

Mark Shepard, Legislative Analyst
651-296-5051

State Contracting Laws: 2001 Changes

This information brief summarizes 2001 changes in laws governing state contracts. Topics summarized are:

- Contracting procedures
 - Qualification-based selection
 - Conflict of interest
 - Barter
 - Transportation (MnDOT) contracts
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Contracting Procedures

The 2001 Legislature made a number of changes in general procedures governing state agency contracts. For purposes of these laws, a “state agency” is an entity in the executive branch, but does not include the Minnesota State Colleges and Universities.

Formal Solicitation Process. The legislature increased from \$25,000 to \$50,000 the dollar value of state agency contracts for which a formal solicitation is required. A formal solicitation means vendors must submit sealed responses. This change is comparable to a change made in 2000 for local government units with a population over 2,500. [Laws 2001, 1st spec. sess., ch. 10, art. 2, § 39](#), amending Minn. Stat. § 16C.06, subd. 2. A different new law established a \$100,000 threshold for Minnesota Department of Transportation (MnDOT) contracts. [Laws 2001, 1st spec. sess., ch. 8, art. 2, §§ 11 and 12](#).

Work Orders. The Commissioner of Administration and the Attorney General may exempt a work order from the requirement that a contract be signed by the commissioner and the Attorney General. [Laws 2001, 1st spec. sess., ch. 10, art. 2, § 37](#), amending Minn. Stat. § 16C.05, subd. 2.

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Information in Bids and Proposals. If the Commissioner of Administration rejects all responses, much of the information in the response remains private for up to a year, unless before then a selection is made or a determination is made to abandon the purchase. This creates a minor exception to the existing law, under which information in a bid response becomes public upon completion of the selection process. [Laws 2001, 1st spec. sess., ch. 10, art. 2, § 40](#), amending Minn. Stat. § 16C.06, subd. 3.

Federal Contracts. Any state agency, when required by a federal agency, can negotiate contract terms providing for full or partial prepayment to federal agencies before work is performed. Under prior law, this provision applied only to the Commissioners of Transportation, Pollution Control, and Natural Resources. The provision for prepayment is an exception to the general rule, under which work must be performed before state agencies make payments under a contract. [Laws 2001, 1st spec. sess., ch. 10, art. 2, § 42](#), amending Minn. Stat. § 16C.081.

Surety Bonds. A new law involves surety bonds required by the state or local governmental units in connection with government construction contracts. The law prohibits a practice known as “directed surety.” It prohibits state and local governments from requiring that surety bonds required of contractors on government construction projects be obtained from a particular company or agent. The governmental unit may set other requirements for surety bonds. [Laws 2001, ch. 76](#), adding Minn. Stat. § 574.39.

The dollar value of a contract for which a public body must obtain a performance bond and a payment bond from the contractor is increased from \$10,000 to \$75,000. [Laws 2001, 1st spec. sess., ch. 10, art. 2, § 83](#), amending Minn. Stat. § 574.26.

Report. A requirement for agencies to report to the Commissioner of Administration on professional and technical service contracts is repealed. A similar requirement remains in Minnesota Statutes, section 16C.08. [Laws 2001, 1st spec. sess., ch. 10, art. 2, § 51](#), amending Minn. Stat. § 43A.047.

Qualification-Based Selection

A new law applies to state agency contracts for professional services of persons regulated by the Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design. The new law creates an option for agency selection of these persons to be based on qualifications. This option may be used only with approval of the Commissioner of Administration. If an agency proceeds under this section, the agency may solicit price information only after it has ranked contractors based on qualifications. The agency would negotiate first with the highest-ranked contractor. The agency would not negotiate with another contractor unless the agency cannot reach agreement with the highest-ranked contractor. If no agreement is reached with the highest-ranked contractor, the agency would terminate negotiations with this contractor, and negotiate with the next highest-ranked contractor. The new law does not apply to contracts that are subject to the Designer Selection Board process. [Laws 2001, ch. 100](#), adding Minn. Stat. § 16C.095.

Conflict of Interest

Organizational Conflicts of Interest. When entering into state contracts, the Commissioner of Administration is required to make reasonable efforts to avoid, mitigate, or neutralize organizational conflicts of interest for state vendors. An organizational conflict of interest means that because of existing or planned activities or because of relationships with other persons:

- (1) the vendor is unable or potentially unable to render impartial assistance or advice to the state;
- (2) the vendor's objectivity in performing the contract is or might be impaired; or
- (3) the vendor has an unfair advantage.

To avoid an organizational conflict of interest, the commissioner is authorized to disqualify a vendor from eligibility for a contract award, or to cancel a contract if the conflict is discovered after the contract has been issued. To mitigate or neutralize a conflict, the commissioner may revise the scope of work to be conducted, may allow vendors to propose the exclusion of task areas that create a conflict, or may provide information to all vendors.

The commissioner is authorized to waive the conflict of interest requirements if vital operations of the state would be jeopardized.

The commissioner is authorized to adopt rules to implement the new organizational conflict of interest requirements. [Laws 2001, 1st spec. sess., ch. 10, art. 1, §§ 33, 34 and 36](#), adding Minn. Stat. § 16C.02, subd. 10a, and Minn. Stat. § 16C.04, subd. 3, and amending Minn. Stat. § 16C.03, subd. 2.

