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Inside this Issue

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 fire district and RFA finances, to include a discussion of the following: property taxes, benefit charges, GEMT, local improvement districts, impact fees, and more! We welcome our readers, and any of your friends in government, to this *free* discussion forum.

This *virtual* MR will take place on Friday, January 6, 2023 from 9:00 to 11:00 AM. See the Zoom link to this free training opportunity:

https://us06web.zoom.us/j/89132107467?pwd=Vm9iOVV6aEJ1dm5HOWt2STE0U2lCZz09

TAX INCREMENT FINANCING: WHAT IS IT AND HOW DOES IT AFFECT US?

Attorney Richard Davis of Chmelik, Sitkin, and Davis provided an informative presentation on a relatively new statute to the Legal Committee at the recent WFCA Conference. The law was passed last year to enable what is known as "tax increment financing."

Cities, counties and port districts are always trying to finance public improvements such as roads and bridges (many types of infrastructure, actually) by any means possible. RCW 39.114, effective July 25, 2021, created a mechanism to fund such improvements, known as tax increment financing.

Suppose a city, county or port district includes within its boundaries an area that could be developed profitably, but lacks the basic infrastructure that all developments need. This new revenue source may facilitate such development, leading to increased tax revenue for that taxing district (and ordinarily under such circumstances, increased revenue for any overlapping taxing district such as a fire district or regional fire authority).

Sounds good so far, doesn't it? Here's the rub, however: When property within the "increment area" boundaries is assessed, the revenues received in taxes the next year are apportioned (diverted?) in a special way to recognize the efforts of the sponsoring city, county or port district. Here is how that works: the sponsoring municipal entity receives a sum equal to their levy rate times the increase (the increment) in the assessed value (AV) over the assessed value in the base year. The overlapping fire district or RFA, by contrast, receives its levy rate multiplied by the AV in the **base year (prior to the improvements).** In other words, the sponsoring city, county or port district gets the full benefit of the increase in value that traces its origins back to the public improvements that entity made in the first instance.

Well, you say, that does not seem fair to the other taxing district(s)! And it might impact, at least for a time, or in fact decrease their tax revenue attributable to those lands and properties within that tax increment area.

This problem was noted by the Washington Fire Commissioners Association when the legislation was being drafted. Apparently, certain protective provisions were therefore included in the legislation. RCW 39.114.020 (2) requires a "project analysis" that must include, among other things, "an assessment of any impacts and any necessary mitigation to address the impacts identified on the following:…(iv) The local fire service." But what if the sponsor does not agree there are any impacts on the fire department? What if the project analysis does not show those impacts?

Apparently, WFCA lobbied for, and was successful, in including a limitation in the law. RCW 39.114.020(1)(c) states that a tax increment area may not have an assessed value of more than 200 million dollars or more than 20 percent of the *sponsoring jurisdiction's* total assessed valuation. Clearly, this legislation is aimed at areas that are under-developed and have a relatively low assessed value as a result. So arguably that helps to mitigate the negative impacts of this law somewhat. Nevertheless, if the infrastructure changes lead to significant

private development in the increment area, the local government sponsor, and not the other taxing districts, seems to reap the full benefit, at least for a time.

RCW 39.114.020 (5) provides that if the analysis indicates that an increment area will impact "at least 20 percent of the assessed value" in a fire protection district or RFA, or if the fire service agency's annual report demonstrates an increase in the level of service (LOS) directly related to the increment area then the local government sponsor "must" negotiate a mitigation plan with the fire district or RFA to address LOS issues in the increment area. It is not clear how that would really work, as the fire agency normally would not include such concerns in their annual report until *after* there is some proposal for development or creation of a tax increment area. Furthermore, what if they are not able to negotiate an acceptable mitigation plan?

In addition to that concern, how does one go about defining an "impact" upon "at least 20 percent of the AV" within the fire agency's boundaries? The entire predicate for this statutory scheme is that the increment area being proposed is unlikely to be developed by private developers in the foreseeable future, due to the lack of necessary infrastructure. This means that the increment area is probably not the most valuable portion of the fire district or RFA because it is undeveloped. This of course makes it unlikely in most cases that the increment area AV will be anywhere near 20% of the fire agency's total AV. The bottom line is that, we predict, rarely would a mitigation plan really be mandatory. We are assuming that the 20% of value parameter is strictly a mathematical calculation and has nothing to do with 20% of the land area of the fire district or RFA.

The result will be, if this statute actually gets used by cities, counties or port districts, that those local governments will get more of the tax increase ultimately resulting from the development and value increase, and the fire agencies will get less.

