Firehouse Lawyer

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Inside This Issue

Firehouse Lawyer Declares State Auditor Is Wrong… Challenges Brian Sonntag to Debate

I hope you liked that catchy headline. It captures exactly what I would like to do, in reaction to reading the State Auditor's Finding, issued in July, against Spokane County Fire District No. 3. In that recent triennial audit, the SAO entered a finding that the fire district did not comply with the applicable public bid law, RCW 52.14.110, when building some fire stations (stations 3-3 and 3-10). The problem or violation, as the SAO sees it, occurred when the district did not go out to bid on certain public works projects, but instead used the services of its volunteer association, which was a licensed general contractor.

Actually, this issue has been festering for many, many years, with the Auditor claiming that the bid laws *require* local governments to hire contractors for all public works projects estimated to cost more than the bid threshold amount (which was $2500 for many years, and was only recently raised to $20,000) by competitive bidding.

The factual history, as set forth in the district's response to the findings, very strongly frames the issue, so we will include it here in some detail. In 1996, the district began to construct its own stations. First, it went out to bid for construction of station 3-2 and received a bid of $94,894. (Apparently, that was the only bid received.) The district rejected that bid, as higher than its estimate or budget. Using the same process later used for stations 3-3 and 3-10 (which is what this audit criticized) the district was able to build the station for $55,048, which is 42% less than the bid received.

When the district began building station 3-7, which is also not covered by the present audit, it advertised for bids. The bids received ranged from $263,000 to $349,000, which exceeded the district's budget, so it rejected all bids. Although station 3-7 was not complete when the response to this audit was written, the district then estimated that the final project cost will be about $155,000, suggesting a savings of 42-55%, when compared with the bids received. The response concluded with this comment:

> "While the District cannot 'guarantee' that it paid the lowest price to complete stations 3-3 and 3-10, the District's documented experiences demonstrate with a reasonable certainty that the District completed the projects at a lower price than if the District had bid the projects."

Obviously, with stations 3-3 and 3-10 the district did not advertise for bids. So, what was the process used by the district? The fire district response states that it did comply with bid laws when awarding specific contracts and purchasing supplies and materials. It just did not go out to bid for the overall, entire project, to retain a general contractor. As discussed in the response, the district had concluded that it would generate substantial taxpayer savings by constructing stations using district employees and volunteer labor, instead of advertising for bids by general contractors for the overall project coordination.

Thus, the issue really is whether these bid laws (for fire districts, RCW 52.14.110 and 52.14.120), by their own provisions, require a municipal property owner to hire a general contractor when doing public works on their properties. We would stipulate or agree that *if* a local government does award a public works contract, *then* it must follow the bid laws absent some exception being applicable, such as the emergency exception or sole source. But this begs the question, which is…must local agencies—municipal corporations in Washington—hire such contractors or can they, on the other hand, do such projects without awarding a contract to a general contractor, i.e. by acting as their own general contractor?

I would like to cite now in passing (I will come back to this) the following statute: RCW 52.14.120 (2), which provides:

> **"A public work involving three or more specialty contractors requires that the district retain the services of a general contractor as defined in RCW 18.27.010."**

Think about the negative inference to be drawn from that clear mandate, while you read the rest of this article.

It just so happens that in 2001, three different King County fire districts asked this writer for legal opinions respecting the **very same issue** presented by this audit and its questionable findings. For your reading pleasure, I am going to reprint the entire legal opinion right in this article, redacting only the names of the three districts. Here is the opinion.

MY 2001 LEGAL OPINION

Recent questions from three different clients—all King County fire districts—have prompted this opinion letter, which discusses the legal implications of fire districts or their employees acting as a general contractor, in lieu of completing public works projects through publicly-bid contracts.

One district has obtained a license as a general contractor and is duly registered as such a contractor with the state of Washington. As such the owner/district/general contractor intends to act as its own general contractor on a fairly substantial remodel of a fire station. The project estimate is well over $100,000.

