

# CONTRACTING FOR MUNICIPAL SOLID WASTE AND RECYCLING SERVICES

---

John W. Giorgio, Esq.  
Matthew G. Feher, Esq.



THE LEADER IN PUBLIC SECTOR LAW  
ATTORNEYS AT LAW

© 2016 KP LAW, P.C. | ALL RIGHTS RESERVED.

# DISCLAIMER

**This information is provided as a service by KP LAW, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship between the presenter(s) and the recipient. You are advised not to take, or to refrain from taking, any action based on this information without consulting your legal counsel about the specific issue(s).**

# PART 1

## **GENERAL MUNICIPAL CONTRACTING ISSUES**

# AUTHORITY TO ENTER IN CONTRACTS

- Who in your municipality is authorized to enter into contracts generally?
- Mayor, Board of Selectmen, Town Manager.
- Chief Procurement Officer is not authorized to enter into contracts under G.L. c. 30B.
- Not likely to be DPW Director or Board of Health.
- Check local charter, ordinances, or bylaws for general authority to determine which municipal official has general contracting authority.
- If no authorization found in local legislation, check to see whether the Town Meeting vote or City Council vote authorized a particular official to enter into the contract.

# TERM OF CONTRACT.

- **G.L. c. 40, § 4 provides general authorization for municipalities to enter contracts “on such terms and conditions as are authorized by the [ charter, bylaw or town meeting vote.”]**
- **G.L. c. 30B, § 12(b) provides: “Unless authorized by majority vote, a procurement officer shall not award a contract for a term exceeding three years, including any renewal, extension, or option. Such authorization may apply to a single contract or to any number or types of contracts and may specify a uniform limit or different limits on the duration of any such contracts.”**
- **Does 12(b) apply to contracts exempt from c. 30B?**

# TERM OF CONTRACT.

- **G.L. c. 30B, § 12 (a) provides: “Unless otherwise provided by law and subject to paragraph (b), a governmental body may enter into a contract for any period of time which serves the best interests of the governmental body; provided, however, that the procurement officer shall include in the solicitation the term of the contract and conditions of renewal, extension or purchase, if any. The procurement officer shall not enter into a contract unless funds are available for the first fiscal year at the time of contracting. Payment and performance obligations for succeeding fiscal years shall depend on the availability and appropriation of funds.**

# TERM OF CONTRACT.

- If you have a Town Meeting vote authorizing the Town Manager to enter into a contract for curbside collection for a term of five years, there is no ability to extend the contract or exercise an option without a subsequent vote of Town Meeting.
- Rather than extend the existing contract, you may enter into a new contract for the same or a different term of years as long as you do not enter into a binding contract that exceeds the maximum term allowed in the authorizing bylaw or vote.
- An option to extend a contract should be in the sole discretion of the municipality.

# CONTRACT MUST BE IN WRITING

- **(a) All contracts in the amount of \$10,000 or more shall be in writing, and the governmental body shall make no payment for a supply or service rendered prior to the execution of such contract. G. L. c. 30B, §17(a).**
- **(b) Subject to the provisions of section three A of chapter forty, a contract made in violation of this chapter shall not be valid, and the governmental body shall make no payment under such contract. Minor informalities shall not require invalidation of a contract. G. L. c. 30B, §17(b).**



# CONTRACT MUST BE IN WRITING

- **What constitutes a written contract/essential terms?**
  - **Signed by authorized representative of both parties.**
  - **Term.**
  - **Compensation.**
  - **All necessary and appropriate contract specifications.**
  - **Termination and default. Termination for convenience.**
  - **Required insurance and bonds.**
  - **Indemnification.**

# CONTRACT MUST BE IN WRITING

- **Dispute resolution.**
- **Certificate of tax compliance**
- **Certificate of non collusion.**
- **Certification of appropriation.**
- **Subject to annual appropriation.**
- **Extensions or Options.**
- **Compliance with law; necessary permits and approvals.**
- **Assignment.**
- **Governing law.**
- **Prevailing wage rates.**

