



PATRICIA ANDERSON  
STATE AUDITOR

STATE OF MINNESOTA  
OFFICE OF THE STATE AUDITOR

SUITE 500  
525 PARK STREET  
SAINT PAUL, MN 55103-2139

(651) 296-2551 (Voice)  
(651) 296-4755 (Fax)  
state.auditor@state.mn.us (E-Mail)  
1-800-627-3529 (Relay Service)

August 30, 2006

James A. Mulder, Executive Director  
Association of Minnesota Counties  
125 Charles Avenue  
St. Paul, MN 55103-2108

Re.: Questions regarding Minnesota Contracting Law

Dear Executive Director Mulder:

Your recent letter to the State Auditor's Office was referred to me. You indicate that several Minnesota school districts have expressed doubt and uncertainty about the use of U.S. Communities as a joint purchasing alliance. As an example, you attached an email to the State Auditor's Office from Deborah Grant of the Northeast Metro 916 Intermediate School District. While Ms. Grant asks additional questions, you indicate that the following appear to be the school districts' primary concerns:

1. The term of a contract cannot be longer than four years under Minn. Stat. § 123B.52;
2. Requests for proposals re not permitted under Minn. Stat. § 471.345, subd. 3, which requires sealed bids for contracts in excess of \$50,000.

You indicate that U.S. Communities "believes both of these concerns are addressed by the language set forth in the Uniform Municipal Contracting Law." You note that the law provides that for municipal contracts estimated to exceed \$50,000, "sealed bids shall be solicited by public notice in the manner and subject to the requirements of the law governing contracts by the particular municipality or class thereof . . . ."<sup>1</sup>

In addition, the law states:

A municipality may contract for the purchase of supplies, materials, or equipment *without regard to the competitive bidding requirements* of this section if the purchase is through a national municipal association's purchasing alliance or cooperative created by a joint powers agreement that purchases items from more than one source on the basis of competitive bids or competitive quotations.<sup>2</sup>

<sup>1</sup> Minn. Stat. § 471.345, subd. 3.

<sup>2</sup> Minn. Stat. § 471.345, subd. 15.



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Your position is that the four-year term limit for school district standard requirement price contracts is a procedural requirement that does not apply because it is waived for contracts made through Minn. Stat. § 471.345, subd. 15.

The State Auditor's Office does not agree. The cooperative purchasing option allows for a purchase without regard for the "competitive bidding requirements" of the uniform municipal contracting law.<sup>3</sup> The Minn. Stat. § 123B.52 four-year term limit is a substantive limit on the term for which school district standard requirement price contracts may be effective. The municipal bid law does not release school districts to enter into standard requirement price contracts with vendors for periods longer than four years.

Individual contracts for supplies, however, may or may not require school districts to meet their requirements by purchasing through the contract. It appears that a contract that simply locks a vendor into pricing levels, without establishing a sole-source relationship or requiring a participating school district to buy any products, would not impose any 4-year obligation on the individual school districts. While the State Auditor's Office cannot give legal advice, absent some direction from a court or the Attorney General's Office we would not say a school district is in legal noncompliance for purchasing through such a national purchasing alliance contract merely because the contract made products available for longer than four years. Individual school districts should have their legal counsel review the individual contracts.

As you know, Ms. Grant asked a similar question regarding a lease-purchase contract available through U.S. Communities that does not provide for cancellation at the end of each fiscal year. Instead, the contract requires any local government that cancels to pay "all money due during the lease period" upon completion of equipment removal. This has the potential to be a serious problem.

The joint powers statute allows two or more governmental units to enter into an agreement to jointly or cooperatively exercise any power common to the contracting parties.<sup>4</sup> The agreement may provide for the exercise of such powers by one or more of the participating governmental units on behalf of the other participating units.<sup>5</sup> The term "governmental unit" includes every city, county, town, school district, other political subdivision of Minnesota or another state, another state, the University of Minnesota, licensed nonprofit hospitals, certified rehabilitation facilities and extended employment providers, licensed day training and habilitation services, any agency of the state of Minnesota or the United States, and any instrumentality of a governmental unit that has independent policy making and appropriating authority.<sup>6</sup>

<sup>3</sup> Minn. Stat. § 471.345, subd. 15 (2004).