A second district plans to fill a vacancy in a Facilities Maintenance position with a person qualified to be a general contractor, such as a person with carpentry, plumbing, electrical and/or other construction skills. Their plan was to use that employee's services to accomplish minor building repairs and perhaps some small remodels. The success of the program is dependent upon generating savings to offset the $10,000-$12,000 required to elevate the position above the "handyman" pay level.

A third district plans to buy and install an above-ground propane tank, but through an unusual method. They will buy the tank using the state bid. Then they will contract with a local water district (apparently an interlocal agreement under RCW 39.34 will be used)

to do the site work with a backhoe and operator. However, they plan to use a district firefighter to form and pour the cement (labor only) and will hire a local electrician to do the electrical work for the pump. In other words, the district will act like a general contractor.

All three of these scenarios present the same legal question, i.e. whether a fire district may act as its own general contractor or alternatively, employ a person to act as a general contractor on the district's behalf. Recently, the Supreme Court of Washington decided a case that is somewhat troubling, and will help to frame the issue for us here. In *City of Seattle v. State,* 136 Wn. 2d 693, 965 P.2d 619 (1998), the Supreme Court held that Seattle fell within the scope of RCW 19.28.120(1), a statute that requires an electrical contractor's license for most electrical work. The Court found that the city was an "entity" within the meaning of that statute, and that there was no statutory exemption for municipal corporations.

The relevant facts of the case were as follows. The City operated a program called the Seattle Conservation Corps (SCC) through its Department of Housing and Human Services. Part of the program involved changing inefficient light fixtures to high efficiency light fixtures in low income multi-family dwellings. The Department of Labor and Industries cited the city for not being licensed under the electrical contractor registration statute, chapter 19.28 of the RCW. The matter worked its way thereafter through the courts, and the Supreme Court ultimately decided that the citation would stand. The Court noted that the City did not fit within the exemption for utilities. *A prior exemption for municipal corporations engaged in certain electrical work was amended in 1980, and municipal corporations were simply left out!* Based on this case alone, one might be concerned that municipal entities should be quite careful to obtain licenses, and become registered contractors, before embarking on being their own contractor.

However, the general contractor statutes are quite different from the electrical contractor statute. There are the following relevant exemptions in RCW 18.27.090, a section in the chapter on the regulation of contractors:

> "This chapter does not apply to: 1)…other municipal or political corporation or subdivision of this state;…
> (11) An owner who contracts for a project with a registered contractor;
> (12) Any person working on his or her own property,….

The foregoing exemptions mean that a fire protection district may supervise or coordinate a public works project on its own property (acting like a general contractor) without worrying about a contractor registration violation. A "person" has a right to do that with their own property under (12) and a municipal corporation has often been held to be a person. Of course, under (11) if the district, as owner, enters into contracts with registered contractor(s) under the bid law or the small works roster law, then there is no problem [under the contractor registration statute].

I conclude that the district itself does not need to obtain a contractor's license in any of the three scenarios mentioned above, because one or more of the above exemptions applies in each instance. Of course, when a district, whether acting as owner or acting like a general contractor, contracts out work to a non-employee, the district must not use unregistered or unlicensed contractors. While the statutory violation is largely the problem of the unregistered contractor, the district will also be in trouble with the state, if that occurs. This is an entirely separate issue.

By contrast, if the district **employs** a person, not as an independent contractor, seasonal or temporary worker, but as a regular, permanent employee, in my opinion that person is not in violation of these laws simply because their duties include carpentry or plumbing. This is because these persons are not "in the pursuit of an independent business" and are therefore not even within the definition of a "contractor" as set forth in RCW 18.27.010(1). This comment applies to the third district above using an

employee to pour some concrete supplied by others, but using none of his contractor's equipment from his outside business. I understand that this employee is a firefighter, and I am not commenting herein on any FLSA issue that might be raised if these hours should create overtime questions.

