The Firehouse Lawyer

Volume 20, Number 8

August 2022

Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-590-6628

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Inside this Issue: New Bid Law Column and a Casenote

TAKE WARNING: OUR NEXT MUNICIPAL ROUNDTABLE IS ON THE WAY!

To all of our friends in the public service, we are hosting yet another Municipal Roundtable (MR). The MR is akin to a "town hall" for those in government, from those in administration to elected officials. The MR is a place for public servants to develop a collective understanding of the legal/politically perilous issues. The MR is not a lecture: Participants share their experiences and discuss them, and share policies they have used to address issues in a uniform manner, rather than "playing it by ear." And we, the attorneys, are the facilitators that articulate the legal concepts underlying the discussion.

Please join us for a *virtual* MR, in which we will be discussing the exceptions to the bid laws under RCW 39.04.280—which we wrote about last month.[1] We welcome our readers, and any of your friends in government, to this free discussion forum. This *virtual* MR will take place on **Friday, September 30,** from 9 AM to 11 AM.

Join our Municipal Roundtable, via Zoom, here:

https://us06web.zoom.us/j/81295328206?pwd=cWRVUUF5RGlCQXNyZS80c0E4aVU1Zz09

---

[1] https://www.firehouselawyer.com/Newsletters/July2022FINAL.pdf

If you are less tech savvy and need access to the MR by different means, please contact us.

THE RESPONSIBLE BIDDER: PIGGYBACKING AND CO-OPS

As promised, we are continuing our Responsible Bidder column that discusses issues relevant to the bid laws and public contracting. We have written on this subject for many years[2] but felt this subject needed revisiting. This month we deal with what is commonly known as "piggybacking," a form of cooperative purchasing. Secondly, we deal with the process of purchasing through cooperatives, which are often headquartered in other states.

A fire district may lawfully engage in cooperative purchasing of materials, supplies, equipment, or services by contracting with other public agencies. RCW 39.34.030. This sometimes takes the form of an interlocal agreement to purchase or engage in procurement jointly, typically with one of the agencies playing the role of "lead agency" to execute the actual purchasing contract.

More often, however, one agency will want to use another agency's executed contract and purchasing process to buy supplies or equipment from the same vendor. This is commonly known as "piggybacking." This too is permissible under the same law, as an exception to using the competitive bidding process under RCW 52.14.110. Chapter 39.34 applies to all municipal corporations, so piggybacking is also available to regional fire authorities.

[2] https://www.firehouselawyer.com/NewsletterResults.aspx?Topic=Public+Bid+Laws+

Of course, the applicable statutes and the common law applicable to public procurement must not be violated. The goal of procuring the best product at a reasonable, competitive price must be kept in mind. Fair competition between vendors should also be ensured. Fraud and collusion must be avoided. The scope and the terms of the original contract must not be unduly changed.

But the more basic requirements are these: (1) There must be agreement between the vendor and the original contracting agency that the contract is open for piggybacking by other agencies; (2) the original agency must have been in compliance with its own applicable bid statutes in the first instance; and (3) the original agency must have posted the bid or solicitation notice on a website maintained by the agency, a purchasing cooperative or similar provider or have used the state's web portal. RCW 39.34.030(5)(b).

With respect to contract terms, we recommend that (1) the original contract should not be stale, for example, more than two years old; and (2) the scope or price of the purchase should not be substantially more, or an auditor might reasonably be concerned that it is not really the same equipment, materials, or supplies that were originally purchased! This can be a problem, for example, when the purchase is a fire engine or similar apparatus, and a lot of extra equipment (bells and whistles?) is added by the second agency.

In recent years, purchasing through cooperatives located in other states, but authorized by the states in which they operate, has become rather common and is now considered generally acceptable if certain safeguards are observed. The State Auditor (SAO) does not endorse any

purchasing cooperatives or maintain a list of the "approved" cooperatives.

However, the SAO has shared with us their thoughts on the appropriate procedures and safeguards to ensure that your purchase through one of these national cooperatives does not violate Washington statutes and the common law of public procurement here in Washington State.

The Interlocal Cooperation Act, chapter 39.34 RCW, is the source of authority again to govern this question. We use the terms "Participating Agency" and "Lead Agency" because the statute contemplates that there will be a contract between two public entities.

As we interpret the SAO guidance, the following requisites must be met:

1. The Participating Agency (the new purchaser) must enter into a "membership agreement" that shows it and the Lead Agency are both public agencies;

2. The Lead Agency must have properly advertised the original bid properly;

3. The Lead Agency must have used a bid process that met their state laws, as documented in a legal opinion that is filed in the Participating Agency's procurement file;

4. The vendor must have agreed to make the bid available to future purchasers (as with piggybacking, see above); and

5. The bid must still be open for purchases, with minor changes to the original bid—as is common—being allowable.

When asked for a legal opinion pertaining to a proposed cooperative purchase, as attorneys we look at the above factors. We start with analysis of the cooperative's competitive bidding and advertising process. Typically, these bid processes involve advertisements in publications in various states. We check the statutes in the state where the Lead Agency is doing business. We are looking for compliance with the notice (advertising) and other statutory requirements. We expect the client (purchasing entity) to show us they have executed a membership or similar agreement with the cooperative.

