

CITY OF MARTINSVILLE

Public Works Projects and Public Purchasing: Statutory Requirements & Best Practices

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Executive Summary

Dear Mayor Kohl:

Shortly after I was appointed City Attorney following Mr. Dale Coffey's resignation, you requested that my office undertake a review of the City of Martinsville's policies and procedures concerning public works projects and public purchasing. The review was prompted because of the actions of the former parks director, including conversion of City property for his personal use and storage of City property on his suspected property. You were also concerned about purchase of City equipment from the parks budget without notification or bidding, and without an authorized purchasing agent executing the claims. What follows is 1) a summary of Indiana law for public purchasing and public works; 2) recommendations for best practices regarding public purchasing and bidding of public works projects; and 3) a detailed analysis about the status of Martinsville's parks system.

THE FOCUS OF THE REPORT

Because of confusion among some members of the City Council that has prompted discussion on this topic, the majority of this report contains detailed summaries of the relevant statutory provisions that govern public works projects and public purchasing in Indiana. This is meant to be a reference guide for you and for anyone you decide to share this with. I've also included a summary of best practices, along with examples of resolutions that you can place before the Council to implement these best practices.

I have also included a detailed analysis about the status of the parks. Again, this is an area of confusion for the Council and also an area of potential legal exposure for the City. Some time ago, the City established a Park Board under I.C. 36-10-3 *et seq.* The Board then issued bonds to undertake some improvements to the parks. But in April of 2016, the Council voted to repeal the ordinance establishing the Park Board and appointed itself the overseer of the parks. Notably, the Council's attempt to usurp the executive function of the Mayor's office is improper. So, any action to disband the Park Board or dictate the governance of the parks is illegal, and the Park Board is still in place, along with the Department of Parks and Recreation. As such, I recommend that you appoint all new members of the Park Board and appoint a new director of Parks and Recreation. However, if for some reason the action to disband the Park Board is upheld, that puts the City in a precarious position because the Board has outstanding bond funds and has not yet retired the bonds previously issued. Not only does that leave the City exposed to disgruntled investors, but it has the potential to reduce the City's bond rating and make it very difficult to obtain future funding for any project, not just those related to the parks.

If you would like to reevaluate the structure of the governance of the parks without running afoul of the law or the bond purchase agreement and related laws and documents, I can provide you with several options in the future that you can present to the Council.

SIDEWALKS / AUDIT

Despite the media attention on the subject, this report does not include an analysis of the City's former sidewalk project and the Council's many protestations about the use of Roberts Construction to perform most of those individual projects. The City Council hired its own attorney, Mr. William Beggs of Bloomington, to review the projects performed by Roberts Construction in the last calendar year. We have not received written confirmation from the Council's attorney despite requesting it. In addition, we have confirmed independently with the State Board of Accounts that it has decided to evaluate and report on the Roberts Construction matter in its regular audit of the City this summer. The Board has sole power and responsibility for auditing public entities in the State of Indiana.

The Council's review of Roberts Construction amounts to an audit, and flies in the face of the Board's core function. So, I have decided not to review the Roberts Construction matter. But the recommendations in this report address any perceived issues with how those projects were handled. It is also unequivocally clear that the Council's allegations regarding a conflict of interest involving you and Roberts Construction are reckless and unfounded. An allegation that a Mayor engaged in criminal activity (which is what the Council has done by accusing you of violating state conflict of interest law) with a former brother-in-law defies logic. It is nothing more than a bald and uninformed attempt to discredit you and your office, made even bolder because the former City Attorney signed claims and the council approved them, until it became disadvantageous. It is apparent on the face of the law that there is no conflict of interest.

SPECIFIC FINDINGS

There has been a systemic failure by prior administrations to implement policies and take advantage of features made available in the law that would allow the City departments to run more efficiently. For example, at one public meeting last year, a City employee stood up during the public comment period and inquired whether the City needed to get bids and quotes every time he needed to replace an inexpensive part in a furnace. Those kinds of issues should be left to the departments and the departments should have clear directives about how to make necessary purchases, small and large. The last iteration of any ordinance relating to public purchasing is a 1998 ordinance, but I have not discovered any departmental policy regarding purchasing. Hopefully this report will be useful to help the City move forward in this regard. My office is exploring the best and most efficient ways to prepare or supplement relevant City policies and procedures, including retention of an outside company. The City Attorney's time should be used judiciously and to further existing projects, as you have done after Mr. Coffey resigned. So, if there is a more efficient and economical way to update City policies and create procedures (should you

decide to move forward) my office will present you with that option. If you need any additional information, please let me know.

Sincerely,

s/ Anne L. Cowgur

Anne L. Cowgur, City Attorney

City of Martinsville, Indiana

Public Works: An Overview¹

Public Works vs. Public Purchasing

Public works projects and public purchases are *not the same*, and each has its own set of procedures, guidelines and rules. A public purchase occurs when the City acquires any property (including equipment, goods, materials, and services) for use. Public purchasing will be explained in detail below, beginning on Page 17. A public work, on the other hand, is “the construction, reconstruction, alteration, or renovation of a public building, airport facility, or other structure that is *paid for out of a public fund or out of a special assessment.*” This definition *includes* the construction, alteration or repair of highways, streets, alleys, bridges, sewers, drains, or other improvements. But this definition *does not include* maintenance, extensions and installations of City utilities if the work is done by utility employees. Nor does it include work involved in an extension or installation of a utility infrastructure by a private developer of land if:

- The City will acquire for the City-owned utility all of the infrastructure that is to be extended or installed;
- Not more than 50% of the total construction costs for the infrastructure to be extended or installed (including increased costs resulting from the construction specifications that are required by the City and specify a greater service capacity for the infrastructure than would otherwise be provided for by the private developer) will be paid for out of a public fund or special assessment; and
- The private developer agrees to comply with applicable local ordinances and engineering standards concerning the construction, extension, or installation of the utility infrastructure.

Various procedures govern the award of public works contracts, and determining the correct procedure to follow often depends on the cost of the project. Importantly, Indiana law contemplates that in certain situations and for certain public works projects, a municipality may utilize and benefit from the public purchasing statute instead of the public works statute. In other words, not every public works project needs to be bid out in a formal manner and the City should evaluate the best practices and the most advantageous ways to operate.

¹ IC 36-1-12 *et seq.*

Public Works: General Provisions

General Public Works Requirements

- Public works contracts must conform to *antidiscrimination* (IC § 5-16-6 *et seq.*) and *contractor insurance, training, and payroll* (IC § 5-16-13 *et seq.*) requirements.
- Contractors dealing with the Government of Iran may be disqualified from being awarded public works contracts, pursuant to IC § 36-1-12-23 and IC § 5-22-16.5.
- IC § 4-13-18 (*drug testing* of public works contractor employees) applies if the cost of the contract is at least \$150,000.
- For projects requiring *creation of a trench at least five feet deep*, IOSHA regulations regarding trench safety systems (29 C.F.R. § 1926, Subpart P) apply.
- To submit a bid for a project involving *plumbing*, the bidder must submit evidence that he or she is a licensed plumbing contractor.
- Public works contracts must contain a provision for the payment of subcontractors, laborers, material suppliers, and those performing services.

Prohibitions

- A public works contract is *void if not let in accordance with the public works statute*.
- The cost of a public works project *may not be divided* into two or more projects for the purpose of avoiding bidding procedures. A violation constitutes a Class A infraction.

Approval of Plans²

- If public work, costing more than \$100,000, is to be performed on a public building, the work may only be undertaken in accordance with *plans and specifications approved by a licensed architect or engineer*. Also, a complete set of final record drawings must be filed in the division of fire and building safety within 60 days of project completion, where they will be kept in a regulated depository.
- All plans and specifications for public buildings *must be approved by*:
 - The state department of health;
 - The division of fire and building safety; and
 - Any other state agencies designed by statute.

² IC § 36-1-12-7 and IC § 36-1-12-10

Public Work Projects During Emergencies³

- *If an emergency is declared*, the Board may contract for public work without following the requirements explained below if:
 - Bids or quotes are invited from at least two people known to deal in the public work to be done; and
 - The Board minutes show the declaration of emergency and the persons invited to bid or provide quotes.

Engineering, Architectural or Accounting Services- Limitations That Do Not Apply⁴

- When public work is to be performed and 2/3 of the Board votes to employ *engineering, architectural, or accounting services* for planning, financing, and preparing plans and specifications, the following do not apply to contracts for the professional services if they would prevent the payment of fees and services rendered. Limitations and restrictions with respect to:
 - Invalidity of contracts without an appropriation therefor.
 - Payment of fees solely from the proceeds of bonds or assessments when and if issued.
 - Payment of fees solely from a special fund or funds to be provided in the future.

Change Orders⁵

- A *change order* may be issued to add, delete, or change original contract items if, in the course of a public work project (*not before the start of a project*), it becomes necessary to change or alter specifications.
- A change order must be directly related to the public work project and prepared as an addendum to the contract that must be approved and signed by the Board and the contractor.
- If a licensed architect or engineer is involved, he or she must prepare the change order.
- If a change order calls for additional units of material, the costs must be the same as those shown in the original contract.
- The total of all change orders increasing the scope of a project (unless the result of circumstances that could not have been foreseen) may not exceed 20% of the original contract amount.

³ IC § 36-1-12-9

⁴ IC § 36-1-12-3.5

⁵ IC § 36-1-12-18

Projects Completed By Board: No Contract⁶

When Public Work May Be Done Without a Contract

- If all criteria listed below is met, *work may be completed without awarding a contract.*
 - The work must be done by the Board of Public Works' *own workforce*; and
 - The cost of the public work must be estimated at *less than \$250,000*. This includes cost of materials, labor, equipment, and rental, as well as a reasonable rate for the use of trucks and heavy equipment owned, and all other incidental expenses; and
 - The City must have a group of employees *capable of performing the construction, maintenance, and repair applicable to the work*. The workforce must show demonstrated skills, training, or expertise.

Requirements

- If the cost of the project is estimated to be *more than \$100,000*, the Board of Public Works must determine at a public meeting that *it is in the public interest* to perform the work with the Board's own workforce and must publish a *public notice* pursuant to IC § 5-3-1 (see Page 37 for more information) that:
 - Describes the work; and
 - Sets forth the projected cost of each component of the public work.
- For these projects, materials may be purchased or leased in the manner provided by IC § 5-22.
- These projects must be *inspected and accepted as complete* in the same manner as other public work projects.
- A Department *may not artificially divide a project* to bring aspects of the project under this section.

⁶ IC § 36-1-12-3

Projects Costing At Least \$150,000: Bidding⁷

Initial Bidding Procedures- Projects Costing At Least \$150,000

- The Board shall *prepare general plans and specifications* describing the public work.
 - The specifications cannot unduly limit competition.
 - If the project involves resurfacing a road, street, or bridge, the specifications must show how the weight or volume of materials will be accurately measured and verified.
- The plans and specifications shall be *filed in a place accessible to the public*, and *public notice* (see Page 37 for more information) shall be given, calling for sealed proposals.
- The *public notice* shall:
 - Specify where the plans and specifications are filed; and
 - Specify the date fixed for receiving bids.
- The period of time between the first publication and receiving bids cannot be more than:
 - Six weeks if the cost of the project is estimated to be less than \$25,000,000.
 - Ten weeks if the cost of the project is estimated to be at least \$25,000,000.

Bid Requirements and Receiving Bids

- Bidders *must submit* each of the following on forms prescribed by the state board of accounts:
 - A financial statement;
 - A statement of experience;
 - A proposed plan for performing the work; and
 - The equipment the bidder has available.
- The City:
 - *Shall require a bond or certified check* to be filed with each bid in the notice of letting if the cost of the work is estimated to be more than \$200,000.
 - *May require a bond or certified check* to be filed with each bid in the notice of letting if the cost of the work is estimated to be not more than \$200,000.
 - The Board can determine the amount required, but it may not be over 10% of the contract price.
 - The bond or certified check shall be made payable to the City or agency.
 - All checks of unsuccessful bidders shall be returned and checks of successful bidders shall be held until delivery of the performance bond.
- Bids are not required to be submitted before the meeting at which bids are received.