Thus, to answer the specific questions implied in the above scenarios, I find the following:

1. The first district (King ------) can act as its own general contractor, due to exemptions, subject to the bid laws and of course having contracts with any "subcontractors".
2. The second district (King -------) can employ a Facilities Maintenance person, qualified to be a general contractor, without licensing and registration being required, although it may have some advantages. As to the electrical work, there definitely could be a problem, however, due to the Seattle case, and so registration [licensing as an electrical subcontractor] is strongly recommended for that.
3. The third district (King -------) can certainly use the state bid to buy an above-ground tank; it can also certainly execute an interlocal agreement with a water-sewer district for the described work. The district can use its own employee for the concrete labor, but without using his contractor status, if he in fact operates a construction company independent of his firefighter status, as long as none of his tools or equipment whatsoever are used. If the district contracts out the electrical, that should only be with a licensed and registered electrical contractor—a "specialty contractor" under the statute.

Because of the way at least one of these questions arose, a discussion of the public bid laws is in order. [Now we turn to the SAO's issue and analysis]. I was told that a Washington attorney was asked an impromptu question at a recent seminar, asking whether a district could act as its own contractor, and he replied that there might be some concern over "the illegality of violating the small works roster law". This is an apparent reference to RCW 39.04.155. As you may know, as recently amended, this allows municipalities to create and use a small works roster process, in lieu of formal sealed bids and advertising under, for example, RCW 52.14.110, for public works projects up to $200,000.

It seems to me that the answer, or perhaps the question, missed the real issue, which is the issue framed above in the first part of this opinion. There can be no doubt that a municipal corporation does not violate the bid laws by doing a project of this nature without going out to bid because the corporation accomplishes the project by itself. **Instead, what the bid laws address is how to proceed if a municipality is going to award a project to a contractor.** Many cases state the twofold purpose of bid laws: (1) to get the lowest price, when executing public contracts, for the public treasury and (2) to assure fairness as between bidders. *See, e.g. Edwards v. Renton,* 67 Wn. 2d 598, 602, 409 P.2d 153, 157 (1965) and *Platt Electric Supply, Inc. v. The City of Seattle,* 16 Wn. App. 265, 555 P.2d 421 (1976). Also, any governmental contract entered into in violation of applicable competitive bidding requirements is null and void. See 64 Am. Jur. 2d Public Works and Contracts, Section 38, at 890 (1970). As pointed out in *Platt Electric,* the purpose of such laws is to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the municipality receives the best work or supplies at the most reasonable prices practicable. Id. at 269. One might well imagine the mischief that could occur if a local government could just award contracts to insiders, friends, relatives, etc. and did not have to use competitive bidding when contracting. But what if the government is not "contracting" the work out but doing it by itself, or with its own employees or volunteer labor? Does this same rationale apply? We think not. [The foregoing paragraph in the opinion has recently been changed to include legal authorities to support what I said in 2001.]

It is not an antitrust law to assure that contractors do not get "competition" from owners. Under federal case law, municipal corporations are exempt from antitrust claims anyway. Therefore, in short, the

reference to the small works roster is entirely inapposite in my opinion, as that law is just a less formal process to attain the same end as the public bid law, but with the smaller projects. The scenarios above do not raise any bid law questions. However, I would note that the bid law certainly would require either formal sealed bids or small works roster usage, whenever a district acting like its own general contractor, requires "subcontracting" work done above the usual dollar threshold, i.e. $2,500.00. Thus, in scenario #1, the district may need to go out to bid for significant electrical or earthwork and in scenario #3, the district would only need to go to bid if the electrician's work on the pump exceeded $2,500.00.

I believe this answers all of the issues raised by the above scenarios, but if any of the three chiefs have questions feel free to call. I will probably share this opinion with the Pierce County Chiefs e-mail group, if that is all right with you. By the way, I will try to divide my time spent in researching and writing this opinion into three equal parts, which should save each of you quite a bit. [I left that last paragraph in the article for the benefit of the SAO, to show cost savings for public agencies—just kidding, Brian].

Now let us return to the basic issues and arguments.

