

# What (When) is a Public Work

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Purchasing Contracts Meeting

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# A public works contract is just a special type of contract

- Like a purchase of service contract or a purchase order, it is a type of contract
- The item purchased is “public construction”
- Sounds easy—but it isn’t

# When is a public works contract necessary?

- Under Wis. Stat. § [66.0901\(1\)\(c\)](#), a public contract “means a contract for the construction, execution, repair, remodeling or improvement of a public work or building or for the furnishing of supplies or material of any kind, *proposals for which are required to be advertised for by law.*”
- For the City, under Wis. Stat. § [62.15\(1\)](#), the following is required to be advertised for by law:
  - All public construction, the estimated cost of which exceeds \$25,000, shall be let by contract to the *lowest responsible bidder*; all other public construction shall be let as the council may direct. If the estimated cost of any public construction exceeds \$5,000 but is not greater than \$25,000, the board of public works shall give a class 1 notice, under ch. 985, of the proposed construction before the contract for the construction is executed. This provision does not apply to public construction if the materials for such a project are donated or if the labor for such a project is provided by volunteers. The council may also by a vote of three-fourths of all the members-elect provide by ordinance that any class of public construction or any part thereof may be done directly by the city without submitting the same for bids.
- Hence, if there is a contract for “public construction” in excess of \$25,000, the City is required to let the contract by bidding, using sealed competitive bids, awarding the contract to the “lowest responsible bidder.” (Wis. Stat. § [66.901\(1m\)](#))
- City Engineering has a recurring Class 1 notice to cover any projects in the \$5,000-\$25,000 range

# There are some exceptions

- Emergency work: Under Wis. Stat. § [62.15\(1b\)](#), public bidding is not necessary for “the repair and reconstruction of public facilities when damage or threatened damage thereto creates an emergency, as determined by resolution of the board of public works or board of public utility commissioners, in which the public health or welfare of the city is endangered.”
  - Recent examples: Flood repairs, fire restoration, Monona Terrace wash out
- Self Performance: Under Wis. Stat. § [62.15\(1\)](#), the Council may, by a  $\frac{3}{4}$  vote, provide by ordinance that certain classes of public construction may be done directly by the City without soliciting any bids
  - Under MGO Sec. [33.07\(6\)](#), this includes such things as: construction of water/sewer/stormwater infrastructure where the City is able to do the work itself, solar panel installations, traffic signal installations, and demolition/installation/construction/improvement/repair of City facilities
- Developer Agreements: Wis. Stat. § [236.13\(2\)\(am\)1.a.](#) and MGO Sec. [16.23\(9\)](#)
- Donated Improvements: Wis. Stat. § [66.15\(1e\)](#)
- Very rare exception: Projects where “the nature of the work called for makes it impossible or impractical to draw specifications satisfactorily to permit competitive bidding.” *Aqua-Tech, Inc. v. Como Lake Prot. & Rehab. Dist.*, 71 Wis. 2d 541, 547, 239 N.W.2d 25, 28 (1976).
  - Recent example: Aldo Leopold Park pump track

# What happens if it's a public work contract?

- If a contract is a public works contract, it is subject to numerous State laws and City ordinances
  - Must award contract to “lowest responsible bidder”; not preferred bidder
  - Under the authority granted by Wis. Stat. § [66.0901\(2\)](#), the City is able to create requirements necessary for the “protection and welfare of the public in the performance of a public contract”
  - This is where our “Best Value Contracting” requirements, including the prequalification process, set forth in MGO Sec. [33.07\(7\)](#) comes from
  - In addition, public works contracts have their own special contract terms (the Standard Specifications), bonding requirements, dispute processes, and amendment (change order) procedures
  - Board of Public Works has special authority over the bidding process; City Engineer has special authority over the work itself
  - Common Council has to approve the plans and specifications, award the contract, and accept the work—at least three separate legislative actions
- A public works contract is a more cumbersome, slow and deliberate process than other forms of contracting

# Public works contracting is not about efficiency

- “Competitive bidding requirements were intended for the benefit and protection of the public. They are designed to prevent fraud, collusion, favoritism and improvidence in the administration of public business as well as to insure that the public receives the best work or supplies at the most reasonable price practicable.”