⁷ IC § 36-1-12-4

- The following apply to *receiving bids*:
 - The meeting must be open to the public; and
 - All bids shall be opened publicly and read aloud at the time and place designated, and not before, subject to the following exception.
 - *Exception*: Bids may be open after the time designated if the Board makes a written determination that it is in the best interest of the Board and the day, time, and place of the rescheduled opening are announced at the day, time, and place of the originally scheduled opening.

Awarding Bids

- The Board *shall (1) award the contract to the lowest responsible and responsive bidder or (2) reject all bids submitted*. For information regarding responsible and responsive bidders, see Pages 35-36.
- If the contract is awarded to a bidder other than the lowest Bidder, the Board must state (in the minutes or memoranda) the factors used to determine which bidder was the lowest responsible and responsive bidder, and make a copy of such available for public inspection.
- The bidder is required to *submit an affidavit* stating:
 - That he or she has not entered into a combination or agreement relative to the price to be bid by someone, to prevent someone from bidding, or to induce someone to refrain from bidding; and
 - That the bid is made without reference to any other bid.

Smaller Projects: Quotes

Quote Procedure- Project Expected to Cost Between \$50,000 and \$150,000⁸

- The Board shall *invite quotes from at least 3 persons* known to deal in the class of work to be performed.
- The Board shall *mail a notice* stating that plans and specifications are on file in a specified office at least 7 days before the time fixed for receiving quotes.
- *Receiving Quotes:*
 - A quoter may not be required to submit a quote before the meeting at which quotes are to be received.
 - Quotes must be opened publicly (at a meeting open to the public) and read aloud at the time and place designated, and not before.
- The Board shall *award the contract to the lowest responsible and responsive quoter* (see Pages 35-36 for information regarding responsibility and responsiveness).
- The Board may reject all quotes.

Procedure- Project Expected to Cost Less Than \$50,000⁹

- The Board may utilize the *bidding procedure* outlined on Page 10, or
- The Board may utilize the *quote procedure* outlined on Page 12.
 - However, the quote procedure may not be used for the resurfacing of a road, street, or bridge unless (1) the weight or volume of the materials in the project is capable of accurate measurement and verification and (2) the specifications define the geographic points at which the project begins and ends. If all resurfacing is done in one calendar year, the work is to be a single public work project.
- If the Board utilizes the quote procedure, *the quotes may be obtained by soliciting at least three quotes by telephone, fax, or email.*
 - The seven-day waiting period does not apply.
 - A quote received via telephone, fax, or email shall be reported to the Board during the public meeting at which the contract is considered. The name of each person submitting a quote, and the amount of each quote, shall be read aloud at the public meeting.
- If the Board utilizes the quote procedure and rejects all quotes, *the Board may negotiate and enter into agreements for work in the open market* without inviting or

⁸ IC § 36-1-12-4.7

⁹ IC § 36-1-12-5

receiving quotes if the Board establishes the reasons for rejecting the quotes in writing.

Routine Work Less Than \$150,000¹⁰

When It Applies

- When the following criteria are met, the Board may utilize an alternate procedure to award public works contracts.
 - The public work is for the *routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property*; and
 - The cost of the work is estimated to be *less than \$150,000*.

Alternate Procedure- Public Purchasing Statutes

- When the aforementioned criteria are met, the Board may award a contract for public work pursuant to *the manner provided in IC § 5-22, the statute governing public purchasing procedures*. Those procedures are further outlined on Page 25 and briefly discussed below.
- *Routine Repair Between \$50,000 and \$150,000*
 - A purchasing agent may *invite quotes* from at least 3 persons, and invitations shall be sent at least 7 days before the time fixed for receiving quotes.
 - If a satisfactory quote is received, *the contract shall be awarded the lowest responsible and responsive offeror or all quotes shall be rejected*.
 - If no quotes are received from a responsible and responsive offeror, a contract may be awarded pursuant to the “special purchases” procedure on described on Page 28.
- *Routine Repair Expected to Be Less Than \$50,000*
 - A contract may be awarded pursuant to *rules adopted by the City Council*.

¹⁰ IC § 36-1-12-4.9

Awarding & Paying For Public Works Contracts

Awarding A Contract & Written Notice to Proceed¹¹

- A successful bidder shall be *awarded the contract and provided with notice to proceed generally within 60 days* after the date when bids are opened.
 - If general obligation bonds are to be sold to finance the construction, the Board shall allow the bidder 90 days.
 - If revenue bonds are to be issued (when approved by the utility regulatory commission) or if special taxing district, special benefit, or revenue bonds are to be issued and sold to finance the construction, the Board shall allow the bidder 150 days.
- Failure to award and execute the contract and issue timely notice entitles the bidder to:
 - *Reject the contract* and withdraw the bid (notice must be given within 15 days of the 60 day expiration date or extension date); or
 - *Extend the time* to award the contract and provide notice to proceed at a later date.

Payment Claims by Subcontractors, Laborers, or Suppliers¹²

- The Board shall withhold final payment to the contractor *until it has paid subcontractors, material suppliers, laborers, and those furnishing services.*
- If the sum owed to the contractor isn't sufficient to pay those bills, it shall be prorated in payment of the bills among those entitled to payment.
- *If there is no dispute among claimants*, the Board shall pay the claim from the money due to the contractor and deduce the claims from the contract price.
- *If there is a dispute among claimants*, IC § 36-1-12-12 outlines the appropriate procedure to be followed.

Payment Bonds & Sureties

- If the project is estimated to be *over \$200,000*, a payment bond to the City, equal to the cost of the project, is required.
- If the project is estimated to be *\$200,000 or less*, the City may require a payment bond, equal to the cost of the project.
- *Payment bond requirements:*

¹¹ IC § 36-1-12-6

¹² IC § 36-1-12-12

- The bond must be deposited with the Board.
- The bond must specify that the following will not discharge the surety: (1) modifications, omissions, or additions to the terms and conditions of the public work contract, plans, specifications, drawings or profile, (2) a defect in the contract, or (3) a defect in the proceedings preliminary to the awarding of the contract. The surety may not be released until one year after the Board's final settlement with the contractor.
- IC § 36-1-12-13.1 outlines procedures regarding *actions brought against the surety*.

Retainage & Escrow Agreements

- If a project contract price is over \$200,000 (and the project is not for a highway, road, street, alley, bridge, or appurtenant structure situated on a street, alley or dedicated highway right-of-way), related contracts shall contain provisions for the retainage of portions of payments by the Board to contractors, by contractors to subcontractors, and for the payment of subcontractors. At the discretion of the contractor, the retainage shall be held by the Board or an escrow account.
- If a project contract price is \$200,000 or less, a Board may require the contracts to contain the aforementioned retainage provisions.
- IC § 36-1-12-14 outlines procedures relating to the *retainage and escrow process*.

Other Payment Provisions- Road and Street Work

- A contract for road or street work must contain a provision for a final payment of contractor claims (that are not in dispute) within 120 days after final acceptance and project completion. Interest shall be paid for every day a payment is late, if that delay is attributable to the Board. The annual percentage rate of interest to be paid is 12%.

Public Purchasing: An Overview¹³

Definition of Public Purchasing

A *public purchase* occurs when the City “purchases” property (by buying, procuring, renting, leasing, or otherwise acquiring) for use. Various purchasing methods and procedures exist, and the statutes allow the City flexibility to meet daily expectations while making public purchases. The statutes also provide the City with the ability to take advantage of price breaks and preferences.

¹³ IC § 5-22 *et seq.*

Purchasing Agencies & Agents¹⁴

Governmental Bodies, Purchasing Agencies & Purchasing Agents

- Public purchasing statutes often refer to duties of a *governmental body*. In the City of Martinsville, *the City Council is the governmental body*.
- A *purchasing agency* is the person designated by law or rule of the governmental body.
- A *purchasing agent* is an individual designated and authorized by a purchasing agency to act as an agent for the purchasing agency in the administration of the purchasing agency's duties.
- A purchasing agency may have more than one purchasing agent.
- Pursuant to Ordinance 98-1427, Martinsville's Board of Public Works is the City's purchasing agency.
- Pursuant to statute, *each taxing entity that is authorized to enter into contracts may be a purchasing agency*. As having more than one purchasing agency and purchasing agent promotes flexibility and efficiency, the City should consider enacting an ordinance, which would revise and expand Ordinance 98-1427, designating additional purchasing agencies and multiple purchasing agents per agency.

Cooperatives

- The City (via the City Council) may enter into an agreement with other governmental bodies to form a *cooperative purchasing organization*.
- All public purchasing statutory requirements apply.
- The cooperative purchasing organization is the *purchasing agency*, and an individual designated by the cooperative is the *purchasing agent*.

¹⁴ IC § 5-22-4 *et seq.*

Specifications¹⁵

Overview of Specifications

- *Specifications* are descriptions of the physical or functional characters of a supply or service, or the nature of a supply or service, including descriptions of any requirements for inspecting, testing, or preparing a supply or service for delivery.
- Specifications must (1) promote overall economy for the purposes intended and (2) encourage competition in satisfying the City's needs.

Developing Specifications

- The City Council may *adopt rules or establish policies* for the preparation, maintenance and content of specifications, including a description of requirements for testing, inspecting, or preparing an item for delivery.
- A purchasing agent shall prepare, issue, revise, maintain and monitor the use of specifications.
- *Alternative Procedure:* If the development of specifications by the City is not feasible, the purchasing agent makes a written determination to that effect, and the City executive approves of the use of the following, the alternative procedure below may be used.
 - The purchasing agent may issue a *request for specifications*.
 - The request must include (1) the factors or criteria that will be used in evaluating the specifications, (2) a statement concerning the relative importance of the evaluation factors, and (3) a statement concerning whether discussions may be conducted with persons proposing specifications to clarify the requirements.
 - The purchasing agent must give *public notice* of the request for specifications (see Page 37 for more information regarding public notice requirements).
 - Fair and equal treatment must be given to all persons proposing specifications, including with respect to opportunity for discussion and revisions of proposed specifications.

Maintenance

- Each purchasing agency shall maintain an indexed file of specifications prepared by or under the authority of its purchasing agents.

¹⁵ IC § 5-22-5 *et seq.*

Public Purchasing: General Requirements¹⁶

Adoption of Rules & Policies

- The *City Council may adopt rules* to regulate City purchases. These rules may supplement, and may not be inconsistent with, the public purchasing statutory requirements explained below.
- A *purchasing agency may establish written policies* for purchases made by the purchasing agency. The written policies may apply to all purchases or specific purchases. A written policy may supplement, and may not be inconsistent with, all statutory requirements and the established rules adopted by the City Council.

General Requirements

- All parties involved in the negotiation, performance, or administration of contracts made pursuant to the public purchasing statutes *shall act in good faith*.
- An offeror does not gain a *property interest in the award of a contract* unless the offeror is awarded the contract and the contract is completely executed.
- A governmental body *may comply with the terms and conditions of a gift* if noncompliance with those terms and conditions would invalidate the gift.

Electronic Transmissions

- Whenever material is required to be sent by mail, *it may be sent by electronic means* as stated in rules adopted by the City Council, written policies of the purchasing agency, or a solicitation.
- Electronic transmission of information must be as efficient and secure as sending the material by mail.
- The City *may receive electronic offers if*:
 - The solicitation indicates the procedure for transmitting electronic offers; and
 - The City receives the offer on a fax machine, e-mail, or another electronic system with a security feature that protects the content of an electronic offer with the same degree of protection as the content of an offer that is not transmitted electronically.
- When a reverse auction is conducted, electronic offers for supplies must be received through an Internet purchasing site.