# CONTRACT MUST BE IN WRITING

- **Is a purchase order sufficient?**
  - **No, unless basic minimum contract provisions are included.**

## **CONTRACT MUST BE SUBJECT TO APPROPRIATION**

- **The procurement officer shall not enter into a contract unless funds are available for the first fiscal year at the time of contracting. Payment and performance obligations for succeeding fiscal years shall depend on the availability and appropriation of funds. G. L. c. 30B, §12(a).**
- **Complications involved if Contractor finances equipment purchases such as collection vehicles and toters.**

# PART 2

## **PUBLIC BIDDING OF SOLID WASTE CONTRACTS**

# PROCUREMENT OF SERVICES

- **Contracts for the collection, transportation, receipt, processing and disposal of solid waste, recyclables, or compostable materials are exempt from c. 30B. See G.L. c. 30B § 1(30).**
- **Exemption would not apply to “hybrid” services that might be included, such as the construction and/or operation of a transfer station.**
- **Always check your local charter, bylaws or ordinances to make sure that there are no required local bidding procedures.**

# PROCUREMENT OF SERVICES

- **Include disclaimer language regarding exemption from 30B. See Sample Contract Language Checklist.**
- **Be sure to reserve the right of the municipality to cancel the procurement at any time.**
- **Once you establish ground rules, you must follow them.**
- **Be sure to advertise in goods and services bulletin not the central register.**
- **Observe all local procurement procedures established by bylaws and c. 30B.**

# PROCUREMENT OF SERVICES

- **Current 30B Bidding Thresholds:**

**Under \$10,000 – sound business practices.**

**Between \$10,000 and \$50,000 – Three quotes**

**Over \$50,000 – Sealed bids or proposals.**



# PROCUREMENT OF SERVICES

- **Invitation for Bid:**

**Minimum evaluation criteria.**

**Award to lowest responsible and eligible bidder.**

- **Request for Proposals:**

**Separately sealed technical and price proposals.**

**Minimum criteria.**

**Comparative evaluation criteria – rating of Not Advantageous, Advantageous, Highly Advantageous.**

# Example of How to Draft Comparative Evaluation Criteria

## Experience

**Unacceptable** - An applicant who does not have at least two (2) years of curbside collection of municipal solid waste, or recent experience of not less than two (2) years in collection of solid waste, or experience of not less than three (3) years of satisfactorily providing municipal curbside services.

**Acceptable** - An applicant who meets the minimum of at least two (2) years of curbside collection of municipal solid waste, or recent experience of not less than two (2) years in collection of solid waste, or experience of not less than three (3) years of satisfactorily providing municipal curbside services.

**Advantageous** - An applicant who exceeds the minimum of at least two (2) years of curbside collection of municipal solid waste, or recent experience of not less than two (2) years in collection of solid waste, or experience of not less than three (3) years of satisfactorily providing municipal curbside services.

**Highly Advantageous** - An applicant who has more than seven (7) years of curbside collection of municipal solid waste; collection of solid waste; or satisfactorily providing municipal curbside services.

# PROCUREMENT OF SERVICES

**Assign rating – open price proposals.**

**The chief procurement officer shall determine the most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria set forth in the request for proposals.**

**Ability to award to other than the low bidder if more advantageous evaluation**

**Reserve the municipality's right in the RFP to negotiate the terms of the contract.**

Under Massachusetts General Laws, Chapter 30B, §1(b)(30), a contract for the collection, transportation, receipt, processing, or disposal of solid waste, recyclable or compostable materials, is exempt from the public bid laws of the Commonwealth of Massachusetts. As such, the Town, at its discretion, will select the firm that it believes offers the best all-round package for solid waste and recycling services. Because this service is exempt from the bidding laws, the Town reserves the right to negotiate with whatever firms it chooses, in whatever manner it believes is best suited to the Towns' needs. All firms responding to this Request for Proposals must clearly understand that this is not a formal bid process pursuant to the legal requirements of M.G.L. Chapter 30B. The Town is utilizing this format in order for all interested firms to provide a proposal based on equal footing so that a more direct comparison can be made among all proposals.