Oh yes. Here is another thing we noticed: Because of this new statutory scheme, RCW 84.55.010—the lid law—was amended last year too. Our readers will no doubt remember that when calculating the allowable tax levy in light of the "1% lid law" (the limit factor, actually) we are told to exclude new construction and other listed items from the 1% lid calculus. Well, the legislature added language about tax increment financing to that statute. Now any increase in AV (just like new construction or increases due to improvements or increased AV of state lands) due to creation of a tax increment area is also excluded from the 1% calculation.

Fascinating law. It remains to be seen if (1) it gets much use; and (2) what if any harm may result to fire agencies' tax revenues. We do not see much upside for the fire districts and regional fire authorities.

RESPONSIBLE BIDDER COLUMN: SMALL WORKS ROSTERS

This month in our monthly *Responsible Bidder* column, in which we discuss the bid laws and rules surrounding them, we will be discussing two statutory sections with a similar purpose—allowing a simplified procurement process for smaller purchases and smaller public works projects.

The latter statute is RCW 39.04.155, which provides uniform procedures for contracting for

small works from a roster of contractors. The process is only available if the project value is estimated at three hundred fifty thousand dollars ($350,000) or less. If the project estimate is for fifty thousand dollars or less ($50,000) there is an even simpler process available, known as the "limited public works" process. Of course, for fire districts, if the project estimate is $30,000 or less, there is no requirement to go out to bid at all. See RCW 52.14.110(2).

RCW 39.04.155 allows a state agency or a qualifying local government such as a fire district or a regional fire authority to create a general small works roster, or a roster for different specialties or categories of anticipated work. The roster consists of all contractors who have requested to be listed, and if required by law, they must be registered or licensed to perform such work. (Fire district law requires that you contract only with registered, licensed contractors.) The roster is assembled by publishing in a newspaper of general circulation within the jurisdiction a notice of the existence of the roster or rosters, soliciting interest from eligible contractors. Also, contractors are added whenever they request it, assuming they are eligible.

The local government should adopt a resolution implementing this law; we recommend a detailed procurement or purchasing resolution that deals with all of the best practices and procedures related to bid law compliance, including the processes described in this article, plus needed provisions on purchasing through cooperatives, piggybacking, bond requirements, retention rules, bid protests and appeals and any other needed rules to guide your procurement staff.

The limited public works process is of only limited value to fire districts because it only applies to projects between the $30,000 estimate and the $50,000 value. Most of the small works process requirements do not apply here, but the agency must still procure quotations from a minimum of three contractors, and award the contract to the lowest responsible bidder.

As for the main small works process, the procedures are as follows: (1) the agency must establish its detailed procedures for securing the quotations, by resolution; (2) invitations for quotations must estimate the scope and nature of the work; (3) the usual rules for architects and engineers' certifications as to code compliance still apply; (4) quotations from all contractors on the roster may be invited or, alternatively, quotes may be solicited from at least five contractors; (5) however, if the cost estimate is between $250,000 and $350,000, if you use that "five contractors" method, all others on the list must be notified; and (6) there can be no favoritism, as contracts must be "equitably distributed." Duh.

A contract awarded through this process need not be advertised. After a contract is awarded, all quotations must be recorded and open to public inspection, either by telephone or electronic request. Retainage requirements of RCW 60.28.011 may be waived for contracts awarded this way. Of course, that presents certain risks to the agency, for example, if laborers or materialmen are not paid by the contractor. While your agency may recover against the contractor theoretically, if a contractor did not pay its debts, there may be underlying financial problems or even bankruptcy involved. Many of these same requirements for openness and retainage are also applicable to the limited public works process.

RCW 39.04.190 provides a somewhat similar process for purchasing by local governments of material, equipment, supplies or services. In other words, for purchasing personal property as opposed to work on the agency's real property. For fire districts, purchases of materials, supplies or equipment valued at over $40,000 must generally be done through competitive bidding. RCW 52.14.110(1). However, the statute goes on to state that if the estimated purchase sum does not exceed $75,000 the agency may –by resolution—use the process set out in RCW 39.04.190. We call that the "vendor list" process.

Here is the way that works: At least twice per year, pursuant to the agency's resolution adopting the vendor list process, the agency must publish in a newspaper of general circulation within the jurisdiction a notice of the existence of the vendor list or lists. The agency resolution shall also establish the method of soliciting telephone or written quotations for the purchase and sale, from at least three different vendors. The goal is to identify the lowest responsible bidder as that term is defined in RCW 39.26. The same rules apply here as discussed above with small works: the agency must record all quotations, keep them open to public inspection and available by telephone. Again, there is no duty to advertise, as is done when a purchase is subject to the bid law of RCW 52.14.110.

Incidentally, with both the small works roster exception and with the vendor list process, an agency may contract with another agency for use of that other agency's compliant process adopted pursuant to either of these two statutes creating exemptions from the bid law requirements. Many of our clients, for example, use the rosters or lists maintained by the Municipal Research and Services Center (MRSC). See https://mrscrosters.org.