¹⁶ IC § 5-22-3 *et seq.*

Purchasing Services

Procedures & Adopting Rules and Policies¹⁷

- A purchasing agency may purchase services *using any procedure the City or the purchasing agency considers appropriate.*
- The City Council *may adopt rules governing the purchase of services* for the City and the purchasing agency of the City *may establish policies* regarding the purchase of services for the City.

Awarding Contracts for Collection Services¹⁸

- The City may let a contract with a public or private person for the performance of any *ministerial service* that it must or may have done under its discretion that is necessary or desirable in the public interest.
- The City shall award a *contract for collection services* using any procedure authorized by statute.
- The City may contract with a collection agency to collect any amount owed and may authorize a collection agency in a contract for collection services to collect from the debtor a collection fee.

¹⁷ IC § 5-22-6 *et seq.*

¹⁸ IC § 5-22-6.5 *et seq.*

Purchasing Supplies At Least \$150,000- Bidding¹⁹

When This Section Applies

- This section generally applies if the purchasing agent expects the purchase to be at least \$150,000 and none of the alternative procedures indicated on Page 26 apply.
- See Page 25 for information regarding smaller supply purchases and Page 26 for alternative supply purchasing procedures.

Invitation for Bids

- The purchasing agent shall issue an *invitation for bids*, which must include each of the following:
 - A purchase description.
 - All contractual terms and conditions that apply to the purchase.
 - The time and place for opening bids.
 - A statement concerning whether bids must be accompanied by a certified check or other evidence of financial responsibility that may be imposed in accordance with the City's rules or policies.
 - A statement concerning whether the bid may be cancelled or rejected in whole or in part (See Page 23).
 - A statement of the criteria that will be used to evaluate bids (See Page 22-23).

Notice of Invitation for Bids

- Invitations must meet *public notice* requirements (see Page 37 for more information regarding public notice requirements).
- A purchasing agency *may provide electronic access to the notice* through the computer gateway administered by the office of technology or any other electronic means available to the City.

Potential Bid Evaluation Criteria

- Inspection
- Testing
- Quality
- Workmanship
- Delivery
- Suitability for a particular purpose

¹⁹ IC § 5-22-7 *et seq.*

- If the bid is submitted by a trust, it must (1) identify the beneficiary of the trust and (2) identify each settlor empowered to revoke or modify the trust.
- Evaluation criteria that will affect bid prices and be considered in the evaluation for an award must be *objectively measureable*.

Cancelling/Rejecting Bids

- A solicitation *may be cancelled or an offer may be rejected* when the purchasing agent determines it is *in the best interests of the governmental body*.
- The cancellation or rejection may be in whole or in part, as specified in the bid solicitation.
- The reasons for a cancellation or rejection must be made part of the contract file.

Opening, Accepting, and Awarding Bids

- Bids must be *opened* by the purchasing agency (1) publicly, (2) in the presence of one or more witnesses, and (3) at the time and place designated in the invitation for bids.
- After bids are opened, *no changes are permitted* in bid prices or other provisions of bids prejudicial to the interest of the governing body or fair competition.
- Bids must be *evaluated* only by the requirements or criteria listed in the invitation for bids.
- Generally, bids must be *unconditionally accepted* without alteration or correction. The following exceptions apply.
 - If a bidder inserts *contract terms or bids on items not specified in the invitation for bids*, the purchasing agent must treat the additional material as a proposal for addition to the contract and either (1) declare the bidder nonresponsive, (2) permit the bidder to withdraw the proposed additions in order to meet the requirements provided in the invitation for bids, or (3) accept any of the proposed additions.
 - If the purchasing agent decides to accept proposed additions, (1) the additions must not be prejudicial to the interest of the governmental body or fair competition, and (2) the decision must be supported by a written determination by the purchasing agency.
 - A decision to permit a change to the requirements of the invitation for bids must be supported by a written determination of the purchasing agency.
- A contract shall be *awarded* (1) with reasonable promptness, (2) by written notice, and (3) to the lower responsible and responsive bidder.

Adopting Rules and Policies Regarding Mistakes

- The City Council may adopt rules or establish policies that allow:
 - *Correction or withdrawal of inadvertently erroneous bids* before or after a contract award.
 - Cancellation of awards or contracts based on these mistakes.
- Unless a rule or policy states otherwise, a purchasing agency must make a written decision to:
 - Permit the correction or withdrawal of a bid.
 - Cancel awards or contracts based on mistakes.

Maintaining Information

- The purchasing agency *must maintain the following*:
 - The name of each bidder;
 - The amount of each bid; and
 - Other information required by statute or rules adopted by the City.
- This information is subject to public inspection after a contract is awarded.

Purchasing Supplies- Small Purchases²⁰

Purchases Expected to be Less Than \$50,000

- A purchasing agent may make a purchase estimated to be less than \$50,000 pursuant to *policies established by the purchasing agent or rules adopted by the City Council*.
- These policies should require purchasing agents to *keep track of all important documentation* relating to small purchases and provide for *transparent processes*.

Purchases Expected to be Between \$50,000 and \$150,000- Quotes

- A purchasing agent may *invite quotes* from at least 3 persons known to deal in the lines or classes of supplies to be purchased.
- Invitations to quote shall be mailed to these 3 persons at least 7 days before the time fixed for receiving quotes.
- If a satisfactory quote is received, *the purchasing agent shall award the contract to the lowest responsible and responsive offeror or reject all quotes*.
- If the purchasing agent does not receive a quote from a responsible and responsive offeror, supplies may be purchased pursuant to the “special purchases” procedure on described on Page 28.

²⁰ IC § 5-22-8 *et seq.*

Purchasing Supplies- Alternative Procedures

Requests for Proposals²¹

- This procedure may be used when the City Council determines (by rule or by policy) that it is not practical or advantageous to purchase a certain type of supply or supplies by competitive bidding and *receiving proposals is the preferred method of purchasing for that supply or those supplies.*
- A request for proposals *must include the following:*
 - The criteria that will be used to evaluate the proposals (only this criteria may be used to evaluate the proposals).
 - A statement concerning the relative importance of price and the other evaluation criteria.
 - A statement concerning whether the proposals must be accompanied by a certified check or other evidence of financial responsibility, which may be imposed in accordance with the City's rules.
 - A statement concerning whether discussions may be conducted with responsible offerors who submit proposals reasonably susceptible of being selected for award.
- *Public notice* of a request for proposals must be given in accordance with IC § 5-3-1 (see Page 37 for more information regarding public notice).
 - Electronic access to the notice may be provided through the computer gateway administered by the office of technology.
- Proposals must be *opened* in a way that avoids disclosure of contents to competing offerors during the process of negotiation.
- A *register of proposals* must be prepared and must be open for public inspection after a contract award.
- The *register of proposals* must contain the following:
 - A copy of the request for proposals.
 - A list of everyone who received copies of the request for proposals.
 - A list of all proposals received (including names, addresses, dollar amounts of each offer, and the name of the successful offeror and dollar amount of the successful offer).
 - The basis on which the award was made.
 - The entire contents of the contract file (aside from proprietary information such as trade secrets, financial information not required to be made available to the public by the terms of the request for proposals, and manufacturing processes).

²¹ IC § 5-22-9 *et seq.*

- If provided in the City's rules or the request for proposals, *discussions may be conducted* with (and best and final offers obtained from) responsible offerors who submit proposals reasonably susceptible of being selected for award.
 - Offerors must be accorded *fair and equal treatment* with respect to opportunities to discuss and revise proposals.
 - Information derived from these discussions may be used in discussion only if the identity of the offeror providing the information is not disclosed. Equivalent information must be provided to all offerors with which the purchasing agency chooses to have discussions,
- *An award shall be made to the responsible offeror* whose proposal is determined in writing to be the most advantageous to the City, taking into consideration price and other evaluation factors. Awards may be made to more than one offeror, if so stated in the request for proposals.

Online Reverse Auctions²²

- A purchasing agency may conduct a reverse auction for the purchase of supplies by using *an Internet purchasing site to issue an invitation for bids and receive bids*.
- A *written policy* (established by the purchasing agency) must require the purchasing agency to maintain adequate documentation regarding reverse auctions so that the transactions may be audited as provided by law, and must establish procedures for:
 - Transmitting notices, solicitations, and specifications.
 - Receiving offers.
 - Making payments.
 - Protecting the identity of a bidder or an offeror.
 - Providing the display of the amount of each offer previously submitted for public viewing.
 - Establishing the deadline by which offers must be received and will be considered to be open and available for public inspection.
 - Establishing the procedure for the opening of offers.
 - A fee for bidders may be set in this policy.
- Only bids made in accordance with the purchasing agency's written policies and made through the Internet purchasing site will be evaluated at the close of bidding.
- When used for a reverse auction, *an Internet purchasing site* must:
 - Comply with all other public purchasing requirements.
 - Provide information that the purchasing entity considers necessary or beneficial to bidders.
 - Display the amount of all bids previously submitted regarding the reverse auction for public viewing.
 - Conceal identifying bidder information.

²² IC § 5-22-7.5 *et seq.*

- A bid is considered *open* when a computer-generated record of the information contained in all bids for a proposed purchase that were received by the site not later than the posted bid deadline is reviewed publicly by the purchasing agency in the presence of one or more witnesses at the time and place designated in the invitation for bids.
- The affirmation requirement does not apply to internet reverse auctions.

Special Purchases- No Bid or Proposal Solicitation Necessary²³

- The following *procedures must be utilized* when a special purchase is made.
 - Contract records shall be kept in a separate file, which must include a written determination of the basis for the special purchase and the selection of a particular contractor.
 - A record shall be kept listing all contracts for a minimum of five years.
 - The record must contain (1) each contractor's name, (2) the amount and type of each contract, (3) a description of the supplies purchased.
 - The contract records for special purchases are subject to audit by the state board of accounts.
 - A special purchase must be made with competition when practicable.
- *No Responsive Offer*: A special purchase may be made when a purchase has been solicited under another method and has not received a responsive offer.
- *Emergency*: A special purchase may be made when there exists, under emergency conditions, a threat to public health, welfare, or safety.
- *Impaired Function*: A special purchase may be made when purchase of the required supplies or services under another purchasing method would seriously impair the functioning of the using agency.
- *Savings*: A special purchase may be made when there exists a unique opportunity to obtain supplies or services at a substantial savings to the governmental body.
- *Auction*: A special purchase may be made at an auction.
- *Government Discount*: A special purchase may be made when the market structure is based on price but the governmental body is able to receive a dollar or percentage discount of the established price.
- *One Source For Supply*: A special purchase may be made to award a contract for a supply when there is only one source for the supply and the purchasing agent determines in writing that there is only one source for the supply.
- *Data Processing*: A special purchase may be made for data processing contracts or license agreements for software programs or supplies or services when only one source meets the agency's reasonable requirements.

²³ IC § 5-22-10 *et seq.*

- *One Source For Equipment:* A special purchase may be made when the compatibility of equipment, accessories, or replacement parts is a substantial consideration in the purchase, and only one source meets the reasonable requirements.
- *Evaluation of Supplies:* A special purchase may be made for the evaluation of supplies or a system containing supplies to obtain functional information or comparative data, if the purchase may advance the long term competitive position of the governmental body.
- *Gifts:* A special purchase may be made by accepting a gift of supplies for the purchasing agent's governmental body.
- *Public Utility:* A special purchase may be made from a public utility if the purchase or lease price is negotiated and considers the results of independent appraisals (one obtained by the purchasing agent and one obtained by the public utility).
- *Efficiency and Economic Advantage:* A special purchase may be made when it is determined in writing that supplies may be purchased at prices equal to or less than the prices stipulate in the current federal supply service schedules and it is advantageous to the City's interest in efficiency and economy.
- *Federal Government and Federal Agency Contracts:* IC § 5-22-10-15 and § 5-22-10-16 discuss special purchases from someone with a contract with a federal agency or a transfer from the federal government.