The bracketed material in the above re-printed legal opinion is what I have added in writing this article. The rest of the opinion is just the way I wrote it on June 7, 2001, except for some emphasis I added today and legal citations. Now let us go back a bit to RCW 52.14.120(2). If I were to re-write the legal opinion today, in the part about the bid law, I would add a discussion of that statute, to support my contention that the bid law does not in any way, shape or form require municipal owners to award contracts to general contractors for all public works. And this statute demonstrates that point by providing that *if and when* three or more specialty contractors are involved in a public works project, then the district must retain a general contractor, and cannot act as its own general contractor. To me, and I would argue under well accepted principles of statutory construction that courts follow, this clearly means that *if and when* less than three specialty contractors are involved the requirement does not apply!

Courts will sometimes point out in their opinions that the legislature is presumed to know of its prior enactments when passing laws. When the legislature added those words contained in RCW 52.14.120(2) about requiring a general contractor when three specialty contractors were involved, was there not already in effect a bid law, codified at RCW 52.14.110, stating that "any public works by the district shall be based on competitive bids"? If it means what the SAO says it means, then why was it necessary to have RCW 52.14.120(2) at all? It is a well-settled rule of statutory interpretation that legislation should be read to give meaning and effect to every word or phrase, so as not to render any language in the statute superfluous or without meaning. *City of Seattle v. Williams,* 128 Wn 2d 341, 349, 908 P.2d 359 (1995). This subsection is important and cannot be ignored.

Similarly, there is a principle of statutory interpretation (sometimes called a canon of construction) that is often referred to as *inclusio unius est exclusio alterius,* which when translated from the Latin so normal people can understand it, means that to include one thing is to exclude a different thing, or to express one thing excludes a different thing. *See Sparkman & McLean Co. v. Govan Investment Trust,* 78 Wn.2d 584 (1970)(statute applying to limited partnerships excluded application to general partnerships); *In re Detention of Dydasco,* 85 Wn. App. 535 (1997)(statute providing 3-day notice in certain situations implicitly did not require 3-day notice in other situations); Black's Law Dictionary, p. 763 (6th ed. 1990). In other words, to affirm one proposition implies that the opposite proposition is negated. Thus, when the legislature passed a law saying that public works projects involving three or more specialty contractors requires that a general contractor be retained, that means projects involving two or less…do not! (As you can see, the practice of law is not rocket science; it is just simple logic.) But what this also demonstrates is this: if the legislature wanted to enact a law that the State Auditor seems to

think they have enacted, it certainly knew how to do so. The legislature has not adopted a law stating that all public works contracts of fire districts require a general contractor to be retained, and despite the SAO's position, the bid law on its own simply does not so provide.

AN INFORMAL ATTORNEY GENERAL OPINION

We have been made aware of an informal AG opinion issued on April 14, 2003 on this subject. The AG opined that the bid law itself—RCW 52.14.110—requires competitive bids on all public works, apparently based on the plain meaning of the language in the statute. After all, he reasoned, a state statute defines "public work" to include all work, construction, alteration, repair or improvement executed by a municipality, other than ordinary maintenance. But that opinion does not address the argument based on RCW 52.14.120(2).

IMPLIED POWERS

The other part of the finding worth discussing is this part: "Fire districts have not been given authority by the Legislature to use their own employees on public works projects that exceed $2,500." This statement seems to ignore the law regarding the powers and authority of municipal agencies like fire districts. Fire districts possess those powers expressly granted by the legislature and those necessarily implied therefrom, to effectuate the express powers. See, e.g., *Taxpayers of Tacoma,* 108 Wn. 2d at 694, 743 P.2d 793
(1987).

In that case, the State Supreme Court held that, when dealing with a proprietary function as opposed to a governmental function, when the legislature authorizes a municipality to engage in a business it may exercise its business powers very much in the same way as a private individual. Id. at 693-95. For that reason, in the *Taxpayers* case, the Court held that a municipal utility, since it is authorized to make all necessary contracts or engage in undertakings needed to make its electrical utility system efficient and beneficial to the public, had the authority to purchase "greenhouse gas offsets", which is some sort of energy conservation practice. And the city utility could do so even without any express delegation of authority.

