

Fairfield County Contracting Procedures Update

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Contracts

Presented by APA Joshua Horacek



What is a contract?

- A contract is simply a legally enforceable promise
- Contract = Agreement ≠ Memorandum of Understanding



What is required to create a contract?

- Certain magic words on a paper?
 - “...in contemplation whereof, the parties have affixed their signatures hereto with intent to be fully bound as of the dates indicated...”
 - No
- Signed by both parties?
 - No
- In writing?
 - No*



What is required to create a contract?

- Offer
- Acceptance
- Consideration



What is “consideration”?

- “Consideration” is a bargained for exchange between the parties
- It may be either a detriment to the promisee or a benefit to the promisor
- MOUs are not contracts because there is consideration, just a mutual statement of positions or undertakings
- A contract without consideration on both sides is just a gift



Offer/acceptance

- Seldom will the County be in position of making an offer, but it is important to understand who can formally accept an offer on behalf of the County



Who can accept (and enter into a contract) on behalf of the County?

- Authority of individual boards and elected officials is limited.
 - Specific statutory authority exists in some cases:
 - R.C. 5713.01 (E): “the auditor may enter into a contract with an individual, partnership, firm, company, or corporation to do all or any part of the [appraisal] work.”
 - R.C. 313.05(A)(1): “The coroner may contract for the services of deputy coroners to aid the coroner in the execution of the coroner’s powers and duties.”



Who can accept (and enter into a contract) on behalf of the County?

- Sometimes elected officials have contracting authority, but BOC approval is still required:
 - R.C. 309.09(D): “The prosecuting attorney and the board of county commissioners jointly may contract with a board of park commissioners under section 1545.07 of the Revised Code for the prosecuting attorney to provide legal services to the park district the board of park commissioners operates.”
 - R.C. 307.51(F): “Subject to the approval of the board of county commissioners of the county, the county law library resources board may contract with other county law library resources boards, the statewide consortium of law library resources boards, private entities, or public agencies for the provision of any services that the county law library resources board considers necessary.”



Who can accept (and enter into a contract) on behalf of the County?

- General contracting authority is vested in the Board of Commissioners
- If there is no specific authority for a board (other than BOC) or EO to enter into a contract, then BOC is contracting authority.
 - Special funding source \neq contracting authority
 - For example, even if funding is coming from Prosecutor's Delinquent Tax Assessment and Collection Fund, contract may still need to go to BOC
- BOC can (and has) delegated that authority to the County Administrator within certain limits (generally up to \$100K)



One other requirement for County Contracts (R.C. 5705.41):

- The County may NOT make any contract involving the expenditure of money unless there is attached thereto a certificate of the Auditor that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.
- THIS OBLIGATION IS MET BY THE PURCHASE ORDER



One other requirement for County Contracts (R.C. 5705.41):

- The requirement of R.C. 5705.41 means that the contract **MUST** have a definite maximum amount
 - Auditor cannot certify unknown amount
- No open indemnification clauses!
 - An indemnification clause is a promise to cover losses or damage sustained—but if we do not know what those losses or damages are, how can we say we have the money to cover them?



Updated Contract Routing form and Refresher on Competitive Selection

Presented by APA Amy Brown Thompson



Updated Routing Form

- Some changes to the form to highlight:
 - Addition of H(1) regarding that the router has no improper interest in the contract (eff 3-21)
 - Previous changes include
 - certifying that there is no finding for recovery against the vendor under R.C. 9.24
 - the router has solicited 3 quotes for the contract (assuming that competitive bidding is not triggered)
 - Exceptions to this provision if the service is sole source
 - a purchase order is included with the Agreement



Contract Routing Form

ROUTING FORM FOR CONTRACTS

The undersigned designee of the County affirms that he/she has reviewed the attached contract to ensure that it complies with County's needs and previous negotiations. The undersigned designee further affirms that the County has complied with the competitive selection process, as prescribed by the Ohio Revised Code, by selecting one of the boxes below.