Purchases From Certain Sources

- In certain circumstances, supplies may be purchased from the following sources without utilizing the bidding or quoting procedures. See the relevant statutes for more information.
- See IC § 5-22-11 for information regarding purchases from the *Department of Correction*.
- See IC § 5-22-12 for information regarding the purchase of *Rehabilitation Center products*.
- See IC § 5-22-13 for information regarding purchases from qualified *nonprofit agencies for persons with severe disabilities*.
- The City may adopt rules to implement IC § 5-22-13, which provides for *small business set-asides for Indiana small businesses owned and controlled by veterans*.

Purchasing Preferences²⁴

Overview

- *The City Council may adopt rules to implement the statutorily-defined purchasing preferences.*
- Generally, a purchasing agent *shall award a contract to the offeror whose total adjusted offer is lower than the total adjusted offer of each other offeror*, subject to applicable responsible/responsive and other statutory requirements. *The price paid shall still be the price offered for the supplies, and not the adjusted offer price.*
- An *absolute preference* is a requirement that the City must purchase supplies, regardless of price.
- An offeror *must indicate in the offer what supply item in the offer is a preferred supply*, and the City may require the offeror to certify that the supply offered meets the qualifications for a purchasing preference.
- IC § 5-22-15 *et seq.* and rules adopted by the City will describe, in detail, when and how the following purchasing preferences apply.

Computation

- *Adjusted Offer:* If an offeror offers a preferred supply for a given supply item, the following formula is used to determine the adjusted offer:
 - Determine the price preference percentage;
 - Multiply the offer by the preference percentage; and
 - Subtract the number determined above from the offer.

Preferred Supplies	Application	Price Preference
Indiana Businesses	The City <i>may</i> adopt rules to give a price preference	Price preference determined by City's rule
Local Indiana Businesses	The City <i>may</i> provide preference in solicitation	1% (at least 100k) 3% (50k-100k) 5% (less than 50k)
Coal Mined in Indiana	Unless federal law requires use of low Sulphur coal	Absolute preference given

²⁴ IC § 5-22-15 *et seq.*

Indiana Small Businesses	Defined in IC § 5-22-14-1, the City may adopt rules	The City <i>shall</i> give a 15% price preference
Indiana Agricultural Products	The City <i>may</i> adopt rules to give a preference	The City <i>may</i> give up to a 10% preference
Supplies Manufactured in the United States	The City <i>shall</i> adopt rules to promote purchase of supplies made in the United States	The City <i>shall</i> give a preference unless exceptions in IC § 5-22-15-21 apply
High Calcium Foods	The City <i>shall</i> give preference to high calcium food and drinks	The City <i>shall</i> give a preference for food/drink has higher calcium level than others at same price/type/quality
Steel Products	The City <i>shall</i> use steel products made in the United States unless exceptions contained in IC § 5-22-15-25 apply	The City <i>shall</i> give a preference to steel made in the United States
Soy Diesel/Bio Diesel	Applies when fuel is at least 20% soy diesel/bio diesel, by volume	The City <i>shall</i> give a price preference of 10%
Supplies Containing Recycled or Post-Consumer Materials	The City <i>shall</i> set a price preference and composition of the supplies by rules, policies, or solicitations	The City <i>shall</i> give a price preference 10% and 15%

Prohibited Supplies

- If supplies are made in a country other than the United States, the City may not award a contract for supplies if they were made using *forced labor*. The City shall inform offerors in the solicitation of this prohibition.
- Contractors dealing with the Government of Iran may be considered nonresponsible for the purpose of submitting bids or offers, or entering into contracts. (IC § 5-22-16.5)

Purchasing Contracts²⁵

Types of Contracts Permitted

- Cost plus a percentage of cost contracts are not permitted.
- Cost reimbursement contracts are permitted if:
 - The purchasing agent determines in writing that the contract is likely to be less costly than any other contract type; or
 - The purchasing agent determines in writing that it is impracticable to obtain the supplies required except under such a contract.

Time Periods for Supply Contracts

- Generally, contracts for supplies may be entered into for a period *not to exceed four years*.
 - See IC § 5-22-17-3 for *limited exceptions*.

Funds Not Appropriated or Available

- The City must have available a *sufficient appropriation balance or an approved additional appropriation* before a contract is awarded.
- Contracts must specify that payment and performance obligations are subject to the appropriation and availability of funds.
- When funds are not appropriated or available, and this is determined in writing, *the contract is cancelled*.

Contract Renewal

- Subject to exceptions, *contracts may be renewed any number of times*, for terms not longer than the term of the original contract.

Contract Modification & Termination

- Pursuant to IC § 5-22-20, the City may establish policies or adopt rules regarding price adjustments, adjustments in time of performance, changes in contract work, and temporary stopping of work or delaying performance.

²⁵ IC 5-22-17 and IC 5-22-20 *et seq.*

Early and Late Performance

- A purchasing agent may specify that early performance will result in increased compensation.
- A purchasing agent may specify that completion after contract termination will result in a deduction in compensation.

Separate Contracts

- Solicitations may provide that offers will be received and contracts will be awarded separately.
- If the solicitation does not indicate how separate contracts might be awarded, the purchasing agent must make a written determination showing that the award of separate contracts is in the interest of efficiency or economy.

Contracts for Certain Supplies and Services

- See IC § 5-22-17 for information regarding contracts for specific supplies and services

Public Purchasing: Public Records

Protection of Documents²⁶

- Generally, public purchasing contracts and records are *public records subject to public inspection*.
- The City Council may adopt rules or establish policies to *protect documents submitted in response to solicitations*. Such rules or policies may provide procedures for:
 - Protection of offers before opening to prevent disclosure of contents;
 - Unobstructed evaluation of offers and awards of contracts by the purchasing agent after closing; and
 - Protection of offers from tampering before and after opening.

Documentation After Accepting An Offer²⁷

- Within thirty days after acceptance of an offer, *a purchasing agent shall*:
 - Deliver in person or by first class mail to the successful offeror the original purchase order or lease;
 - Retain a copy for records; and
 - File a copy for public record and inspection with the fiscal officer of the unit.

²⁶ IC § 5-22-18-4

²⁷ IC § 5-22-18-5

Duties of Offerors & Bidders²⁸

Public Works Projects: Responsibility of Bidders

- In determining responsibility, *the following factors* may be considered:
 - The ability and capacity of the bidder to perform the work.
 - The integrity, character, and reputation of the bidder.
 - The competency and experience of the bidder.

Public Works Projects: Responsiveness of Bidders

- In determining responsiveness, *the following factors* may be considered:
 - Whether the bid or quote conforms in all material respects to the specifications.
 - Whether the bid complies with the invitation to bid and instructions to bidders.
 - Whether the bidder complies with statutes, ordinances, resolutions or rules pertaining to the award of a public contract.

Public Purchasing: Responsibility of Offerors

- A determination that an offeror *is not responsible must be made in writing.*
- In determining responsibility, *the following factors* may be considered:
 - The ability and capacity of the offeror to provide the supplies or service;
 - The integrity, character, and reputation of the offeror; and
 - The competency and experience of the offeror.
- An offeror who does not provide information required to determine responsibility is not considered responsible.
- Information furnished to determine responsibility cannot be disclosed without written consent.
- Foreign corporations must be registered with the secretary of state.
- Prospective contractors may be prequalified for certain types of supplies.

Public Purchasing: Responsiveness of Offerors

- In determining responsiveness, the following factors may be considered:
 - Whether the offer conforms to the specifications.
 - Whether the offer complies with the solicitation and instructions.

²⁸ IC § 5-22-16 *et seq.*

- Whether the offeror complies with statutes, ordinances, resolutions or rules pertaining to the award of a public contract.
- Prospective contractors may be prequalified for certain types of supplies.

Public Purchasing: Financial Responsibility

- A purchasing agent *may specify that an offeror must provide evidence of financial responsibility* at the time specified in a solicitation. This may be a bond, certified check, or other evidence. If in the form of a bond or check, it may not be more than 10% of the contract price and shall be made payable to the City.
- Checks of unsuccessful offerors shall be returned open selection of a successful offeror, and checks of successful offerors shall be held until delivery or contract completion.

Public Purchasing: Affidavit Required

- *An offeror must file an affirmation*, made under penalty for perjury, that states the following:
 - The offeror has not entered into a combination or agreement (1) relative to the price to be offered by a person, (2) to prevent someone from making an offer, or (3) to induce someone to refrain from making an offer; and
 - The offer is made without reference to any other offer.
- The affirmation may be made in the contract documents.
- Collusive offers shall be rejected.
- False affirmations will result in a forfeited contract.
- A person convicted for perjury for filing a false affirmation may not be a party to a public purchasing contract for three years following conviction.

Public Notice

Public Notice

- IC § 5-3-1 *et seq.* governs Public Notice requirements, which are cited often throughout the public purchasing statute and this packet.
- To give adequate public notice, the following requirements must be met:
 - Notice shall be published *two times*, at least one week apart, with the second publication made at least seven days before the day the bids will be received.
 - The notices must be published in *two newspapers* published in Martinsville. If only one newspaper is published in Martinsville, publication in that newspaper is sufficient.
 - If the newspaper of publication maintains an Internet website, the notice must also be posted there on the same day it is published in the newspaper.

Martinsville's Next Steps

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Designate Purchasing Agencies and Agents

As an initial step in the process of establishing public purchasing rules and policies, the City should identify which, if any, City departments will be considered separate purchasing agencies. Ordinance 98-1427, passed in 1998, establishes the Board of Public Works as Martinsville's purchasing agency. To promote efficiency and flexibility, however, additional taxing entities that are authorized to enter into contracts should be designated as separate purchasing agencies. A purchasing agent (or agents) must be designated for each purchasing agency. One way to designate appropriate purchasing agencies and agents is via resolution. A sample resolution is included below, and can be revised to include more, fewer, or different purchasing agencies and/or agents.

RESOLUTION NO. 2018-

A RESOLUTION OF THE COMMON COUNCIL TO ESTABLISH AND AUTHORIZE, FOR PURPOSES OF FORTHCOMING PUBLIC PURCHASING RULES AND POLICIES, PURCHASING AGENCIES AND PURCHASING AGENTS

WHEREAS, the City of Martinsville, Indiana ("Martinsville") is in the process of establishing detailed rules and policies to govern public purchasing procedures;

WHEREAS, governmental bodies that are taxing entities authorized to enter into contracts and make purchases may be designated as purchasing agencies, and purchasing agents represent purchasing agencies in administration of duties;

WHEREAS, IC § 5-22-2-25, IC § 5-22-2-26, and IC § 5-22-4 *et seq.* provide for the designation, by law or rule, of purchasing agencies and purchasing agents for municipalities; and

WHEREAS, designating appropriate purchasing agencies and purchasing agents will effectuate Martinsville's goals of establishing public purchasing rules and policies and improving efficiency, uniformity, and transparency in the public purchasing process.

NOW, THEREFORE, BE IT RESOLVED BY THE MARTINSVILLE COMMON COUNCIL AS FOLLOWS:

- (1) A purchasing agent for the City of Martinsville shall act pursuant to the provisions of IC § 5-22, all applicable resolutions and/or ordinances, and all applicable policies specific to his/her purchasing agency.
- (2) Purchasing agents shall have the authority to establish written policies regarding purchases of materials and supplies which the purchasing agency deems to be in the best interests of the municipality. Any written policies regarding purchases in

conflict with or contrary to the laws of Indiana or Martinsville shall be deemed null, void, and unenforceable.

(3) The purchasing agencies for the City of Martinsville are as follows:

- The City of Martinsville;
- The board of public works;
- The department of parks and city properties;
- The water & sewer utility department; and
- The wastewater treatment plant.

