain a warrant to enter private property to abate a public nuisance."[10]

But Judge Bianco's analysis of the Fourth Amendment issue did not end with this finding. Instead, the court held even a warrantless abatement of a public nuisance by governmental actors must still be "reasonable" to comply with the requirements of the Fourth Amendment.[11] In this regard, the court found adherence to well-established principles of procedural due process is required before government actors may reasonably abate a known public nuisance without violating a private-property owner's Fourth Amendment rights.[12] Turning back to procedural due process analysis, the court found there were genuine issues of material facts whether the defendants' seizure of plaintiff's property was "reasonable" under the Fourth Amendment because the defendants failed to conduct a pre-deprivation due process hearing in what appeared to be a non-emergency situation.[13]

Judge Bianco's opinion in *Ferreira* makes clear governmental actors who seek to summarily abate known nuisance conditions on private property must proceed cautiously and take heed of constitutional limitations on their powers. Although such actors may not need a warrant to enter private property and abate a public nuisance, at the very minimum, they must afford private-property owners pre-deprivation due process, *i.e.*, notice and an opportunity to be heard, before abating a public nuisance under non-emergency circumstances. Failure to provide such due process could lead to costly and time-consuming civil-rights litigation.

Perhaps the most prudent course of conduct for a municipality to abate or eliminate a nuisance is to obtain injunctive relief from the New York State Supreme Court. The courts of this state have long allowed municipalities to enforce zoning ordinances and other code provisions.[14] One advantage a municipality has when obtaining a preliminary injunction is not being held to the customary three-prong test to be entitled to the relief. A municipality must only demonstrate its ordinance is being violated and the balance of the equities are in their favor.[15] It does not need to allege a special injury or damage to the public.[16] Seeking a preliminary injunction rather than proceeding in some other "extra-judicial" manner, also ensures the procedural due process and privacy rights of private property owners are respected prior to the abatement of a nuisance.

If a municipality has provided some mechanism in its local laws for providing pre-deprivation due process to a property owner prior to abating a public nuisance, and such process had been adhered to, a municipality should still consider obtaining a warrant prior to actually performing an abatement. Although Judge Bianco found that a warrant was not required in *Ferreira*, his opinion showed that the law is not settled on this question in the Second Circuit and there is a split of authority on this issue at the circuit court level among the circuit courts that have considered this issue.

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1. 14 New York Zoning Law and Practice Report 1.
2. *Shedrick v. Bd. of Health of Consol. Dist. of Prattsburg*, 204 Misc. 545, 547 (Sup. Ct., Steuben Co., 1953).
3. 56 F. Supp.3d 211 (E.D.N.Y. 2014).
4. 56 F. Supp.3d at 225.
5. *Id.* at 227.
6. *Id.* at 227-28.
7. *Id.* at 228.
8. *Id.* at 229.
9. *Id.* at 231.
10. *Id.* at 230.
11. *Id.* at 231.
12. *Id.* at 231.
13. *Id.* at 231.
14. *Beneke v. Town of Santa Clara*, 45 A.D>3d 1164 (3d Dept. 2007); *Town of New Baltimore v. Winslow*, 39 A.D.3d 1074 (3d Dept. 2007); 15. Town of Hempstead v. Davis, 245 A.D.2d 366 (2d Dept. 1997); *Town of Coeymans v. Malphrus*, 160 A.D.2d 1178 (3d Dept. 1990).
15. *Town of Huntington v. Reuschenberg*, 70 A.D.3d 814 (2010).
16. *Inc. Village of Freeport v. Jefferson Indoor Marina*, 162 A.D.2d 434 (2d Dept, 1990).