- A. Goods and/or Services in excess of \$50,000.00—competitively selected via an Invitation to Bid, pursuant to R.C. 307.86-307.92
- B. Goods and/or Services in excess of \$50,000.00—competitively selected via a Request for Proposals, pursuant to R.C. 307.862
- C. Public Improvement contracts—competitively selected pursuant to R.C. 153.08-153.12
- D. Architect/Engineer design services for public improvements—selected through the Request for Qualifications process pursuant to R.C. 153.65-153.72
- E. County Road Improvement/Construction—competitively selected pursuant to R.C. 5555.61
- F. The subject matter was exempt from competitive selection for the following reason(s):
- Under \$50,000
 - State Term #: _____ (copy of State Term Contract must be attached)
 - ODOT Term #: _____ (See R.C. 5513.01)
 - Professional Services (See R.C. 307.86)
 - Emergency (Follow procedure under ORC 307.86(A))
 - Sole Source (attach documentation as to why contract is sole source)
 - Other: _____ (cite to authority or explain why matter is exempt from competitive bidding)
- G. Agreement not subject to Sections A-F (explain): _____
- H. Compliance with Fairfield County Board of Commissioners Procurement Guidelines
- No County employee, employee's family member, or employee's business associate has an interest in this contract OR such interest has been disclosed and reviewed by the Prosecutor's Office
 - No Finding for Recovery against Vendor as required under R.C. 9.24 (search via "Certified Search" on <http://ffr.ohioauditor.gov>)
 - Obtained 3 quotes for purchases under \$50,000
 - Purchase Order is included with Agreement

Signed this _____ day of _____, 20_____

Name and Title

*** Please note that this checklist only addresses County and statutory requirements. If a contract is paid for with state and/or federal funds, please consult with the appropriate state and/or federal agency to ensure your department is complying with any additional requirements. By submitting a request for approval, you are certifying you have addressed County, statutory, and grant requirements.***

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When is competitive selection necessary? (R.C. 307.86)

- ANYTHING TO BE:
 - Purchased
 - Leased
 - Leased with an option or agreement to purchase
 - Constructed

When the cost exceeds **\$50,000**



What does this include?

- –Any product
- –Structure
- –Construction/reconstruction
- –Improvement
- –Maintenance
- –Repair
- –Service



Exceptions to Competitive Bidding

- Services of an
 - accountant
 - architect*
 - attorney at law
 - physician
 - professional engineer*
 - construction project manager
 - consultant
 - surveyor
 - appraiser

*So long as the services are not design services related to a public improvement. Must do a Request for Qualifications (RFQ) for those design services under R.C. 153.65 -153.73



Different types of competitive selection

- Invitation to Bid (ITB)
 - Solicitation for "lowest and best" bid
 - winning bid must be both the lowest and most responsive to the ITB
 - more important to be responsive to the ITB and not necessarily the cheapest bid
 - Important to be fair to all prospective bidders during process
 - If a question is posed by one bidder, a response needs to be issued to all bidders
 - Any amendment to the solicitation must be shared with all



Different types of competitive selection (cont'd)

- Request for Proposals (RFP)
 - Solicitation for proposal that is later scored and negotiated
 - See R.C. 307.862
 - Can only be used for certain types of purchases/leases
 - Preferred for more technical or service-based purchases



Different types of competitive selection (cont'd)

- Request for Qualifications (RFQ)
 - Solicitation for qualifications of architects and engineers to design public improvements
 - Covered by R.C. 153.65-153.73
 - Only need to do for design build construction projects
 - Can pre-qualify architects and engineers if project is less than \$50,000
 - If project is more than \$50,000, specific RFQ must be issued
 - Can solicit qualifications more informally



CRMS

Presented by APA Thomas Linger



Issues the Prosecutor's Office will look for in CRMS review

- Indemnification clauses
- Collection/attorney fees
- Interest
 - The Auditor must be able to appropriate the necessary funds per RC 5705.41(D)(1). Unless there is a maximum or definite amount, the funds could not be properly appropriated.
- Venue
- Choice of law
 - The contract should be governed by laws of the state of Ohio and the venue in Fairfield County Courts



Issues the Prosecutor's Office will look for in CRMS review (cont'd)

- Not included terms and conditions (link to a website)
- The Prosecutor's Office reviews the contracts for form only. We do not review them for fair terms, etc. The expectation that the department negotiating the contract has the expert knowledge to obtain the best terms.



Questions?