(3) The purchasing agents for the City of Martinsville are as follows:

- The public works director or his/her designee for the City of Martinsville.
- The public works director or his/her designee for the board of public works.
- The parks office manager or his/her designee for the department of parks and city properties.
- The water department assistant and water treatment operator or his/her designee for the water and sewer utility department.
- The wastewater treatment plant superintendent or his/her designee for the wastewater treatment plant.

ADOPTED by the Common Council of the City of Martinsville, Indiana, on this _____ day of _____, 2018.

MARTINSVILLE COMMON COUNCIL

FOR:

Terry Buster

Ben Merida

Mike Lanam

Chip Keller

Phil Deckard

AGAINST:

Eric Bowlen

Kristopher Fuller

ATTEST:

Establish Specification Policies

Pursuant to IC § 5-22-5-1, the City should adopt rules or establish policies for the preparation, maintenance, and content of specifications. The rules or policies may provide that the City may develop specifications, or solicit requests for specifications when (1) a purchasing agent makes a written determination that it is not feasible for the City to develop specifications, and (2) the City's executive approves of the use of a request for specifications.

Establish Service Purchase Procedures

The public purchasing statutes are relatively silent regarding how the City should purchase services, only providing that purchasing agencies may purchase services using any procedure the City or a purchasing agency considers appropriate. Thus, it is imperative that Martinsville establish a rule determining the appropriate procedure for purchases of services. Sample language is below.

"A purchasing agent for a purchasing agency may purchase services in whatever manner the purchasing agent determines to be reasonable. If practicality and expediency permit, it is preferred that a purchasing agent, seeking to purchase services, utilize the process outlined in Title II, Section F: Requests for Proposals."

Implement Optional Procedures

Indiana's public purchasing statutes contain many optional processes and procedures that cities may choose to implement by adopting rules or policies to that effect. Significant optional procedures will be discussed below, along with sample language that the City could adopt to implement the processes.

- Rules implementing optional purchasing preferences (some preferences are mandatory).
- Rules implementing requests for proposals procedures.
- Rules concerning electronic transmittal of materials and receipt of electronic offers.
- Rules protecting documents submitted in response to solicitations.
- Rules permitting correction or withdrawal of erroneous bids.
- Rules establishing a prequalification process for contractors.

a. Purchasing Preferences

IC § 5-22-15 *et seq.* discusses various types of purchasing preferences. Martinsville must establish rules implementing the preferences required by law, and may establish rules implementing the optional purchasing preferences. Both optional and mandatory purchasing preferences are described below.

Mandatory Purchasing Preferences- Martinsville SHALL Adopt These Rules

- **Indiana Coal:** Purchasing agents shall give absolute preference to coal mined in Indiana when purchasing coal for use as fuel, unless federal law requires the use of low-sulphur coal in the circumstances for which the coal is purchased.
- **Forced Labor Prohibition:** Purchasing agents may not award a contract to an offeror of supplies made in a country other than the United States, if the supplies were made using forced labor.
- **United States Steel:** When purchasing services involving the use of steel products (as defined in Title I of the City's Purchasing Policy) or supplies manufactured using steel products, purchasing agents shall give preference to steel products manufactured in the United States.

- Details of his requirement shall be included in any solicitations.
- A preference need not be given if the purchase is less than \$10,000 and made under the City's small purchase policies.
- A preference need not be given if a purchasing agent determines in writing that (1) the cost of the contract (using steel manufactured in the United States) would be greater than 115% of the cost of the contract using steel manufactured outside of the United States and (2) failure to use steel manufactured in the United States would not harm the business or result in the reduction of employment, wages, or benefits of any Indiana steel-manufacturing facilities.
- **United States Products:** Purchasing agents shall give preference to supplies manufactured in the United States unless any of the following apply:
 - The supplies are not manufactured in the United States in reasonably available quantities.
 - The price of the supplies manufactured in the United States exceeds by an unreasonable amount the price of available and comparable supplies manufactured outside the United States.
 - The quality of supplies is substantially less than the quality of comparably priced supplies manufactured outside the United States.
 - The purchase of supplies manufactured in the United States is not in the public interest.
- **Indiana Small Business Products:** Purchasing agents shall give a 15% preference for supplies to Indiana small businesses (as defined in Title I of the City's Purchasing Policy) that submit offers for purchase.
 - THE CITY MAY ADOPT ADDITIONAL RULES.
- **High Calcium Foods:** When purchasing foods or beverages to be used in a City-owned or City-operated building or room, purchasing agents shall give a preference to food and beverages that (1) contain a higher level of calcium than products of the same type and quality and (2) are equal to or lower in price than similar products.
- **Soy Diesel/Bio Diesel:** Purchasing agents shall give a preference of 10% for soy diesel/bio diesel (as defined in Title I of the City's Purchasing Policy) when the purchase of fuel is at least 20% by volume soy diesel/bio diesel.
- **Recycled/Post-Consumer Materials:** Purchasing agents shall give a preference for supplies containing recycled or post-consumer materials. A preference between 10% and 15% shall be given, and shall be established by each purchasing agency and/or in each solicitation for purchases.

Optional Purchasing Preferences- Martinsville MAY Adopt These Rules

- **Indiana Businesses:** Purchasing agents shall give a % (CITY MAY CHOSE PREFERENCE AMOUNT) preference to Indiana businesses when (1) an out-of-state business submits an offer for the purchase and (2) that out-of-state business is from a state that gives purchase preferences unfavorable to Indiana businesses.
 - For purposes of this preference, NEED RULE ABOUT WHEN OFFEROR IS AN INDIANA BUSINESS
 - NEED RULE ABOUT HOW PREFERENCE IS COMPUTED
 - NEED RULE ABOUT WHEN OTHER STATES PREFERENCE IS UNFAVORABLE TO INDIANA (cannot give more favorable preference to Indiana business than other state's preference to that state's business)
 - Regardless of preference to Indiana businesses, a purchasing agent shall still award a contract to the lowest responsible and responsive offer when (1) the offeror is an Indiana business or (2) the offeror is a business from a state bordering Indiana and the offeror's home state does not provide a preference to the home state's business more favorable than is provided by Indiana law to Indiana businesses.
- **Local Businesses:** Purchasing agents shall give the following preference to local Indiana businesses submitting offers for purchase: a 1% preference for purchases of at least \$100,000, a 3% preference for purchases between \$50,000 and \$100,000 and a 5% preference for purchases less than \$50,000.
 - "Local Indiana Business" and "Affected County" are defined in Title I of the City's Purchasing Policy.
 - A purchasing agent may award a contract to the lowest responsible and responsive bidder, regardless of this preference, if the offeror is a local Indiana business.
 - A business that wants to claim a local business preference must (1) state in the bid that the business claims the local business preference, (2) provide the location of its principal place of business (if an affected county, why the business considers that location its principal place of business), (3) provide the business's total payroll and the amount of the payroll paid to residents of affected counties, (4) provide the number of employees and the number of employees who are residents of affected counties, (5) provide a description of capital investments made in affected counties and a statement of the amount of the investments (if the business claims it makes significant capital

investments in the affected counties), and (6) provide a description of the substantial positive economic impact the business has on affected counties (if the business claims it has a substantial economic impact on affected counties).

- **Indiana Agricultural Products:** Purchasing agents shall give a 10% preference (can be up to 10%) for agricultural products grown, produced, or processed in Indiana.
 - THE CITY MAY ADOPT ADDITIONAL RULES

Implementation of Purchasing Preferences

1. Offeror Requirements

- An offeror who wants to claim a purchasing preference must indicate in the offer what supply item is a preferred supply.
- A purchasing agent may require an offeror to certify that the claimed preferred supply meets qualifications for that supply.

2. Computation

If an offeror offers a preferred supply, the purchasing agent shall compute an *adjusted offer* pursuant to the following formula.

- Determine the price preference percentage;
- Multiply the offer by the preference percentage; and
- Subtract the number determined above from the offer.

3. Award of Contract

A purchasing agent shall award a contract to the offeror whose total adjusted offer is lower than the total adjusted offer of each other offeror, subject to the following:

- Statutory requirements to award a contract to a responsible and responsive bidder;
- Statutory requirements to award a contract to the best bidder or offeror whose offer is most advantageous to the City; and
- The authority of a purchasing agent to award separate contracts pursuant to IC § 5-22-17-12.

If contracts are awarded separately, the purchasing agent shall compute total adjusted offers and award contracts as if each combination of lines or classes of supplies to be awarded a contract had been solicited separately.

The price paid for the supplies shall be the price offered for the supplies and not the adjusted offer price.

b. Requests for Proposals

IC § 5-22-9-8 permits the City, by rule or by policy, to purchase certain types of supplies by receiving proposals, rather than by soliciting sealed bids. The following is a rule that could be adopted if Martinsville decides to permit purchasing agencies to utilize this procedure in lieu of competitive bidding.

Requests for Proposals

1. Scope

A purchasing agency is authorized to use the Request for Proposals procedure, in lieu of competitive bidding, when a purchasing agent makes a written determination that (1) the use of competitive bidding is not practicable or advantageous to the City *and* (2) the use of Request for Proposals procedure is the preferred purchasing method.

2. Necessary Components

Each Request for Proposals *must* include the following:

- Criteria that will be used to evaluate proposals;
- A statement concerning the relative importance of price and other evaluation criteria;
- A statement concerning whether proposals must be accompanied by evidence of financial responsibility (See Title II, Section K); and
- A statement concerning whether discussions may be conducted with responsible offerors with proposals reasonably susceptible of being selected for award.

3. Appropriate Notice

A purchasing agent soliciting a request for proposals shall give public notice in the manner required by § IC 5-3-1.

- Notice must be provided two (2) times, at least a week apart.
- The final notice must be given at least seven (7) days prior to the receiving of proposals.

- The notices must be published in two (2) newspapers published in Martinsville, and any corresponding internet websites.

Electronic access to the notice may be provided through the computer gateway.

4. Evaluation and Award

- Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the negotiation process.
- Proposals shall only be evaluated pursuant to the criteria listed in the request for proposals, and in the manner provided in the request for proposals.
- If the request for proposals so states, discussions may be conducted with responsible and responsive offerors who submit proposals reasonably susceptible of being selected for award. Offerors must be accorded fair and equal treatment with respect to opportunity for discussion.
- Information derived from these negotiations may be used in other discussions only if (1) identities are not disclosed and (2) the information is provided to all offerors with whom the purchasing agency is having discussions.
- An award shall be made to the responsible offeror whose proposal is determined (in writing) to be the most advantageous to the City. Price and other evaluation factors shall be taken into consideration.
- If the request for proposals so states, awards may be made to more than one offeror.
- All proposals may be rejected.

5. Register of Proposals

After a contract is awarded, a purchasing agent must prepare a Register of Proposals, which shall be made available for public inspection. The Register of Proposals must contain the following information:

- A copy of the request for proposals;
- A list of all persons to whom copies of the request for proposals were given;
- A list of all proposals received, including names and addresses of offerors, the dollar amount of each offer, and the name of the successful and the dollar amount of the successful offer;
- The basis on which the award was made;
- The entire contents of the contract file, except for accompanying proprietary information (such as trade secrets, manufacturing processes, and financial information not required for public inspection.)

c. Electronic Transmission of Material

IC § 5-22-3-4 permits the City, via rule, policy, or solicitation, to use electronic methods to submit materials, in lieu of sending such materials by mail. Martinsville should implement a rule governing electronic transmission if it determines that purchasing agents should be able to use electronic means to transmit public purchasing materials. Sample language that could be adopted by the City as a rule follows.

Electronic Transmission of Materials

1. Authority

A purchasing agency or purchasing agent is hereby authorized to send notices, or other public purchasing materials, via electronic means, in lieu of sending such materials via mail, subject to the requirements outlined in Section 2 below.

2. Requirements

- Materials may be sent via fax, email, or by means of another electronic system.
- The electronic system used, including fax or email, must provide at the least the same amount of efficiency and security as sending the material via mail.

