Whenever public funds are in play, specific rules govern municipal procurement, or purchase of goods, services and construction. The ground rules are primarily set forth in the General Municipal Law ("GML") and the Finance Law ("SFL"). Other laws and regulations are equally important when federal or state funds are utilized in combination with local governmental funds, or when federal or state funds are the sole source of funding for municipal procurement.

Municipal procurement rules, however, do not require a municipality to select the least expensive vendor. Public funds are protected through adherence to procedures based on law that is transparent, legal and designed to protect the public from collusion and the municipality from incompetence.

The Bidder

The business or individual responding to a Request for Proposal ("RFP") is referred to as a “bidder,” “proposer” or “vendor.” Any writing of the initial decision on the method of procurement up to the decision to award, is part of the municipality’s procurement record, which includes notes, minutes, and emails, no matter how informal.

A responsible bidder demonstrates the requisite financial ability, legal capacity, integrity and past performance record. A responsive bidder demonstrates that it has the minimum specifications or requirements spelled out in the RFP.

State Government Guidance and Controls

In New York State, the Office of the State Comptroller ("OSC") has the authority to protect the public from collusion and the municipality from incompetence. OSC audits are conducted in accordance with the GML § 103, which requires that municipalities submit for audit purchase contracts in excess of $20,000.00. Although such audits are not subject to competitive bidding, they are performed in a seemingly random basis; each year, a dozen audits are published on the OSC website.

Municipal Procurement Policies

A municipality should review, amend its procurement policies annually at its organization meeting along with all other policies (EEO, FOIL, Investment, official newspaper, etc.). Some municipalities meet this procurement policy requirement by adopting resolutions. Some adopt local laws after public hearings that explicitly govern procurement and purchasing.

F. Bianco of the Eastern District issued an instructive opinion analyzing the nature and scope of various constitutional restraints on the power of local governments to summarily abate nuisances. In the new age of "zombie houses" left behind by their owners in many Long Island communities in the wake of the 2008 financial crisis, many of which have, or are in the process of developing into nuisance conditions, government actors should consult Judge Bianco’s opinion in Ferreira before taking any action to abate such conditions on their own.

Ferreira: Public Nuisance on Private Property

In Ferreira, the plaintiff, a self-employed mechanic, operated an automobile repair shop and family-owned private property in Montauk. He stored many unregistered and inoperative motor vehicles on the property. In an attempt to get the plaintiff to clean up the property, the Town of East Hampton issued numerous summons to the plaintiff returnable in town justice court. When the criminal prosecutions stalled in town court and failed to produce their intended effect, i.e., the clean-up of the property, town officials searched for other mechanisms in the clean-up of the property, town officials searched for other mechanisms in the clean-up of the property, town officials searched for other mechanisms in the clean-up of the property.

In Ferreira, the plaintiff, a self-employed mechanic, operated an automobile repair shop and family-owned private property in Montauk. He stored many unregistered and inoperative motor vehicles on the property. In an attempt to get the plaintiff to clean up the property, the Town of East Hampton issued numerous summons to the plaintiff returnable in town justice court.
part since the mayor was the subject of the alleged smear, even though the statute requires for the mayor to decide removal or not. In the interest of justice and to avoid a conflict of interest between local politics and the politics, the recused himself and the board voted to authorize the deputy mayor to determine if cause was warranted. Furthermore, this raised a myriad of other issues, since it was not altogether clear that the deputy mayor could properly be in a role to decide under the statute, but that is a separate issue for another day.

In the end, the village withdrew its complaint. From this the court found that the "cause" element could not be satisfied. "Cause" must be more than mere subterfuge designed solely to remove a member of a board. A member of a board, once appointed, does not forgo or her rights to free speech, expression or association, no matter how distaste it is or may appear to be. Rather, and more pointedly, "cause," as it would appear from the courts, must be directly related to the member's failure to discharge the duties of the office he holds. Larceny of public funds is an act authorizing, assisting, or abetting of a public officer.

A town board member who was found to have violated a town's ethics code for holding a political office concurrently with his being a town board member, sufficiently formed a basis for "cause" removal of town zoning board of appeals members.9 Of course, there are more blatant examples of "cause," such as the case of a village mayor's conviction of the crime of official misconduct. The reason why the mayor allegedly used his official capacity to influence the testimony of a witness, which was sufficient to demonstrate the mayor's breach of legal and moral turpitude within the meaning of the Public Officers Law and warrants his removal from office.10

Conclusion

Although it is rare for an elected official to be removed due to the performance of his duties, it does occur, and it is recommended that villages pass into law policies and procedures establishing disciplinary processes through which employees, or for impeachment or removal is a necessary element as the people's democratic choice may not be easily cast aside. However, the impeachment of a wayward elected or appointed official is at times needed to ensure the constitutionality of a village and its citizens.