Designer Selection Board. Under prior law, the Designer Selection Board could not select a designer or firm in which a board member had a financial interest, even if the board member did not participate in the selection. The new law would not disqualify the designer or firm in this circumstance, but provides that a member of the Designer Selection Board may not participate in review, discussion, or selection of a designer or firm in which the member has a financial interest. [Laws 2001, ch. 33, § 1](#), amending Minn. Stat. § 16B.33, subd. 4.

Barter

After July 1, 2002, a state agency may not contract or otherwise agree with a nongovernmental entity to receive nonmonetary consideration valued at more than \$100,000 in exchange for the agency providing nonmonetary consideration, unless such an agreement is specifically authorized by law. The state lottery is exempt from this prohibition.

The Legislative Auditor must report to the legislature and the Governor by January 15, 2002, on state agency use of barter agreements. [Laws 2001, 1st spec. sess., ch. 10, art. 2, § 38](#), adding Minn. Stat. § 16C.055.

Transportation (MnDOT) Contracts

Formal Solicitation. The threshold over which formal solicitation procedures must be used for contracts is increased from \$25,000 to \$100,000 for MnDOT contracts. [Laws 2001, 1st spec. sess., ch. 8, art. 2, §§ 11 and 12](#), amending Minn. Stat. § 16C.06, subds. 1 and 2.

Cost-Benefit Analysis. A contract for transit or other transportation purposes in an amount greater than \$10 million may not be approved unless a cost-benefit analysis has been completed and shows a positive benefit to the public. The management analysis division in the Department of Administration must perform or direct the analysis. This section applies to contracts for goods or services that are expected to have a useful life of more than three years, but does not apply to purchases for response to a natural disaster. The section expires June 30, 2003. [Laws 2001, 1st spec. sess., ch. 10, art. 2, § 41](#), adding Minn. Stat. § 16C.066.

Work Orders. Signatures of the Commissioner of Administration and the Attorney General are not required for work orders and amendments to work orders related to MnDOT contracts. [Laws 2001, 1st spec. sess., ch. 8, art. 2, § 10](#), amending Minn. Stat. § 16C.05, subd. 2.

Electronic Bidding. MnDOT is authorized to use, and to require use of, electronic bidding. [Laws 2001, 1st spec. sess., ch. 8, art. 2, §§ 17 to 19](#), amending Minn. Stat. § 161.32, subds. 1, 1a, and 1b.

Professional and Technical Service Contracts. The law establishes new procedures for MnDOT professional and technical services contracts, notwithstanding any law to the contrary. Many of the procedures are similar to those required for professional and technical service contracts entered into by other agencies. However, some of the MnDOT procedures (e.g., certifying that no state employee is able and available to perform the work, and that reasonable efforts were made to publicize the contract) apply only to contracts over \$100,000. The threshold for other state agency contracts is \$5,000.

There appears to be a potential conflict between two laws enacted this year. [Laws 2001, first special session, chapter 8, article 2, section 21](#), appears to grant the Commissioner of Transportation authority to enter into professional and technical service contracts without approval of the Commissioner of Administration. However, [Laws 2001, first special session, chapter 10, article 2, section 35](#), provides that notwithstanding any law to the contrary, after January 1, 2002, any contract entered into by the Department of Transportation must be approved by the Commissioner of Administration, unless the commissioner has delegated approval authority to the Department of Transportation. [Laws 2001, 1st spec. sess., ch. 8, art. 2, § 21](#), adding Minn. Stat. § 161.3205.

Design-Build Contracts. A new law authorizes MnDOT to enter into design-build contracts. A design-build contract is a single contract to furnish architectural or engineering services, as well as construction services and materials. This differs from the customary process in which architectural and engineering services are contained in a separate contract from the contract for construction services and materials.

Under the new law the number of design-build contracts in any fiscal year may not exceed 10 percent of the total number of transportation construction contracts awarded by the commissioner in the previous year.

The law contains criteria for use of design-build. It states that the final determination to use design-build may be made only by the Commissioner of Transportation. However, there may be a potential conflict with another law enacted in 2001. Laws 2001, first special session, chapter 10, article 2, section 35, provides that notwithstanding any law to the contrary, after January 1, 2002, any contract entered into by the Department of Transportation must be approved by the Commissioner of Administration, unless the commissioner has delegated approval authority to the Department of Transportation.

The design-build process involves two phases.

- ▶ The first phase is a request for qualifications (RFQ). Based on responses to this request, a short list of no more than five of the most highly qualified firms will be established.
- ▶ In the second phase, the commissioner will issue a request for proposals (RFP) to the design-builders on the short list.

A technical review committee will score the proposals, using criteria specified in the RFP. After the sealed bids containing price information are opened, for each design-builder the price will be divided by the technical proposal score to obtain an adjusted score. The commissioner must select the design-builder who is responsive and responsible and whose adjusted score is the lowest. The statute specifies a method of adjusting bids for a time factor if a time factor is included in the RFP.

The law requires the commissioner to award a fee of not less than 0.2 percent of the contract cost to each short-listed responsible proposer who provides a responsive but unsuccessful proposal.

The law specifies an alternative method of relating price to qualifications for large projects (over \$5 million). The law also specifies an alternative low-bid design-build process where the scope of work can be clearly defined. Under this process an RFQ is optional. Also under this process, there is no ranking or scoring of technical proposals, but rather only a determination if a proposal complies with the RFP and is responsive. After review of the technical proposals, the contract must be awarded to the lowest bidder whose proposal is responsive to the RFP.

The commissioner is authorized to reject all bids in any design-build process. [Laws 2001, 1st spec. sess., ch. 8, art. 3](#), adding Minn. Stat. §§ 161.3410 to 161.3428.