# Part 3

## Contract Drafting – Best Practices

# Contract Drafting – Best Practices

Be sure to establish a term for the contract including any options or renewals. Make sure that the Town has sufficient authority to enter into a multiyear contract pursuant to the charter, bylaws, or town meeting vote. The officer signing the contract on behalf of the Town must be authorized to bind the Town contractually.

A multi-year contract must be subject to annual appropriation. The contract should include a restatement of this legal requirement.

The procurement officer shall cancel the contract if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal year succeeding the first year.

# Contract Drafting – Best Practices

This contract is subject to the availability and appropriation of funds. The Town shall cancel this contract if funds are not appropriated or otherwise made available to support continuation of performance during any contract period as provided in M.G.L. Chapter 30B, section 12 and Chapter 44, section 31.

**Due to the uncertainty in the fuel market, you may find that the Town will receive a more competitive bid if you include a fuel adjustment clause. Make sure that the fuel cost has a downward adjustment as well**

**It is recommended that you include in the contract the relevant portions of a PAYT program instituted by the Town, including the requirements for placement of the carts at curbside.**

# Contract Drafting – Best Practices

**The contract should address the disposal and processing capabilities of the contractor, identifying the location of the disposal facility, whether the contractor owns the facility or has a long-term contract to use the facility. The contract should also make it clear that the disposal and processing services are the contractor's responsibility at the identified facilities or at alternate facilities at no additional cost to the Town.**

**The contract should provide that ownership of the solid waste and recyclables is assumed by the contractor upon collection and that the Town will not be considered the generator of the materials at any time.**

**Be sure that your contract addresses the collection of white goods, bulky wastes, yard and leaf collection, and collection services for municipal buildings and schools. In particular, determine whether bulky item pick-up will be by appointment only.**



# Contract Drafting – Best Practices

**Liquidated damages provisions can be a good way to deal with relatively minor contract violations.**

**The insurance provisions in the contract should be reviewed by the Town's insurance advisor. Inclusion of pollution insurance is recommended.**

**In order to protect the Town, a performance bond is recommended. The amount of the bond should at least equal the contract price for one year, and the contract should provide that it must be renewed each year by the contractor.**

**It is important that the contract require the contractor to indemnify the Town for liability. Reciprocal indemnification is not enforceable against the Town absent an appropriation.**

**The contract should include a provision requiring the contractor to perform the services in accordance with all applicable laws.**

**The contract should provide that it is the contractor's responsibility to obtain all necessary permits and approvals to conduct the required services.**

# Contract Drafting – Best Practices

**It is advisable to require the contractor to use drivers who have met applicable safety training requirements.**

**The contract should provide that the contractor may not assign the contract without the written approval of the Town.**

**The contract should clearly state that it is governed by the laws of the Commonwealth of Massachusetts.**

# Contract Drafting – Best Practices

**The contract should include the required revenue enforcement and non-collusion certifications.**

By signing this contract, the contractor certifies that under penalties of perjury, the contractor has filed all State tax returns and has paid all State taxes required under law. The contractor certifies under the penalties of perjury that its proposal has been made and submitted in good faith and without collusion or fraud with any other person. As used in this certification, the word “person” shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals.

