

## MEMO

TO: Mayor James Tipple  
FROM: Anne Jacobson  
RE: Crossing Guard Contract  
DATE: October 13, 2011

Based upon Chief Hardel's Memo to the Council (dated October 6, 2011), factual representations made to me, a review of the applicable law, and consultation with legal sources, I make the following opinion.

Police Chief Hardel executed a contract with All City Management Services (ACMS) to provide crossing guard services on August 10, 2011, thereby directly eliminating the crossing guard positions from city employment.

Section 62.11(5) of the Wisconsin Statutes grants broad governmental powers to city councils, including contract power. While contract authority is generally vested in the governing bodies of cities, the power may be delegated by the governing body to a subunit, official or employee. However, in the absence of express delegation, it is a well-established rule that no subunit, official or employee of a city can bind their municipality to any contract (*Holzbauer v. Safway Steel Products, Inc.*, 288 Wis. 2d 250, 712 N.W.2d 35 (2005)). Thus, some authorization is a key procedural requirement for every city contract.

On November 9, 1999, the City of Wausau Common Council adopted the City of Wausau Procurement Policy and resolved that its administration and enforcement should be done under the direction of the Mayor and department heads. The minutes of that regular council meeting indicate that then Mayor Lawrence requested language be inserted to provide flexibility which would allow a committee or entity to use a sole source procurement method provided it is documented in writing and placed on file as a public record.

Turning to the policy itself, under **Spending Levels and Methods of Procurement**, it states, "Procurement method shall generally be determined by the dollar amount of the item or service being purchased." Under paragraph 3., purchases in excess of \$15,000 require [compliance with] additional procurement procedures , including a requirement that requests for quotations be formally advertised.

"Competitive proposals for professional services", under paragraph 4., requires that a request for proposal be publicized and identify the evaluation factors to be used and their relative importance.

However, focusing on "Noncompetitive Proposals," under paragraph 5., this method "*may*" be used in special circumstances when a purchase or award of a contract is better done under a noncompetitive or sole source method." It goes on to state:

"Noncompetitive or sole source procurement involves the solicitation or acceptance of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate, nonresponsive, or the department believes that it is in the best interest of CITY to accept a certain proposal.

The circumstances of each noncompetitive procurement are to be documented and kept on file in the Engineering Department along with a sufficient cost analysis to show that the price is fair and reasonable.

There is no dollar limit beyond which additional scrutiny is imposed under the policy.

Finally, under "**Organizational Responsibilities**," paragraph 2., "The unit managers or division heads are responsible for compliance with the City's procurement policy."

All procurement, according to the policy, shall comply with applicable federal, state and local laws, regulations, policies and procedures. The policy further provides that the commitment to purchase goods or services may be made by using a contract.

If the adoption of this policy by the common council, while not clearly stated, can be read as a delegation of express authorization of a contract by an employee, then arguably, the Chief's Memo provides sufficient facts to show substantial compliance with the "Noncompetitive Proposal" provision. He explains that his lieutenant's research revealed "very few companies who provide this service." A local company was contacted who was not interested. Great attention to detail is given to documenting the process of determining whether to outsource the service, and less to the decision to award the contract to ACMS , although one can infer management felt it was in the best interest of the City to contract with ACMS, since it is the "only service [they] provide" and they "received outstanding recommendations." He goes on to later state what the company provides to

the city under the contract.

If relying upon the "Noncompetitive Proposal" provision, strict compliance with that provision would require the documented circumstances of this procurement be kept on file *in the Engineering Department along with a sufficient cost analysis to show that the price is fair and reasonable*. Complying with the intent of the Council in 1999, that documentation be kept on file as a public record, I suggest that this type of documentation be placed on file with the city clerk in the future.

The cost analysis required by the policy may have been performed and just not outlined in the Chief's memo. We know the cost of 10% of Lt. Bliven's pay and benefits is approximately \$10,000. At a minimum, it is my opinion that the policy requires, in this instance, documentation of the personnel cost of the crossing guard positions in pay and benefits, plus the additional cost of a police lieutenant, supervising the program, compared to the contract cost and any related staff cost to administer the contract. The cost of the contract is found in paragraph 15 and provides for a per hour cost per guard per year. What is the projected cost of the contract to the City this first year, given the number of guards that were needed to be hired? How much of that per guard cost is salary paid by ACMS and how much is kept by them as administrative expense? The price may very well be fair and reasonable, but additional documented analysis is recommended to comply with this portion of the policy.

I am unaware of any other statutes, ordinances or policies that would be applicable to the decision to contract with an outside source to provide a service.

Second, budgetary authorization must exist for the contract. Was the expense budgeted? Without having the comparison of the relative hard costs of this procurement, I can render no opinion with regard to whether the Chief exceeded his budgetary authority. If after any necessary reallocation of funds are made, his authorized budget has not been exceeded, no further Council authorization is necessary.

Turning to the issue of termination of city employed crossing guards, I have confirmed with WERC General Counsel that because the collective bargaining agreement between the city and 1287CH, the union to which the crossing guard positions belonged, expired on December 31, 2010, coupled with the enactment of Act 10, the termination of the crossing guards from city employment was not a violation of a collective bargaining agreement and is a permissible action under the provisions of the new state law.

Whether this action required committee and/or Council review or action is less clear. I find nothing in the Wausau Municipal Code under Ch. 2.02.080 that was violated in this termination action by not securing the approval of the human resources committee, although arguably, it may have been advisable to inform them, at a minimum, prior to the action being taken.

Lastly, all city contracts must be signed by the mayor and city clerk, unless otherwise provided by resolution or ordinance, and approved as to form by the city attorney (Wis. Stats. S. 62.15(12)). I don't think it is clear that the policy authorizes the purchaser to execute the contract. In cities, the comptroller, or officer performing his or her duties, must countersign all contracts. Wis. Stats. s. 62.09(10)(f).

In summary, with additional documentation of the cost analysis required by the noncompetitive proposals provision of the procurement policy, no ratification of the contract appears necessary under the foregoing analysis. However, it is advised that the appropriate committees periodically review the ordinances and procurement policy described herein.