

COUNTY OF MILWAUKEE
Interoffice Memorandum

DATE: May 8, 2014

TO: Supervisor Theodore Lipscomb, Sr., Chairman, Committee on Judiciary, Safety, and General Services

FROM: Jessica Janz-McKnight, Research and Policy Analyst, Office of the Comptroller-Research Services Division

SUBJECT: Procurement Appeal Processes Comparison to Proposed Policy

REQUEST

Recently, the Office of the Comptroller submitted a request to update the Milwaukee County Code of General Ordinances to clarify and unify the appeal procedures for all county contracts and bids when preparing and executing RFPs for professional services.

The Research Division was asked to provide the Committee on Judiciary, Safety and General Services further information on how the Comptroller's proposed policy compares to practices of other governmental agencies' procurement appeal processes.

HISTORICAL BACKGROUND: CHAPTER 110

In 1976, the Milwaukee County Corporation Counsel recommended File No. 76-879 to create Chapter 110 of the General Ordinances (MCO). The ordinance was approved by the County Board on December 14, 1976 and published on January 20, 1977.

It should be noted that the ordinance was relatively brief and suggested that the county will follow procedures "which shall reasonably resemble the conduct of a hearing and final determination under ss. 68.11 and 68.12. Wis. Stats., although exempt from the strict requirements thereunder pursuant to s. 68.14(3), Stats."

On March 17, 1988, the County Board approved (vote 15-7) an amendment to the Chapter 110 ordinance in File No. 88-88 that removed matters covered by subchapter II of Chapter 32 and matters related to procurement practices and procedures of the Medical Complex from the jurisdiction of the chapter 110 appeal process. This change, which was requested by the Purchasing Administrator, would prohibit vendors from appealing adverse decisions of the Purchasing Standardization Committee to the Committee on Finance, Personnel and Audit.

The Office of the Corporation Counsel submitted a comprehensive change to the Chapter 110 ordinance in a memo dated February 7, 1997. The changes were designed to make

the appeals process “more orderly and uniform throughout the County.” File No. 97-248 to repeal and recreate Chapter 110 of the general ordinances was approved by the County Board on March 20, 1997 (vote 22-0).

It is important to note that the creation of Chapter 110 was not specifically created to solely address procurement appeals, but rather with the intent of establishing a due process within Milwaukee County to handle grievances for *all* administrative matters including contracts, permits, licenses, rights, privilege and authority.

Specifically for Chapter 110, an aggrieved party can file a written notice of review within five days after a determination to contest the process. The authority that made the determination can review its initial decision and may either reverse, modify or affirm it. If the aggrieved party is still not satisfied with the resulting decision, they may follow with an appeal to the appropriate standing committee of the County Board within five days of the written decision. The appeal is then heard by either the appropriate standing committee, or by a review panel of three to five appointees made by the standing committee chairperson and confirmed by the committee members. The review must take place within ten days of receiving notice of the appeal, unless extended by the committee chair. The review panel may consist of elected officials, county employees, or non-county personnel; experience in procurement matters is not required of the review panel members.

The review panel’s duty is to determine whether or not the determination process was followed correctly. If the panel finds that the process was carried out correctly, the administrative determination is upheld and the department can proceed in executing the contract. If the panel finds that the process was not followed correctly, the department’s decision is appealed and the procurement process would start over.

APPEALS PROCESSES IN OTHER JURISDICTIONS

Dane County, Wisconsin

In Dane County a vendor may appeal to the Contract Compliance Officer who determines whether there is a violation in the procurement process. If a violation is substantiated and in accordance with the Dane County Ordinance, the Contract Compliance Officer refers the appeal decision to the Contract Compliance Hearing Board (“Board”). The Board consists of the chairperson of the Equal Opportunity Commission, one citizen member, and one Supervisor member of the Commission appointed by the Commission chairperson. There are two County Board Supervisors who serve on the Equal Opportunity Commission. Appeals must be properly noticed to the County Clerk no later than 30 days after issuance of the proposed decision. The Board shall meet on notice, take testimony, receive evidence, allow a party to call witnesses, allow cross-examination and issue a final decision.

City of Milwaukee

If a bidder refutes recommendations made by the City Purchasing Director, the City of Milwaukee Charter states that the appeal shall be heard and determined by the Purchasing Appeals Board. In accordance with the City of Milwaukee's Code of Ordinances, the bidder may object by filing a written appeal with the purchasing director no later than five working days after the date the recommendation is made.

The purchasing director then forwards the appeal to the chairperson of the Purchasing Appeals Board ("the Board"), which is comprised of eight members including the Mayor, the Commissioner of Public Works, the chair of the Common Council Committee on Finance and Personnel, the Director of Administration, the City Comptroller, the president of the Common Council, and two City of Milwaukee employees appointed by the mayor and the Common Council president. The Board is sent adequate materials to assist them in making a sufficient and prompt decision, and conducts a hearing in which a determination is made prior to adjournment. The Board must file its written findings and conclusions within ten days of making the determination. Unless there is a necessary time constraint, the Board reserves the right to schedule the hearing for its next regular or special meeting as long as notice is provided to all bidders at least five days prior to the hearing.