# Contract Drafting – Best Practices

**While not required by law, a non-discrimination clause can be added to protect individual worker's rights.**

**A severability clause is standard language for any municipal contract.**

**If the contractor is a subsidiary of a large corporation, you might want to add a provision requiring the corporate parent to guaranty performance under the contract.**

**A notice provision should be included in the contract. Make sure that the person authorized to receive notice on behalf of the Town has sufficient authority to bind the Town.**

# Change in Law Provisions

## **10. EFFECT OF MATERIAL CHANGE AFFECTING AGREEMENT**

In the event that a change in Applicable Law or a material change in market conditions occurs, including but not limited to lack of commercially reasonable market availability for processed Recyclables, changes in market specifications affecting the salability of processed Recyclables, changes affecting the recyclability or marketability of Recyclables, changes in the quantity, quality or composition of the Recyclables or Single Stream Materials, (each a “Material Change”), has the effect of materially altering the terms of this Agreement, or preventing or precluding compliance with one or more provisions of this Agreement, or preventing, precluding or substantially affecting the benefit(s) bargained for under this Agreement, including profits of Company, this Agreement shall be modified or suspended as may be necessary to comply with, ameliorate, or prevent the detrimental effects on the Agreement of, such Material Change. A Party detrimentally affected by a Material Change shall so notify the other Party and request amendment to this Agreement accordingly, and the Parties shall engage in good faith negotiations for a period of three (3) months after such request regarding such amendments of this Agreement that reflect the extent to which the provisions hereof have been, or should be, so modified or suspended. If a Material Change precludes or reduces any of Company’s rates or other revenues, or otherwise increases costs to process single stream materials, then the Parties shall negotiate in good faith to modify this Agreement in accordance with this provision in order that Company can achieve, on an ongoing basis, profits that existed immediately prior to the Material Change. In the event that such good faith negotiations are unsuccessful, then either party may terminate this Agreement upon prior written notice to the other party.

# Prevailing Wages

**G.L. c. 149, §27F provides:**

**No agreement of lease, rental or other arrangement, and no order or requisition under which a truck or any automotive or other vehicle or equipment is to be engaged in public works by the commonwealth or by a county, city, town or district, shall be entered into or given by any public official or public body unless said agreement, order or requisition contains a stipulation requiring prescribed rates of wages, as determined by the commissioner, to be paid to the operators of said trucks, vehicles or equipment.**

# Prevailing Wages – Essential Elements

1. Contract by a municipality
2. Agreement of lease, rental, or other arrangement
3. Performance of a public work
4. No dollar threshold applicable
5. Requirement to include wage rate schedules in the procurement document and/or the contract.
6. Obtained from the Division of Workforce Development
7. Requirement that the municipality monitor the weekly rate schedules to determine whether prevailing rates are being paid are not expressly required under §27F.

# Applicability Of Prevailing Wages to Solid Waste and Recycling Services

- Is the service being traditionally performed by a Public Works Department? - Vining Disposal v. Town of Burlington.
- Prevailing Wages apply to contract for curbside collection and disposal of solid waste and for curbside recycling contracts because such services are typically performed by a DPW.
- Prevailing wages apply to a contract for the operation of a landfill or a transfer station if trucks or other vehicles are used by the contractor.



# Department of Labor Standards Rulings

- Truck drivers who transport solid waste or recycling materials from a municipal landfill or recycling center to a market site for disposal must be paid the prevailing wage.
- Transportation and disposal of sludge from wastewater treatment facility owned by DPW does not constitute being “engaged in public works” because practices regarding disposal are recent in origin and largely carried out by specialized private contractors.
- Operation of a municipal landfill and residential recycling drop-off center, functions commonly performed by city or town employees, would generally fall under the ambit of Section 27F.

# Department of Labor Standards Rulings

- A municipally run landfill operating under consent order requiring it to accept private construction debris in order to facilitate closure, where no public funds are expended, not a public works for purposes of section 27F.
- “Shakers”, workers who operate equipment from back of trash hauling truck, are “operators” of “other vehicles and equipment” for purposes of section 27F and are therefore covered by the Prevailing Wage Law.
- Gate attendant who checks incoming vehicles for current permits and directs customers to appropriate container for waste and recyclable disposal not subject to the Prevailing Wage Law

# Department of Labor Standards Rulings

- A municipal contract with a private haulers which arranges for the curbside pick-up of textiles from households at no cost to the municipality (although the municipality receives a fee based on the tonnage collected) is not subject to the Prevailing Wage Law because this is a service that is not traditionally performed by a DPW Department.
- Likely applicability for other types of arrangements under similar contract terms for waste ban items such as mattresses and organics.