3. Receipt of Electronic Offers

A purchasing agency or purchasing agent may receive offers electronically if:

- The solicitation indicates the procedure for electronic transmission; and
- The offers are received via fax machine, email, or another electronic system that has a security feature protecting the contents of the offer and offering and same degree of protection as the content of an offer transmitted by mail.

d. Correction or Withdrawal of Erroneous Bids

IC § 5-22-7-10 provides that the City may adopt rules or establish policies that allow the correction or withdrawal of inadvertently erroneous bids before or after a contract award, and cancellation of awards or contracts based on these mistakes. Without a rule in place, a purchasing agency must make a written determination to permit the correction or withdrawal of erroneous bids or cancel awards or contracted based on bid mistakes.

e. Document Protection

IC § 5-22-18-4 discusses the protection of documents submitted to the City in by offerors response to solicitation. Martinsville may establish rules providing procedures designed to (1) protect offers before opening, (2) afford unobstructed evaluation of offers and award of contracts by the purchasing agent after opening, and (3) protect offers from tampering.

f. Prequalification

IC § 5-22-16-3 provides that prospective contractors may be prequalified for particular types of supplies. As prequalification may save time and promote efficiency, the City may choose to establish a process for prequalifying interested parties.

Establish Online Reverse Auction Rules

IC § 5-22-7.5 *et seq.* provides that purchasing agencies may conduct online reverse auctions to purchase supplies. However, before an online reverse auction is conducted, the City must establish procedures governing the following:

- Transmission of notices, solicitations, and specifications;
- Receipt of offers;
- Payments;
- Identity protection for bidders or offerors;
- The display of the amount of each offer previously submitted for public viewing'
- Establishing the deadline by which offers must be received and will be considered open;
- Procedure for opening of offers; and
- Process for maintaining adequate documentation.

Below is an example of language that Martinsville could modify as desired adopt to govern online reverse auctions.

Online Reverse Auctions

1. Authorization

A purchasing agent is authorized to select and use a third-party to conduct reverse auctions for the purchase of supplies. The third-party must have prior experience in conducting reverse auctions.

2. Transmission of Materials

- *Notice:* Notice of the invitation for bids shall be published two (2) times, at least one (1) week apart. The last publication shall be at least seven (7) days before the reverse auction. Notice may also be given by email or fax. If a third-party is conducting the reverse auction, notice shall be posted on the third-party's website.
- *Solicitations and Specifications:* Solicitations shall be transmitted in accordance with the invitation for bids, and shall identify where, when, and how they may be inspected or copied. If a third-party is conducting the reverse auction, solicitations and specifications shall be made available on the third-party's website.

3. Pre-Qualification

THE CITY MAY CHOOSE TO REQUIRE BIDDERS TO PRE-QUALIFY AND ESTABLISH A PRE-QUALIFICATION PROCESS.

4. Invitation for Bids

An invitation for bids must include:

- A purchase description;
- A statement that bids will be accepted by a reverse auction process;
- A description of all contractual terms and conditions (including the affidavit requirement for the successful bidder);
- A statement of the evaluation criteria that will be used;
- A statement concerning any requisite evidence of financial responsibility;
- The location, including websites, at which the invitation for bids may be inspected and copied;
- A statement regarding whether a third-party is conducting a reverse auction on behalf of the town;
- The date and time at which the reverse auction bidding period will commence and length of time it will be conducted;
- A statement explaining that the bidding period may be extended based upon competitive activity;
- A statement identifying when a reverse auction may be postponed, paused, rescheduled, or cancelled;

- The place and time at which offers will be reviewed publicly by a representative of the purchasing agent in front of one or more witnesses;
- A statement regarding whether a third-party conducting the reverse auction will collect a charge from the successful bidder;
- The contact information for the third-party conducting the reverse auction;
- A statement concerning the conditions under which a bid may be canceled or rejected in whole or in part.

5. Receiving Offers

- Before receiving electronic offers, the City must ensure that the invitation for bids indicates the transmission procedure and that the electronic system's security features protect content with the same degree of protection as offers not transmitted electronically.
- If a third-party is conducting the reverse auction, offers will only be received through the third-party's secure website.
- A purchasing agent shall establish the initial bidding period, which shall not be less than one hour. This period may be extended for pre-determined periods based upon competitive activity.
- During the bidding period, the following information will be available for public display: the ranking, price, and name of bidders of each price bid relative to all other price bids.
- Dollar amounts shall not be disclosed until the close of the bidding period.
- All information obtained during a reverse auction is confidential and shall not be disclosed until after the close of the bidding period.

6. Opening Offers

- Offers will be deemed "open" when a computer generated record of the information contained in all bids received is reviewed publicly at the close of the bidding period in the presence of one or more witnesses at the designated time and place.
- Only bids made pursuant to these rules and through the requisite third-party site will be evaluated.

7. Contract Award

- The purchasing agent must award a contract for the purchase of supplies with reasonable promptness to the lowest responsible and responsive bidder.
- If the contract is not awarded to the lowest bidder, the purchasing agent must indicate the reasons for the award in writing.
- A third-party may impose a fee as a term of the contract for a purchase made by means of the reverse auction.

8. Documentation

- The purchasing agent is required to maintain adequate documentation regarding reverse auctions so that the transactions may be audited as required by law.
- The purchasing agent shall maintain an indexed file of specifications for each reverse auction in which he or she participates.

Establish a Small Purchase Policy

Although the public purchasing statutes provide specific bidding and quoting procedures for larger purchases, the statutes permit individual cities to establish procedures governing purchases of supplies less than \$50,000. The City should adopt rules governing small purchase procedures, and purchasing agencies and agents may make policies that do not contravene the City's rules or the applicable purchasing statutes.

It is important to keep in mind that pursuant to IC § 36-1-12-4.9, the City's small purchase policies and procedures may also apply to awarding public work contracts less than \$150,000 for the routine repair or maintenance of existing structures, buildings, or real property.

Establish Supply Purchase Procedures

The majority of the public purchasing statutes discuss when and how the City may purchase supplies. The City should adopt rules that mirror or supplement, and do not violate, statutory requirements. Individual purchasing agencies may establish policies that supplement, and do not violate, the City's rules and the public purchasing statutes. An outline of a draft policy for Martinsville follows. This is an example, and if Martinsville chooses to implement such a policy, the language would need to be supplemented.

Title I. Definitions

Title II. Public Purchasing Procedures

- A. **Public Purchasing.** These requirements apply to every expenditure of public funds by the City. These requirements do not apply to public works projects, which are discussed in Title III- Public Works.

B. **Specifications**

1. **Definition:** *Specifications* are descriptions of the physical or functional characters of a supply or service, or the nature of a supply or service, including descriptions of any requirements for inspecting, testing, or preparing a supply or service for delivery.
2. **Requirements:** Specifications must (a) promote overall economy for the purposes intended and (b) encourage competition in satisfying the City's needs.
3. **Procedure:** INSERT SPECIFICATION RULES/POLICIES HERE. See Page 41 of this Packet.
4. **Alternative Procedure:** When a purchasing agent makes a written determination that the development of specifications is not feasible, a *request for specifications* may be issued.
 - a. The request must include: (1) The factors or criteria that will be used in evaluating the specifications, (2) a statement concerning the relative importance of the evaluation factors, and (3) a statement concerning whether discussions may be conducted with persons proposing specifications to clarify the requirements.
 - b. The purchasing agent must give public notice of the request for specifications, pursuant to Section L of this Title.
 - c. Fair and equal treatment must be given to all persons proposing specifications, including with respect to opportunity for discussion and revisions of proposed specifications.
5. **Documentation:** Each purchasing agency shall maintain an indexed file of specifications prepared by or under the authority of its purchasing agents.

- C. **Purchase of Services:** INSERT PURCHASE OF SERVICES RULES/POLICIES HERE.
See Page 41 of this Packet.

D. Purchase of Supplies Less Than \$150,000

1. Less than \$50,000: INSERT SMALL PURCHASE POLICIES HERE. See Page 52 of this Packet.
2. Between \$50,000 and \$150,000- Quotes: When the purchase is estimated to be between \$50,000 and \$150,000, a purchasing agent shall use the quote procedure below.
 - a. A purchasing agent shall invite quotes from at least three (3) people known to deal in the line or class of supplies to be purchased.
 - b. Invitations to quote shall be mailed at least seven (7) days before the time fixed for receiving quotes.
 - c. If a satisfactory quote is received, the purchasing agent shall either (1) award the contract to the lowest responsible and responsive offeror or (2) reject all quotes.
 - d. If a quote is not received from a responsible and responsive offeror, supplies may be purchased pursuant to the procedure in Section H of this Title.

E. Purchase of Supplies \$150,000 or More- Competitive Bidding

1. Application: When the purchase is estimated to be at least \$150,000, the purchasing agent shall use a competitive bidding process.
2. Invitation for Bids- Content. An invitation for bids shall contain the following.
 - a. A purchase description.

- b. All contractual terms and conditions applicable to the purchase.
- c. The time and place for opening bids.
- d. A statement concerning whether bids must be accompanied by a certified check or other evidence of financial responsibility.
- e. A statement concerning whether the bid may be cancelled or rejected in whole or in part.
- f. A statement of the criteria that will be used to evaluate bids.

3. Invitation for Bids- Notice

- a. Invitations to bid must meet the public notice requirements in Section L of this Title.
- b. In addition, a purchasing agency may provide electronic access to the notice through the computer gateway administered by the office of technology or any other electronic means.

4. Bid Evaluation.

- a. An invitation to bid must contain the criteria that will be used to evaluate bids, and only those criteria may be used.
- b. Evaluation criteria must be objectively measurable.
- c. The following potential evaluation criteria may be used: (1) inspection, (2) testing, (3) quality, (4) workmanship, (5) delivery, (6) suitability, (7) if the bid is submitted by a trust it must identify (a) the beneficiary of the trust and (2) each settlor empowered to revoke or modify the trust.

5. Rejection and Cancellation of Bids.

- a. A purchasing agent may decide to cancel a solicitation or reject an offer only when he or she determines, in writing, that doing so is in the best interests of the City. This determination must be made part of the contract file.

- b. The cancellation may be in whole or in part, as specified in the bid solicitation.

6. Opening and Awarding Bids

- a. Bids must be opened (1) by the purchasing agency, (2) publicly, (3) in the presence of one or more witnesses, and (4) at the time and place designated in the invitation for bids.
- b. After bids are opened, no changes are permitted in bid prices or other provisions of bids prejudicial to the interest of the City or fair competition.
- c. Bids must be accepted without condition unless a bidder inserts terms or bids on items not specified in the invitation for bids. The purchasing agent may treat this as a proposal for addition to the contract and may:
 - i. Declare the bidder nonresponsive;
 - ii. Permit the bidder to withdraw the proposed additions; or
 - iii. Accept any of the proposed additions.
- d. If proposed bid additions are accepted, the additions:
 - i. Must not be prejudicial to the interest of the governmental body or fair competition, and
 - ii. Must be supported by a written determination by the purchasing agency.

7. Document Maintenance. After a contract is awarded, it is subject to inspection. Therefore, each purchasing agency must maintain the following:

- a. The name of each bidder;
- b. The amount of each bid; and
- c. Other information required by statute or OTHER INFORMATION MARTINSVILLE WANTS PURCHASING AGENCIES TO MAINTAIN.

8. Correction or Withdrawal of Bids: INSERT CORRECTION/WITHDRAWAL POLICY HERE, IF ADOPTED. See Page 48 of this Packet.

F. Requests for Proposals: INSERT REQUESTS FOR PROPOSALS RULES HERE, IF ADOPTED. See Page 46 of this Packet.

G. **Online Reverse Auctions:** INSERT ONLINE REVERSE AUCTION RULES HERE. See Page 49 of this Packet.

H. **Special Purchases:** When certain criteria are met, a purchasing agent may purchase supplies without soliciting bids or quotes.