Hence, while it is true that no statute expressly states that a fire district may use its own forces or personnel to perform labor on public works projects to improve the district's own property, that would fall under "implied powers". There can be no doubt that fire districts can hire employees. That is an express power granted by the legislature. See RCW 52.12.021. That statute also grants express power and "full authority" to carry out district purposes and to that end to "manage" real and personal property. Furthermore, the specific powers statute—RCW 52.12.031—adds the power to "maintain" and "operate" real property and "improvements". We submit that, when dealing with its own property the municipal corporation is performing a proprietary function, as opposed to acting governmentally. A fire district's "governmental" functions, it seems to me, would be limited to carrying out the basic mission or objects for which fire protection districts were created in the first place, i.e. suppressing and preventing fires, performing emergency medical services, rescues of various types, and more modernly, dealing with hazardous materials incidents, but would not include the (proprietary[1]) functions of any property owner such as contracting for public works or making decisions about purchasing. My conclusion therefore is that the powers to hire employees, and to own, operate and maintain property, necessary imply that a district can use its employees to operate or even improve its property. Not every function or detail of municipal corporate operations needs to be, or can be, set forth in an explicit statute. If there were no implied powers doctrine, we would have to invent one!

Thus, that part of the Auditor's finding is also incorrect. While there is no express power to act as your own general contractor and use employees to

[1] The dictionary definition of "proprietary" includes "of or pertaining to one's property".

perform labor on your district property, I would say that power is clearly an implied power. Besides, the exemptions in the general contractor statute support that interpretation.

Well, now I have come full circle and so I will stop. While I was only being facetious in writing that headline about debating Brian Sonntag, I am sure someone will provide him with a copy of this article. If not I will call Brian and alert him to the issue. Probably it is due time for this issue to reach a head. It accomplishes little to continue experiencing adverse findings, rather than work on the problem collaboratively. Some district or other local government may need to request a declaratory judgment from Superior Court, or some authorized elected official needs to at least request a formal Attorney General Opinion on this question. Until then, the SAO will continue to find that the bid laws require districts to go out to bid (even though that may sometimes actually cost more than doing it yourself) and simply do not allow a district to act as its own general contractor when improving its own property. And I will continue to respectfully disagree, as will the attorneys for Spokane County Fire District No. 3 and perhaps many other lawyers. (In writing this article, I found out that Brian Snure, who serves as *of counsel* to my office, is the attorney for Spokane 3 and worked on that matter.)

Oh wait, there is one more argument worth talking about briefly. While the Auditor insists that the bid law itself clearly requires hiring a general contractor whenever doing a public works project, what about the language of the statute itself? Is it clear and strict in every respect, admitting of no exception? RCW 52.14.110—the main bid law for fire districts—starts out this way: "Insofar as practicable…." That does not sound like a strict or rigid law to me, admitting of no exception! [2] We would argue that in some cases it is not practical (or practicable) to insist upon competitive bidding. Is it practical to pay 42-55% more in order to follow the bid law? Does the bid law always accomplish its apparent purpose of saving money for the public? Let's face it…many of you have known for years that in reality it does not! Whether we can blame that on minority hiring requirements, prevailing wage laws, or whatever, there seems to be a growing body of evidence that "competitively" bid public works projects generate somewhat higher bids or prices than non-bid contracts. Maybe it is high time to address the reasons for that dilemma, in today's tight economic times, rather than insisting upon bidding in every case because of a misguided interpretation of the bid law. I would love to discuss this issue with Brian Sonntag.

DISCLAIMER

The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Joseph F. Quinn and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.

[2] The informal legal opinion of the AG in 2003 addressed that argument but only summarily, without any real legal analysis or citation of authority. He assumed that it would rarely be impracticable to follow the bid law, but the Spokane Fire District 3 factual situations seem to indicate it might not be so rare.