# PART 4

## **Other Issues to Consider**

## **PAY AS YOU THROW PROGRAM**

**For curbside collection, may be initiated by Town board authorized to set solid waste users fees which is typically the chief executive officer – Select Board in most instances.**

**For transfer station, need to determine which Town board has care, custody and control of facility, and which Town board is authorized to assess fees.**

**Generally, there is no requirement for Town Meeting approval unless there is a Town bylaw or City ordinance.**

**Compliance with Emerson College Test.**

# SOLID WASTE ENTERPRISE FUND

- **Local acceptance of G.L. c. 44, §53 F ½ Town Meeting/City Council vote.**
- **Permits the municipality to set up a special fund for solid waste activities.**
- **Each year the enterprise fund budget is appropriated by the legislative body.**
- **All revenue received from the operation of the enterprise is deposited in the Enterprise Fund.**
- **Permits separate accounting/budgeting for solid waste services.**
- **Differences between an enterprise fund and a revolving fund.**

## REGIONALIZATION OF SOLID WASTE SERVICES

- **G. L. c. 40, §4A (intermunicipal agreements) provides:**  
**The chief executive officer of a city or town, or a board, committee or officer authorized by law to execute a contract in the name of a governmental unit may, on behalf of the unit, enter into an agreement with another governmental unit to perform jointly or for that unit's services, activities or undertakings which any of the contracting units is authorized by law to perform, if the agreement is authorized by the parties thereto, in a city by the city council with the approval of the mayor, in a town by the board of selectmen and in a district by the prudential committee.**

## REGIONALIZATION OF SOLID WASTE SERVICES

**G.L. c. 40, §4A $\frac{1}{2}$  (joint powers agreement) provides:**  
**The chief executive officer of a city or town, or a board, committee or officer authorized by law to execute a contract in the name of a governmental unit may, on behalf of the unit, enter into a joint powers agreement with another governmental unit for the joint exercise of any of their common powers and duties within a designated region; ... The joint powers agreement shall be authorized by the parties thereto in the following manner: in a city, by the city council with the approval of the mayor; in a town, by the board of selectmen; and in a district, by the prudential committee.**



# REGIONALIZATION OF SOLID WASTE SERVICES

- **Regional Refuse Disposal District:**

**Formed through a process similar to a regional school district.**

**Planning Committee drafts agreement.**

**Town Meeting votes to accept the recommendation.**

**District that is created is a body politic and corporate.**

**Makes assessments on member municipalities.**

**Authorized to acquire land, incur debt, and operate regional solid waste facilities.**

# REGIONALIZATION OF SOLID WASTE SERVICES

- **Special Act creating special use entity.**
- **Joint purchasing agreements.**
- **Informal regional committees to negotiate solid waste collection and disposal contracts.**

# SOLID WASTE USER FEES

- A fee can only be charged in exchange for a particular government service which benefits the party paying the fee in a manner “not shared by other members of society.
- The fee must be paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the fee.
- The fees are collected, not to raise revenues, but to compensate the governmental entity providing the services for its expenses.
- Emerson College v. Boston, 391 Mass. 415 (1984). Fees that do not meet these three characteristics would be regarded as illegal taxes.<sup>KP</sup> | LAW

# SOLID WASTE USER FEES

**G. L. c. 44, §28C(f) provides:**

**Any city or town acting by and through the officer or officers, board, committee or other body authorized by law, if any, to fix, revise, charge and collect such fees and other charges, otherwise, acting by and through its chief executive officer, is hereby authorized to fix, revise, charge and collect fees and other charges for any facilities or services provided by such city or town as relate to the collection or disposal of solid waste.**