<sup>4</sup> Minn. Stat. § 471.59, subd. 1 (2004).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

The joint powers statute specifically provides that “contracts let and purchases made under the agreement shall conform to the requirements applicable to contracts and purchases of *any one* of the parties, as specified in the agreement.”<sup>7</sup> This language appears to allow the parties to state in the joint powers agreement which member entity’s purchasing provisions will apply to all contracts and purchases made under a joint powers agreement.

It is unlikely, however, that this provision contemplates a joint powers agreement that simply allows Minnesota entities to “piggyback” on contracts from around the country regardless of whether their substantive provisions comply with Minnesota law. This broad reading of the joint powers law would allow local governments to avoid any Minnesota contract requirements by using a foreign contract. The State Auditor’s Office is not in a position to anticipate or resolve all the issues that may arise if foreign contracts fail to adhere to Minnesota substantive contract law. Local governments considering participating in particular contracts should consult with legal counsel for advice.

Minnesota law allows cities, counties, towns and school districts to lease personal property with an option to purchase under a lease-purchase agreement.<sup>8</sup> The city, county, town, or school district must have the right to terminate a lease-purchase agreement at the end of any fiscal year during its term.<sup>9</sup> If a lease-purchase agreement meets the requirements of the statute, it is not included in the calculation of net debt, and no election is required in connection with the execution of the lease-purchase agreement.

However, a lease-purchase contract that obligates a local government purchaser to pay the full value of the lease upon cancellation would constitute an “obligation” under Minn. Stat. § 475.51, subd. 3:

“Obligation” means any promise to pay a stated amount of money at a fixed future date or upon demand of the obligee, regardless of the source of funds to be used for its payment, made for the purpose of incurring debt, including the purchase of property through an installment purchase contract or any other deferred payment agreement, for which funds are not appropriated in the current year’s budget.

The provisions of Minn. Stat., ch. 475 regarding the creation of debt would therefore apply.<sup>10</sup> This means that an election would probably be required to enter into the contract.<sup>11</sup> In addition, the contract would have to be included in the calculation of net

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<sup>7</sup> Minn. Stat. § 471.59, subd. 3 (2004).

<sup>8</sup> Minn. Stat. § 465.71 (2004).

<sup>9</sup> *Id.*

<sup>10</sup> *See Op. Atty. Gen. 59a-40 (Jun. 8, 1966); see generally Gelfand State & Loc Govt. Debt Fin §3;04 Debt or Current Expense under State Law (Callaghan, 2002).*

<sup>11</sup> Minn. Stat. § 475.58 (2004).

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debt for net debt limitation purposes.<sup>12</sup> For these reasons, it is important that Minnesota local governments only enter into lease-purchase contracts that allow termination at the end of any fiscal year during the contract term.

Finally, you point out the bid exception in Minn. Stat. § 471.345, subd. 15 and indicate that U.S. Communities “offers competitively solicited contracts awarded through a sealed Invitation to Bid or a sealed Request for Proposal . . . .” The State Auditor’s Office agrees that the solicitation of bids or RFPs meets the statute’s requirement that purchases be made “on the basis of competitive bids or competitive quotations.”<sup>13</sup>

The State Auditor’s Office cannot give legal advice to you, the school districts or others. We acknowledge that unresolved legal issues may exist that are not addressed in this letter. Although this letter does not constitute legal advice we hope you find it helpful.

If you have questions or comments, feel free to contact me.

Sincerely,



Mark F. Kerr  
Assistant Legal Counsel  
(651) 296-4717

cc: Deborah Grant, Intermediate School District 916  
✓ Gary Nytes, NJPA

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<sup>12</sup> Minn. Stat. § 475.53 (2004).

<sup>13</sup> U.S. Communities is sponsored by two national municipal associations, the National Association of Counties and the National League of Cities. In addition, it appears that units of governments that register to participate in the program agree to the “Master Intergovernmental Cooperative Purchasing Agreement” during the online registration process. The State Auditor’s Office believes this agreement meets the requirement that a national purchasing alliance or cooperative be created by a joint powers agreement.