Nelson Inc. of Wisconsin v. Sewerage Comm'n of City of Milwaukee, 72 Wis. 2d 400, 408, 241 N.W.2d 390, 395 (1976)

- Concern is that staff/policy makers may prefer to avoid public works process because other contracting options are easier (i.e., many contracts don't even require special council approval)
- But law doesn't allow that

# Why does the distinction matter?

- If the City violates the public works bidding laws (e.g., by not awarding to lowest responsible bidder, by opening all bids before awarding, by issuing the work as a purchase of service contract) there could be lots of negative consequences
  - Contractors who otherwise may have bid on the project, or may have been the lowest bidder, *may* have a cause of action against the City
  - Taxpayers *may* also have a cause of action against the City
  - Remedies could include: invalidating the existing contract, damages, delayed work/project, or rebidding the project. In addition, there would develop a lack of trust in the contracting community toward the City—making future projects more expensive and costly
    - Even minor errors in the process can cause extensive project delays
  - Ultimately, the risks to the City of not carefully following the public works bidding laws outweigh any perceived benefits

# So what is “public construction”?

- As noted above, the public works laws apply to contracts for “public construction”
- Unfortunately, the legislature, in its (lack of) wisdom, has not defined this term, so it is subject to interpretation
- A general rule of thumb, public construction includes: “(A)ctivities concerned with the erection of buildings and bridges, the construction of streets and highways, and other similar public improvements *which require the combining of materials, supplies and labor*. Mere maintenance and other public works which do not involve the actual combining of materials and labor with a definable end result would unlikely constitute public construction.”
- The Court of Appeals has held that in determining whether a project constitutes a public work, "the pertinent factors to consider include the nature and the character of the project, the ownership, use and maintenance of the project, and whether the work is being done for the appropriate municipality."



# Examples of Public Construction

- Road reconstruction project
- Demolition of a building
- Remodeling the interior of a City office
- Installing new fencing around a City facility
- Painting the interior of a new building
- Installing a new roof
- Installing new landscaping features

# Examples of work that is not public construction

- Chip sealing pavement (maintenance)
- Repairing damage to a wall
- Purchase of large or expensive equipment where the installation costs are a minimal part of the contract
- Repairing hail damage to an existing roof
- Repairing existing landscaping features

# Existing processes

- Agency looking to do the work should ask itself whether the work in question is “public construction” and thus needs to be handled as a public work contract
- Warning: An item that may look like a simple purchase of services or equipment, could constitute public construction
- When in doubt, ask Engineering or the City Attorney’s Office
  - Don’t be afraid to ask. There is no clear line—but the City will be better served if the question is addressed up front, rather than after the fact
- Sometimes, it may be possible to redefine or better define the work to steer clear of these requirements

# An example to consider—Truck Scales Project

- In 2018, Streets needed three new vehicle scales for salt/sand storage facilities and contacted the desired supplier (Cream City Scale, LLC) to obtain the new equipment—originally deemed a sole source POS
- The supplier quoted the City \$350,000 for the equipment and software
  - On further examination of the proposal, the proposed work included site preparation work and installation
  - The site preparation work included >\$25,000 in concrete foundation installation, work which would normally be a public improvement subject to the bidding requirements
- The City could have put the whole project out to bid, and required the specific scale as part of the work—this would have likely added significant additional costs and delays to the project
- Instead, the foundation work was split off into a separate public works contract and put out to bid. The scale was purchased and installed by its own purchase contract
  - The supplier's contracting entity (Cream City Concrete Contractors) was the only bidder on the project (Contract No. 8465).
  - Ultimately, the same entity essentially entered into two contracts with the City. Not efficient—but legally necessary.
- Some creativity may be necessary—although we cannot avoid the \$25,000 limits by splitting work into multiple contracts.

# Questions?

- Feel free to reach out to me should any questions arise:
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