**Always check local bylaws re: whether Town can charge for service.**

# MANDATORY RECYCLING PROGRAMS

**G. L. c. 40, §8H provides:**

**A city, town, or district may establish, by approval of the local legislative body, a recycling program for the purpose of recycling any type of solid waste including but not limited to paper, glass, metal, rubber, plastics, used tires and compostable waste. The program may be established for groups of cities, towns, or districts upon agreement of all municipalities or districts in a joint program.**

**Any recycling program established pursuant to this section may require that all residents, schools and businesses in a city or town separate from their solid**

## **MANDATORY RECYCLING PROGRAMS**

**waste those recyclables designated by the local legislative body. In cities and towns in which solid waste is collected at the curbside, the recycling program may include curbside collection of such recyclables. In cities and towns in which residents, schools or businesses may take their solid waste to a municipal landfill or transfer station, the recycling program shall include provision for the separation and storage at such landfill or transfer station of the solid waste being disposed by such residents, schools or businesses, and may include collection of recyclables at the curbside.**

# FLOW CONTROL

- **Bylaw requiring that all solid waste generated within the Town be disposed of at a particular facility.**
- **Likely violates the Commerce Clause of the U.S. Constitution unless the designed facility is publicly owned.**
- **Carbone case.**

## Long Term Solid Waste Disposal Contracts

**G.L. c. 30B, §12(f) provides:**

**Notwithstanding the provisions of paragraphs (a), (b), clause (3) of paragraph (c) and paragraph (d) and further notwithstanding any contrary provision of any law or the provisions of any charter, a city or town may, in a contract for the disposal of its garbage, refuse, and offal or treatment or disposal of sewage, septage or sludge, agree that said city or town shall not be exempt from liability on such contract; provided, however, that such disposal shall be in a sanitary manner approved by the Department of Environmental Protection; provided further, that the contract, including any**



## Long Term Solid Waste Disposal Contracts

**renewal, extension, or option, shall be for a period not exceeding twenty years; and provided, further, that such contract has been authorized by majority vote.**

- **Authorizes so-called “put or pay contracts.”**
- **Town Meeting vote or city Council authorization required.**
- **Exception to rule that multi-year contract is subject to annual appropriation.**
- **Contract cannot exceed 20 years.**

## Long Term Solid Waste Management Contracts for Town-owned Land

- **G. L. c. 30B, §1(e) provides:**

**Notwithstanding the provisions of any general or special law to the contrary, a governmental body may enter into a contract, in conformance with this chapter, for the construction and for services at a facility owned by a private party or parties, whether such facility will be located on public or private land for the disposal, recycling, composting or treatment of solid waste, sewage, septage or sludge without said contract being subject to the competitive bid process as set forth in sections thirty-eight A1/2 to thirty-eight O, inclusive, of chapter seven, section thirty-nine M of chapter thirty, or sections forty-four A to**

## Long Term Solid Waste Management Contracts for Town-owned Land

**forty-four J, inclusive, of chapter one hundred and forty-nine; provided, however, that this subsection shall not apply to a procurement of proprietary environmental technology in accordance with subsection (5) of section forty-four A of chapter one hundred and forty-nine.**

- **See also: G.L. c. 30B, §6(j).**

## Landfill or Transfer Station Operating Agreements

- **Standard contract for services if Town will simply be hiring a contractor to operate a Town solid waste facility.**
- **Most likely will be a hybrid service requiring compliance with 30B exemption from bidding not applicable.**
- **Subject to prevailing wage under the vehicle hired in the performance of a public works provision.**
- **Not exempt from public construction laws.**

# CONTACT INFORMATION

Attorney John W. Giorgio

Attorney Matthew G. Feher

**KP Law, P.C.**

101 Arch Street, 12th Floor

Boston, MA 02110

(617) 556-0007

835119v.3/80000-0014



THE LEADER IN PUBLIC SECTOR LAW  
ATTORNEYS AT LAW

© 2016 KP LAW, P.C. | ALL RIGHTS RESERVED.