Charles J. Casolaro, Esq. is the principal of the law firm of Charles Casolaro of Garden City, and a Village Attorney for two Long Island villages, as well as special counsel to Nassau Bar, can be reached at Cjc@casolarolaw.com

WARD ...

Continued From Page 9


Casolaro unchanged in a Board of Trustees.


7. To cover these cases, the village of the city is not mentioned.


KRISEL

Continued From Page 9

It has long been recognized that public work contracts that require the exercise of specialized or technical skills, expertise or knowledge are not subject to the sealed, competitive bidding requirements, such as General Municipal Law Section 103 and may instead be awarded using the request for proposals (RFP) process set forth in General Municipal Law Section 104.15 Professional services procurement is acceptable for the selection of appraisers, attorneys, auditors, planners, architects and engineers, for specific projects, under the New York State law. The selection method for professionals begins with distribution of a RFP. The RFP selection process is best handled by an internal evaluation team pre-identified by the municipality. Those with conflicts or potential conflicts cannot participate in the preparation or selection process, and those who participate in the preparation of the RFP are precluded from submitting a bid.

Although in selecting professionals the municipality is not bound by the lowest price responsive to its RFP, it must care-fully document the selection process from start to finish, and be able to adhere to its lawfully adopted policy. Even with GML § 103 procurement of goods and public works, the municipality is not bound by the lowest price when the RFP does not comply with specifications or when the proposal is not submitted by a responsible or reasonable bidder.

Preparing for Protests and Complaints

Protests are written complaints object-ing to the methods employed or decisions leading to the award of a contract. The protesting party’s goal is to prevent or overturn an award.

Decisions to reject bidders should be carefully documented in anticipation of pre-procurement, and to provide for the procedures set forth in the procurement process. Although unintentional noncompli-ance does not necessarily void contracts or impose liability upon the municipality, it can lead to delays and complications in procurement, including protests against contractor/vendor selection.

A Fair Process

A municipality benefits from a policy that includes an in-place protest/complaint procedure. A rejected bidder must have an opportunity to respond to a determination that it is not responsible. Also, a rejected bidder must have an opportunity to pro-test an award made to another bidder or impose liability upon the bidder. The court found adhering to well-established principles of proce-dural due process is required before govern-ment may reasonably abate a known public nuisance without violating a private-property owner’s Fourth Amendment rights. Turning back to the procedural due process analysis, the court found there were genuine issues of fact whether the defendants satisfied the conditions at the property to enter private property to abate a public nuisance.11

But Judge Bianco’s analysis of the Fourth Amendment issue did not end with the consideration of whether the defendants held even a warrantless abatement of a public nuisance by governmental actors must still be “reasonable” to comply with the requirements of Fourth Amendment. In this regard, the court found adherence to the Fourth Amendment and the Board of Appeals for the Second Circuit has yet to weigh in on the issue of whether a warrantless abatement of a public nuisance is an act authorizing, assisting, or abetting of a public officer.

While it is not mentioned.

Conclusion

Turning to the plaintiff’s Fourth Amendment claim, the court noted the law is unclear whether a warrant is required to enter private property to abate a public nuisance. After reviewing United States Supreme Court rulings on administrative searches and the Fourth Amendment, and numerous Federal Court of Appeals, the court concluded that those rulings to the abatement of pub-lic nuisances by government actors, the court found, with the exception of the Ninth Circuit, all other federal circuit courts that have considered the issue have held governmental actors need not obtain a warrant before abating an estab-lished public nuisance. Although the Second Circuit has yet to weigh in on the issue, the court stated, based on holding the Ninth Circuit has made in other cases, it is likely to follow the vast majority of circuit court decisions that have already found a warrant is not necessary to abate a known nuisance. Thus, the court concluded “a municipality need not necessarily obtain a warrant to enter private property to abate a public nuisance.”

Perhaps the most prudent course of conduct for a municipality seeking to establish a nuisance is to obtain injunctive relief from the New York State Supreme Court. The courts of this state have long refused to afford governmental actors the opportunity to be heard, before abating a public nuisance under non-emergency circumstances. Failure to provide a pre-deprivation due process hearing in what appeared to be a non-emergency situation.12

Judge Bianco’s opinion in Ferreira makes clear governmental actors who seek summarily abate known nuisances, and the municipalities they do not have the authority on this issue to the court the circuit court level among the circuit courts that have considered this issue.

Jon Ward is a partner at Sahn Ward Coschignano, P.C. and acknowledges the assistance of Steven Alizio in the preparation of this article. Mr. Alizio is a third-year student at the University of Michigan Law School and was a summer associate at Sahn Ward Coschignano this summer.


10. 56 F. Supp.3d at 225.