1. **Special Purchase Procedures.** When a purchasing agent makes a special purchase pursuant to this Section, he or she must do the following:

- a. Keep (in a separate file) special purchase contract records, which must contain a written determination for the basis of the special purchase and the selection of a contractor (these may be subject to audit);
- b. Keep a record all contracts for a minimum of five (5) years; and
- c. Keep records containing (1) each contractor's name, (2) the amount and type of each contract, and (3) a description of the purchased supplies.

2. **Special Purchase Classifications.** The following circumstances permit a purchasing agent to make a special purchase.

- a. **No Responsive Offer:** A purchasing agent may make a special purchase when a purchase has been solicited pursuant to Sections C through G of this Title, and no responsive offers were received.
- b. **Emergency Situations:** A purchasing agent may make a special purchase when emergency conditions result in a threat to public health, welfare, or safety.
- c. **Impaired Function:** A purchasing agent may make a special purpose when purchasing supplies pursuant to Sections C through G of this Title would seriously impair the functioning of the purchasing agency.
- d. **City Savings:** A purchasing agent may make a special purchase to obtain supplies or services at a substantial savings to the City.
- e. **Auctions:** A purchasing agent may make a special purchase at an auction.

- f. City Discount: A purchasing agent may make a special purchase when the market structure is based on price, but the City has the opportunity to receive a dollar or percentage discount.
- g. Gifts: A purchasing agent may make a special purchase by accepting a gift of supplies for the City.
- h. One Source: A purchasing agent may make a special purchase when he or she determines in writing that there is only one (1) source for the desired supply.
- i. Public Utilities: A purchasing agent may make a special purchase from a public utility if the purchase or lease price is negotiated and the results of independent appraisals (one obtained by the purchasing agent and one obtained by the public utility) are considered.
- j. Federal Government Purchases: A purchasing agent may make a special purchase when:
 - i. The purchasing agent determines in writing that supplies may be purchased at prices equal to or less than the prices stipulate in the current federal supply service schedules and it is advantageous to the City's interest in efficiency and economy;
 - ii. The purchase is from a person who has a contract with a federal or state agency that requires that person to make the supplies available to the City; or
 - iii. The purchasing agent determines that the City can obtain the transfer of supplies from the federal government pursuant to IC § 4-13-1.7 at a cost less than the supplies could be obtained by soliciting bids or proposals.
- k. Other Special Purchases: A purchasing agent may make a special purchase when:
 - i. Only one source meets the City's requirements for data processing contracts or license agreements for software programs, supplies, or services;
 - ii. The compatibility of equipment, accessories or replacement parts is a substantial consideration in the purchase, and only one source meets the City's requirements; or
 - iii. The purchase is for the evaluation of supplies or a system containing supplies to obtain functional information and comparative data, and the purchase may advance the long-term competitive position of the City.

- I. **Purchasing Preferences:** INSERT PURCHASING PREFERENCE RULES AND MANDATORY PURCHASING PREFERENCES HERE, AND OPTIONAL PURCHASING PREFERENCES IF ADOPTED. See Page 42 of this Packet.

J. **Contracts**

K. **Offeror and Bidder Requirements**

1. **Responsibility.** Purchasing agents shall only consider offers submitted by responsible offerors. A determination that an offeror is not responsible must be made in writing, by the purchasing agent.
 - a. **Criteria:** When determining whether an offeror is responsible, a purchasing agent shall utilize the following criteria:
 - iv. The offeror's ability and capacity to provide the supplies or service;
 - v. The offeror's integrity, reputation, and character; and
 - vi. The offeror's competency and experience.
 - b. **Lack of Information:** When an offeror does not provide the information required to determine responsibility, he or she shall not be considered responsible.
 - c. **Disclosure:** Information furnished by offerors for the purpose of determining responsibility may not be disclosed without appropriate written consent.
 - d. **Foreign Corporations:** To be considered responsible, all foreign corporations must be registered with the secretary of state.
2. **Responsiveness:** Purchasing agents shall only consider offers submitted by responsive offerors.
 - a. **Criteria:** When determining whether an offeror is responsive, a purchasing agent shall utilize the following criteria:
 - i. Whether the offer conforms to the specifications;
 - ii. Whether the offer complies with the solicitation and instructions; and
 - iii. Whether the offeror complies with statutes, ordinances, resolutions, or rules pertaining to the award of a public contract.

3. Financial Responsibility: A purchasing agent may require an offeror to provide evidence of financial responsibility.
 - a. Types: Financial responsibility may be in the form of a bond, certified check or other evidence. If in the form of a bond or a check, it may not be more than 10% of the contract price and shall be made payable to the City.
 - b. Return: Checks of unsuccessful offerors shall be returned upon selection of a successful offeror. Checks of successful offerors shall be held until delivery or contract completion.
4. Affidavit Requirement: All offerors must file a non-collusion affidavit under penalty of perjury. The affirmation may be made in the contract documents.
 - a. Substance: Each non-collusion affidavit shall state that (1) the offer is made without reference other offers and (2) the offeror has not entered into a combination or agreement:
 - i. Relative to the price offered by another person;
 - ii. To prevent someone from making an offer; or
 - iii. To induce someone to refrain from making an offer.
 - b. Collusive Offers: Purchasing agents shall reject all collusive offers.
 - c. False Affirmations: False affirmations will result in a forfeited contract. If an individual is convicted of perjury for filing a false affirmation, he or she may not be a party to a public purchasing contract with the City for three years.

L. Public Notice

1. Publication: Notices shall be published in two (2) newspapers published in the City. If only one (1) newspaper is published in the City, publication that newspaper is sufficient. If the newspaper maintains an Internet website, the notice must also be posted there on the same day it is published in the newspaper.
2. Responsiveness: Notice shall be published two (2) times, at least one (1) week apart, with the second publication made at least seven (7) days before the day the bids will be received.

Establish Definitions

As rules are adopted and policies are established, an exhaustive list of definitions must be drafted to correspond with the rules. Below are definitions of select terms used in sample policies above.

- **Steel Products:** Products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or similarly processed (or processed by a combination of two or more such operations), by the open hearth, basic oxygen, electric furnace, Bessemer, or other steel making process.
- **Small Business:** Pursuant to IC § 5-22-14-1, a business that is (1) independently owned and operated, (2) not dominant in its field of operation, and (3) qualifies as a veteran-owned small business concern (IC § 5-22-14-3.5) or satisfies the following applicable criteria pursuant to IC § 5-22-14-3:
 - A wholesale business must not have annual sales (recent most fiscal year) over \$4,000,000.
 - A construction business must not have average annual receipts for the preceding three fiscal years over \$4,000,000.
 - A retail or service-selling business must not have annual sales and receipts over \$500,000.
 - An IT, life sciences, transportation or logistic company may not employ more than 100 people or have an annual sales of over \$5,000,000.
- **Local Indiana Business:** (1) a business whose principal place of business is located in an affected county, (2) a business that pays a majority of its payroll (in dollar volume) to residents of affected counties, (3) a business that employs residents of affected counties as a majority of its employees, (4) a business that makes significant capital investments in the affected counties (NEED A RULE ABOUT THIS), or (5) a business that has a substantial positive economic impact on the affected counties (NEED A RULE ABOUT THIS).
- **Affected County:** An Indiana county (1) in which Martinsville is located, or (2) adjacent to a county in which Martinsville is located.
- **Soy Diesel/Bio Diesel:** Fuels (other than alcohol) that are primarily esters derived from biological materials, including oilseeds and animal facts, for use in compression and ignition engines.

Draft Template Forms

Indiana's public purchasing statutes require the use, and maintenance, of many documents and forms. To promote efficiency and uniformity, the City may choose to establish a variety of template documents and forms that will be used frequently throughout public purchasing processes.

Review Routine Maintenance Projects

Pursuant to IC § 36-1-12-4.9, Martinsville may choose to use public purchasing procedures to award contracts for certain public works projects. The following is a rule that could be adopted if the City finds it advantageous to award contracts for certain public works projects pursuant to public purchasing policies, which allow for flexibility in many instances.

Using Public Purchasing Procedures to Award Public Works Contracts

1. Applicability

The process outlined in Section 2 may be used when:

- The public work is for routine operation, routine repair, or routine maintenance;
- The work is to be performed on existing structures, buildings or real property; and
- The cost of the public work is estimated to be less than \$150,000.

2. Using Title II Procedures

When all of the requirements listed in Section 1 are met, the contract may be awarded pursuant to Title II (Public Purchasing Procedures).

- Title II, Section D(1) may be used if the project is estimated to cost less than \$50,000.
- Title II, Section D(2) may be used if the project is estimated to cost between \$50,000 and \$150,000.

Analysis of Martinsville's Parks System

Councilman Kris Fuller introduced an Ordinance to repeal Ordinance 2016-1714 and establish an administrative division of Parks and Recreation. The Ordinance essentially sought to abolish Martinsville's Department of Parks and City Properties ("Parks Department") and Parks Board, and provide the City Council with the powers and duties currently vested in the Parks Department and Parks Board, including the authority to maintain and operate all parks and recreational facilities and properties. I issued a legal opinion finding that the aforementioned Ordinance, as well as a similar Ordinance also proposed by Councilman Fuller, is invalid and unenforceable. The legal opinion is reprinted below. Upon further review of the actions of Martinsville's Parks Department and former City Attorney, and in light of the public purchasing and public works statutes discussed in this packet, additional issues will be discussed below.

December 3, 2017 Legal Opinion

TO: Mayor Shannon E. Kohl and the Common Council of the City of Martinsville

FROM: Anne Cowgur, City Attorney

DATE: December 3, 2017

RE: Legal Opinion Regarding "*An Ordinance Repealing Ordinance 2016-1714 and Establishing the Administrative Division of Parks and Recreation*"

Mayor Kohl and Council,

We have had an opportunity to review the ordinance provided by Councilman Kris Fuller at the previous Common Council meeting entitled "*An Ordinance Repealing Ordinance 2016-1714 and Establishing the Administrative Division of Parks and Recreation*" ("Ordinance") for the City of Martinsville ("City"). This opinion is being submitted concurrently with a more streamlined "in-line" analysis of the Ordinance.

Upon review of the Ordinance and applicable statutory and case law, it is our opinion that the Ordinance is invalid on its face and would be unenforceable if adopted.

I. BACKGROUND

A brief review of the Ordinance—and Ordinance No. 2016-1714 ("Ordinance 1714") that the Ordinance seeks to repeal—is instructive. The Ordinance offers several recitals in support of its purpose. Chief among them is that the City Parks system has been improved

but that further improvements are needed, and that the Martinsville Common Council (“Council”) has the power to operate and maintain all public- and park-owned parks, recreational facilities, and properties in the City. The purpose of the Ordinance is to establish an administrative division to oversee and perform “day-to-day” tasks and improvements of the parks; to move all of the employees of the City Park system to the new division; and to name the current Assistant Superintendent the “Director of the City of Martinsville Division of Parks and City Properties.” The Ordinance further establishes a reporting structure whereby the new division reports to the Council, and the Council is tasked with consulting the Mayor to “consider various program or amenity ideas.” Finally, the Ordinance relies on Indiana’s Home Rule Act as an alleged basis for the powers the Council seeks to realize.

Ordinance 1714 was adopted by the Common Council on April 18, 2016 upon the recommendation of the Mayor. It established a Department of Parks and City Properties (“Parks Department”) and appointed an Assistant Superintendent to oversee the operations of the Parks Department.

The Ordinance also references Ordinance 2016-1713 (“Ordinance 1713”) in support of the proposed restructuring of the Parks Department. Ordinance 1713 also speaks to the need to reorganize and restructure the function of the Parks Department system. It bestows the Common Council with the “authority and responsibility to maintain and operate all public and park owned parks, recreational facilities and properties” and relies on the Home Rule Act.