Requisites 2 through 5 above can be accomplished by the lawyer for the purchasing agency, since the main task is to research the applicable bid laws in the state of the Lead Agency. While it is not too difficult for a lawyer to find the statutes in all fifty (50) states, it is probably not a task that a lay person, such as a Fire Chief or his/her staff, should undertake. We have become quite comfortable with the necessary work when the cooperative is Sourcewell (Fire Rescue GPO),[3] NPPgov,[4] or the Houston-Galveston Area Council (HGACBuy[5]) and a few others.

TAKE NOT: Do not proceed to purchase through a cooperative without getting a legal opinion on whether the applicable state's bid laws have been satisfied in the first instance.

MASK MANDATE UPHELD BY COURT OF APPEALS

[3] https://www.sourcewell-mn.gov/fire-rescue-gpo

[4] https://nppgov.com/

[5] https://www.hgacbuy.org/Home

In a recent 2-1 decision, Division 2 of the Washington Court of Appeals upheld the mask mandate imposed by the Washington State Secretary of Health, pursuant to the emergency declared by the Governor due to Covid-19. While the decision is not that surprising, and is consistent with Supreme Court decisions, we found the discussion of the delegation doctrine interesting. Municipal agencies often exercise their powers through a non-elected official such as a Fire Chief, due to a delegation of authority made by the elected board, so the principles discussed in this case are relevant to us.

The recent case is *Sehmel et al. v. Shah*, No. 55970-6-II (2022).[6] The appellants challenged the authority of the state Secretary of Health to mandate that every person in Washington State wear a mask indoors and in certain large outdoor settings in the midst of the coronavirus pandemic.

The majority decision and the one dissenter agreed on one argument: they ruled that wearing a mask or not wearing a mask (to prevent Covid transmission) does not constitute political speech so the First Amendment is not implicated at all.

However, the appellants also argued that the mask mandate was void because they claimed the legislature did not properly delegate authority to the secretary of health. Applying the principles of administrative law established in *Barry & Barry, Inc. v. Dep't of Motor Vehicles,* 81 Wn. 2d 155, 500 P.2d 540 (1972), the Court of Appeals ruled that the legislature had adequately set out guidelines defining what is to be done and the instrumentality or administrative body that is to accomplish it.

Second, the Court held that procedural safeguards were adequate to prevent arbitrary administrative action or abuse of discretion. The Court reiterated the concept set forth in *Barry,* that the legislative standards in the applicable statute need not be strict or exact. They may be quite broad or even vague. Also, the procedural safeguard may be as obvious as the right to judicial review.

We see this case as illustrative of the analysis when the issue is whether the Board of Commissioners has properly delegated one of its powers to the Fire Chief. Take, for example, the case of a credit card resolution adopted by the board of a fire district. To be a proper delegation of the power and authority to manage the financial affairs of the district (which is a power given by the state legislature to the board) the resolution should make it clear who manages the credit card "program" and how they should do it. It should also include some procedural safeguards and limits, such as timelines for payment to avoid late charges, and probably some credit limits.

There are very few nondelegable duties of the elected officials of a municipal corporation, but we can think of a few powers or duties that cannot be delegated. For example, we do not think the elected officials could delegate the final authority to approve the annual budget to the Fire Chief. Nor could a board member give a proxy to the Fire Chief, allowing him or her to vote at a board meeting as if he/she were a commissioner. Having said that, we do think that there are many situations where a delegation can and does occur, such as authorizing a Fire Chief or a Board Chair to sign a contract or agreement on behalf of the Board, which approves the same and then expressly authorizes one person to affix a signature to the actual document.

---

6 https://www.courts.wa.gov/opinions/pdf/D2%2055970-6-II%20Published%20Opinion.pdf

Let's say, for example, that a Board is agreeable to giving an easement for utilities across its property. The Board passes a motion to approve the easement and then gives the Fire Chief or Board Chair authority to sign the easement on behalf of the district. We think this is perfectly fine and the acknowledgement on the recorded conveyancing document will reflect that the signatory is an officer of the municipal corporation.

RETIREMENT? NEVER!

Is the Firehouse Lawyer retiring? Not really. In 2014, Eric Quinn (Firehouse Lawyer 2) and I agreed on an eight-year succession plan. Under this plan, I would gradually turn over most of the work of the law firm to Eric, assuming that clients were willing to do so (since ultimately that decision is not up to us but the clients). Eric started his own law firm years ago, with slightly expanded areas of practice, including litigation, which was not my focus.

In January of 2022, many Quinn & Quinn clients became clients of Eric T. Quinn, P.S. instead but the rest of my clients remained with Q&Q. Now, at the end of August, I am closing my law practice. I will, however, remain with Eric's law firm as "of counsel". Clients should not see any difference at all.

Also, I want to take this opportunity to announce that henceforth I will be available to consult with fire districts and RFAs on many of the issues I have dealt with often in 36 years of focusing mainly on fire department clients. Either through my own (non-law practice) firm or in an association with an established fire service/EMS consulting firm, I will be ready to help you with mergers, consolidations, annexations and any other form of alliance you can imagine with your neighboring departments. Pierce County, where my practice took off in the 1980's, has been a hotbed of mergers and consolidations for many years and I have been involved in virtually all of that. Due to my legal expertise and experience in the field of fire department financing, another focus will be helping districts to deal with their long-range financial planning.

Since departments also often need to engage in team building, I will offer facilitation for your retreats or study sessions between the board and the Fire Chief. This is a role I have played often; it helps if your facilitator knows a lot about the issues to be discussed and is a "fire service person."

If interested, my email address will still be joequinn@firehouselawyer.com.