NON-PANEL JURISDICTIONS

In a recent report on "Milwaukee County's Policies & Procedures Review" from the National Institute of Governmental Purchasing, Inc., File No. 14-422, information is provided stating that at least three other counties, Waukesha, Wisconsin, Fairfax, Virginia and Gwinnett, Georgia, grant the purchasing director the sole discretion to hear appeals without any further appeal process prior to an appeal to a circuit court. Our research, however, indicates that many other governments have an additional appeal process after the procurement director (or department head) has considered the initial appeal and prior to a judicial appeal. The composition of appeals boards varies among jurisdictions and, if the volume of appeals is similar to Milwaukee County, they are not used very frequently.

Walworth County, Wisconsin

In accordance with Walworth County Code of Ordinances s. 17-41(b), if a violation or irregularity is detected during the bidding process in Walworth County, the bidder may protest in writing to the Deputy County Administrator-Central Services within 72 hours of the bid opening. According to the Walworth County Purchasing Manager, due to the very limited response timeframe of 72 hours, appeals have not been conducted as bidders do not file grievances in time. There is no formal procurement appeals procedure in place, but the Purchasing Manager suggested that something would be put together if it was needed.

Broward County, Florida

The Purchasing Division in Broward County, Florida has received state and national awards (National Association of Counties & National Institute of Governmental Purchasing) for their procurement processes. An aggrieved bidder or offeror must pay a filing fee and submit the grievance to the Director of Purchasing. The Director has the authority to settle or resolve the protest and provides a written decision. The bidder or offer or then has the right to have an Administrative review by a hearing officer. The hearing officer is selected by the County Attorney from a list of candidates chosen by the Board of Commissioners. The administrative process should be utilized before the final step, which is the filing of a civil suit against the County.

Du Page County, Illinois

Du Page is a county of a similar size, budget, and legislative and executive composition to Milwaukee County. The Chief Procurement Officer (CPO) can resolve any conflict under his purview. The bidder, offeror or contractor has seven days to submit a letter of protest to the CPO. The CPO has 5 days to respond in writing and notification of the right to appeal. The County decides whether the protest is cause for a delay in procurement. The CPO's decision is final unless the County Board Chairman receives a written appeal within five business days of receipt of the final decision of the CPO. The County Board Chairman shall render a decision in ten business days on the matter.

AMERICAN BAR ASSOCIATION RECOMMENDED PRACTICES

The 2000 American Bar Association (ABA) Model Procurement Code for State and Local Governments publication is used by many jurisdictions throughout the country. The Model ABA code states, in part:

2. *Authority to Resolve Protests.* The Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offer or, or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with regulations promulgated by the [Policy Office] [Chief Procurement Officer].

3. *Decision.* If the protest is not resolved by mutual agreement, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer shall promptly issue a decision in writing. The decision shall,
(a) state the reasons for the action taken; and
(b) inform the protestant of its right to judicial * or administrative * review as provided in this Article.

The ABA Code recommends a "Procurement Appeals Board" to hear appeals of those who do not believe the decision of the Chief Procurement Officer is fair. The model ABA Code for the creation of an appeals board states:

Creation of the Procurement Appeals Board.

There is hereby established in the executive branch of this County a Procurement Appeals Board to be composed of a chairperson and at least two other members, but not more than [_____] members. The chairperson and members of the Board shall be appointed by the County Executive, and confirmed by the County Board, and shall serve full-time.

Perhaps more useful is the ABA commentary section related to the creation of the Procurement Appeals Board which states:

(1) An independent, full-time Procurement Appeals Board can provide informal, expeditious, and inexpensive procedures for the resolution of controversies. Further, creation of a Board can advance the development of a uniform set of precedents in procurement law.

(2) The size of the Board beyond the minimum of three members is left to the discretion of the county. It is believed that a Board should be full-time, although its members may have other duties in their job descriptions, in order to be independent and to develop the desired expertise. It is vital that the members of the Board be highly competent, fair, and impartial.

PROPOSED CHANGES

Chapters 32, 44, 56, and 110 of the MCO currently have different appeal procedures that do not uniformly designate a consistent process for handling the full scope of appeals in the event of a grievance or protest.

The Comptroller's recommendation is to have all awarded services, contracts, or bid processes under chapters 32, 44, and 56 be governed by one appeal process to be outlined in a newly proposed Chapter 110.20 of the MCO. This would also require that chapters 32, 44, 56, and 110 be amended to reflect cross-references to the new chapter's process.

Changes requested for the new process would include a requirement that aggrieved parties pay a \$1000 deposit towards the cost of the review, and a Contract Award Reviewer would be assigned to conduct any type of review they deem appropriate. Also, a three-person review panel with experience in procurement matters would be appointed by the County Executive and confirmed by the County Board to serve a three-year term and be paid an hourly rate determined by either the county budget or by the Procurement Director.

The existing process contained in Chapter 110 would remain in place for all reviews not related to contract awards.