II. LEGAL ANALYSIS

The Ordinance and Ordinance 1713 are both invalid because they purport to transfer executive functions to the Council. And, as a general matter, both ordinances incorrectly use the Home Rule Act in support of the purported transfer of power.

a) The Ordinance is Not Properly Before the Council

As an initial matter, the fact that the Ordinance is being presented to the Council by a Councilman is outside of normal legislative procedures and beyond statutory reach. The Ordinance purports to establish an administrative division and to allow the Council, itself, to take up the executive duty to oversee that division. Yet, the legislative body may “transfer to or from [City] departments any powers, duties, functions, or obligations” only upon recommendation of the Mayor. Ind. Code § 36-4-9-4(d). The Mayor has made no such recommendation here. Accordingly, the Ordinance is not properly before the Council for consideration.

b) The Ordinance Invades the Functions of the Executive Branch

The Ordinance is an impermissible intrusion by the Council into the executive functions of the Mayor. The phrase “the Common Council of the City of Martinsville shall have and exercise the authority and responsibility to maintain and operate all public and park owned [sic] parks, recreational facilities and properties” disregards statutory requirements. To be sure, the legislative body may, “*by ordinance passed upon the*

recommendation of the city executive: terminate departments . . . [or] transfer to or from those departments any powers, duties, functions, or obligations.” Ind. Code § 36-4-9-4. But “the head of each city department is under the jurisdiction of the executive.” Id. Moreover, the legislative body “may not elect or appoint a person to any office or employment, except as provided by statute.” Ind. Code § 36-4-4-4. Yet, the Ordinance does both, stating, “[t]he current employees of the City Park will now work under this administrative division and . . . [t]he current Assistant Superintendent of the Parks and City Properties shall become the Director of the [new administrative division].” Again, this is improper and expressly prohibited by Indiana law.

Thus, this Ordinance improperly appropriates executive functions reserved for the Mayor and is impermissible as a matter of law. As such, if the Ordinance were to be passed, it would be in violation of separation of powers principles and would create uncertainty in the application of the powers to oversee the parks. The Mayor would, therefore, have to file a lawsuit that would be heard by the Morgan County judges *en banc*. Ind. Code § 36-4-4-5.

c) Home Rule Does Not Apply in an Instance Where the Contemplated Action Expressly Violates Statute and Separation of Powers Principles

The reference to Indiana’s Home Rule Act for the proposition that the Council has certain powers reserved to it is misplaced.

The Ordinance references Ind. Code § 36-1-3-3. The purpose of the reference is unclear. That section states, “a) The rule of law that any doubt as to the existence of a power of a unit shall be resolved against its existence is abrogated. (b) Any doubt as to the existence of a power of a unit shall be resolved in favor of its existence. This rule applies even though a statute granting the power has been repealed.”

To the extent the Ordinance was meant to reference the “specific powers” section within the Home Rule Act, that section still fails to provide the necessary power. It states, in relevant part, “[i]f there is a constitutional or statutory provision requiring a specific manner for exercising a power, a unit wanting to exercise the power must do so in that manner.” But “[i]f there is no constitutional or statutory provision requiring a specific manner for exercising a power, a unit wanting to exercise the power must . . . [in case of a city] adopt an ordinance prescribing a specific manner for exercising the power . . .” Ind. Code § 36-1-3-6(a) and (b).

But the Home Rule Act speaks to a “unit’s” duty to follow prescribed constitutional or statutory provisions requiring a specific action, or a “unit’s” ability to forge its own path if no such constitutional or statutory provision exists. A “unit” is defined as a county, municipality, or township. A municipality includes a city. Thus, it is plain on the face of the statute that it is not meant to permit the exercise of power by a branch of a unit of government. Rather, it is expressly meant to permit units of government to exercise powers vis-à-vis each other. The Home Rule Act simply does not provide an avenue

through which a legislative body of a unit may exercise powers not specifically prohibited.²⁹

Even if the Home Rule Act were to apply separately to a unit's branches of government, the action in the Ordinance would still be expressly prohibited. As stated above, the Home Rule Act permits an exercise of power if there is "no constitutional or statutory provision requiring a specific manner for exercising a power" Ind. Code § 36-1-3-6(b). In this instance, however, Indiana Code § 36-4-9-4 details how a legislative body of a city must exercise its power with regard to executive departments.

Moreover, it is telling that the only instance in the Indiana Code where a legislative body of a municipality is given the authority to exert control over a city department of the type contemplated by the Ordinance is found in Indiana Code § 8-1.5-3-3. That section generally affords a legislative body of a municipality the power to provide for the control of its municipally-owned utilities through the creation of a board. When that statute is juxtaposed with the parks board statute (particularly Indiana Code § 36-10-4-3) and the corporate powers statutes as reviewed above, it is clear that there is no instance in which it would be proper for a legislative body of a city to exercise the power conveyed in the Ordinance.

The issue here, however, is simpler still. In this instance, Indiana Code § 36-4-4-2 expressly prohibits the legislative body of a city from infringing upon the executive function. As detailed above, section 9 states, "The head of each city department is under the jurisdiction of the executive." Ind. Code § 36-4-9-4. The legislative body may, "*by ordinance passed upon the recommendation of the city executive*: terminate departments . . ." [or] transfer to or from those departments any powers, duties, functions, or obligations." *Id.*

Indiana Code § 36-4-9-4 also lists the executive departments of a city that may be established and how the powers of those departments may be allocated. The executive departments include the following:

- (1) Department of finance or administration.
- (2) Department of law.
- (3) Department of public works.
- (4) Department of public safety.

²⁹ *Twp. Bd. of Calumet Twp. of Lake Cty. v. Elgin*, 850 N.E.2d 1020, 1023 (Ind. Ct. App. 2006) ("In granting the Trustee declaratory relief, the trial court did not declare the Home Rule Act unconstitutional. Rather, the trial court concluded that the Home Rule Act did not confer upon the Township Board the statutory authority to pre-approve the Trustee's contracts and purchases in excess of \$75,000.00. The trial court explained that a township is a governmental unit, consisting of the legislative branch, i.e., the Township Board, and the executive branch, i.e., the Trustee. As one branch of a local government unit, the Township Board did not enjoy all powers granted to the unit as a whole. The trial court accurately observed that the Township Board could not unilaterally declare itself a 'governmental unit' within the scope of the Home Rule Act.").

(5) **Department of parks and recreation.**

(6) Department of human resources and economic development.

(7) Any other department considered necessary.

Ind. Code § 36-4-9-4 (emphasis added).

Accordingly, the legislative body may establish or terminate the departments only as described above, and it may not transfer power to itself or act on an ordinance not presented by the recommendation of the Mayor.

d) Ordinance 1713 is Also Invalid and Unenforceable

The Ordinance presented by Councilman Fuller references Ordinance 1713. However, Ordinance 1713 is similarly flawed. It states, in relevant part, “the Common Council of the City of Martinsville shall have and exercise the authority and responsibility to maintain and operate all public and park owned parks, recreational facilities and properties.”

Consequently, it is invalid and unenforceable for the same reasons as discussed above.

III. CONCLUSION AND RECOMMENDATIONS

For these reasons, the Ordinance is invalid on its face and would be unenforceable if adopted. The Council should refuse to adopt the Ordinance and keep the current structure, under Ordinance 1714, in place.

Sincerely,

Anne L. Cowgur, City Attorney

Parks District Bond Issues

Following the initial analysis of the City Council's attempt to repeal Ordinance 2016-1714 and establish an administrative division of parks and recreation, it came to light that Martinsville's Parks Board has (at least one) outstanding bond in its name, which was approved by the City Council in 2009. If the Ordinance attempting to abolish the Parks Department and Board was valid and enforceable (which it is not), its passage would create damaging and long-lasting repercussions for Martinsville's parks system, and the City of Martinsville in general.

The 2009 bond was issued in the name of Martinsville's Park District, which would have been abolished had the aforementioned Ordinance been valid and enforceable when "passed" by the City Council. If the Parks District ceases to exist, Martinsville (via its Park District) could be deemed in default on its outstanding bond obligation. A default would lead to a variety of negative consequences, including:

- Liability to litigation and resulting damages;
- Reduction in Martinsville's bond rating and credit rating;
- Damage to Martinsville's reputation with lenders; and
- Increased hardship for Martinsville, and its departments, to secure financing or funding for future projects of any type.

The Ordinance purporting to abolish the Parks Department and Parks Board is clearly invalid and unenforceable, for the reasons outlined in the City Attorney's legal opinion. However, if the Ordinance was actually valid and enforceable, it could significantly impact the Park District's debt obligation, open Martinsville to liability, and make it much harder for the City or its departments to finance public projects. The fact that Martinsville's Park District has at least one outstanding bond demonstrates that not only is Councilman Fuller's aforementioned Ordinance invalid pursuant to Indiana law, but is an extremely ill-advised move that would negatively impact Martinsville's park systems, the City, and ultimately, its citizens.

Parks Purchasing and Credit Issues

Multiple concerns relating to Martinsville's Parks Department highlight the need for Martinsville to adopt purchasing and public works policies and procedures, and adhere to the requirements outlined in Indiana's purchasing statutes.

Martinsville's Parks Department has not delegated a purchasing agent to act on behalf of the department, in contravention of Indiana law. The lack of a designated purchasing agent and oversight structure has resulted in unauthorized purchases, unauthorized decisions, and mishandled (and ultimately missing) City-owned property.

First, Martinsville's former parks director, while never appointed as the Parks Department purchasing agent, made many purchases on "behalf" of the Parks Department. While acting as parks director, this individual stored many materials, purchased with City funds, off-premises and not on City property. In fact, Martinsville is still unable to locate many of the items purchased by the former parks director, even after he was terminated and instructed to return all City-owned property. Martinsville, and the Parks Department, should designate purchasing agents, and establish purchasing policies and procedures that allow for accountability and oversight throughout the purchasing process. If Martinsville's Parks Department had such policies in place, the former parks director likely would not have had the latitude to make unauthorized purchases, store City-owned property off-site, and essentially hide and steal property from the City.

Second, the analysis of Martinsville's park systems also revealed that a line of credit in the amount of \$25,000, a copy of which is attached hereto, was signed by Dale Coffey while he was serving as Martinsville's City Attorney. Unless designated as a purchasing agent for the City or a specific department, it is atypical for a City Attorney to sign lines of credit and bind the City or its departments financially. Mr. Coffey was not designated as the appropriate purchasing agent, based on the information made available to me, for Martinsville's Parks Department, and it is unclear why he would be the appropriate individual to bind the Parks Department financially. This is yet another incident that emphasizes the need for Martinsville to adopt policies and guidelines, and appoint specific employees to purchase materials on behalf of the City and its departments, and bind the City financially.

Third, the lack of established procedures has resulted in the City's inability to take advantage of efficiencies built into the law. Purchasing and financial decisions should not be made ad hoc by various City employees, but rather should be made pursuant to statute and established policies and procedures. Designated purchasing agents should be appointed to represent Martinsville and its various departments, including the Parks Department, throughout the purchasing process.

Conclusion

Martinsville has failed to adhere to Indiana's public purchasing laws for years. The current administration inherited an extremely deficient purchasing system, made apparent by the lack of designated purchasing agents, policies, and guidelines. These deficiencies have resulted in various incidents that negatively impacted the City. By requesting a review of statutory provisions and current policies, Martinsville has taken the necessary and appropriate first steps to bring the City in line with Indiana law and establish an efficient and transparent purchasing system.

Municipal law is a distinct area of law, and Indiana's public works and public purchasing statutes are sophisticated and complex. It is incredibly important that attorneys well-versed in municipal law provide guidance concerning how best to adhere to public works and purchasing laws, while still allowing for flexibility throughout the purchasing process. This packet contains many recommendations and proposed procedures. As Martinsville essentially has no purchasing or public works policies in place, the recommendations contained herein are merely starting points. The City Attorney looks forward to helping Martinsville establish up-to-date policies and procedures that will increase accountability, uniformity, and efficiency throughout the purchasing process.