

In Brief

PUSHING THE EASY BUTTON: A REFRESHER ON COOPERATIVE PURCHASING AND THE JOINT PURCHASING ACT'S \$100,000 "SMALL PURCHASE" THRESHOLD FOR CONSTRUCTION PROJECTS

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Cooperative purchasing continues to remain a hot topic throughout the state. Governmental units across Illinois regularly use "cooperatives" to purchase equipment, supplies, and services, and for other procurements. So, what exactly is cooperative purchasing, and how does it work? How can a governmental unit best leverage cooperative purchasing to meet its needs while complying with legal requirements? Lastly, can a governmental unit use a cooperative to purchase labor and materials for construction, without going through a competitive bid process? Read on, the answers may surprise you.

Before we dive in, it is important to note that cooperative purchasing serves an important but limited function: in fact, more often than not, competitive sealed bidding is the best process to engage market forces, and to ensure the prudent spending of taxpayer dollars. And, depending on the type of purchase, best practices or even board policies may require a 'hard bid' or other locally administered procurement process. But, for those cases where pricing is fairly stable and predictable; where exigency demands a faster process; where long lead times are in play; where few if any local bids are expected; and where the administrative cost of a 'hard bid' is greater than the expected impact on price, cooperative purchasing may just be the answer.

What Is Cooperative Purchasing?

Cooperative purchasing generally means that two or more public entities work together to make a public procurement. Under the Illinois Governmental Joint Purchasing Act, 30 ILCS 525/0.01, *et seq.* (the "JPA"), any governmental unit in Illinois that has the power to tax (a "governmental unit") may cooperate with another governmental unit – in Illinois or elsewhere – to purchase personal property, supplies, or services in

accordance with the JPA. The JPA supersedes any other law under which a governmental unit normally makes its purchases. This means, from a practical standpoint, that the JPA operates as another statutory bidding exception.

What Can and Cannot Be Purchased Under the JPA?

The JPA authorizes the joint purchase of personal property, supplies, and services. Additionally, the JPA authorizes the procurement of construction, meaning labor and materials for a capital improvement project. However, the JPA does not authorize the procurement of construction-related professional service contracts, such as contracts for the services of architects, engineers, or land surveyors.

What Is the JPA's Procurement Process?

Under the JPA, one of the governmental units must conduct a competitive procurement process, including at least one notice in a newspaper of general circulation in one of the counties where the procurement will be utilized. This requirement is typically satisfied by publishing the notice in a nationally circulated newspaper. The notice must be published at least five calendar days before the deadline for submitting bids or offers. The notice must also include a general description of the item(s) to be procured, and must state where the specifications for the procurement may be obtained, along with the time and place that bids and offers will be opened. All contracts must be awarded to either the lowest responsible bidder or the highest-ranked offeror.

Can a Governmental Unit Purchase Construction Work Under the JPA?

Yes. While historically the JPA has been used mostly for the purchase of personal property, supplies, and services, the recent trend reflects a much broader use of cooperative purchasing to procure labor, materials, and equipment for construction and capital improvement projects. This recent trend appears to be driven, at least in part, by changes to Section 4 of the JPA, which were enacted in 2017.

Section 4 of the JPA provides that “small purchases” under the JPA shall follow the same procedure used for small purchases in Section 20-20 of the Illinois Procurement Code. Section 20-20 of the Procurement Code provides that “any procurement of construction not exceeding \$100,000, or any individual procurement of professional or artistic services not exceeding \$100,000 may be made without competitive source selection.”

Up until 2017, Section 20-20 of the Procurement Code was practically irrelevant to JPA procurements because its threshold for non-competitive source selection was set at \$10,000. But with the passage of Public Act 100-43, which became effective August 8, 2017, Section 20-20’s “small purchases” threshold increased from \$10,000 to its existing level of \$100,000, quickly eclipsing the statutory bidding thresholds otherwise constraining many governmental units.

As a result, Section 4 of the JPA allows a governmental unit to award a contract to a construction company – without competitive source selection – for construction contracts of \$100,000 or lower. Practically speaking, this means the successful vendor does not need to be the lowest responsible bidder or the highest ranked offeror, and instead must simply have an existing contract with a JPA-compliant cooperative. Moreover, for JPA-compliant construction contracts in excess of \$100,000, the award criteria remains flexible: the contract must be awarded to either the lowest responsible bidder or the highest ranked offeror – and again – the successful vendor must have an existing contract with a JPA-compliant cooperative.

Does the JPA Affect Other Applicable Laws or Policies Related to Construction Procurements?

No. Even when a construction procurement is made in accordance with the JPA, the resulting contract must be structured to comply with the Illinois Prevailing Wage Act, regardless of the size of the

contract. Additionally, for construction contracts involving an expenditure in excess of \$50,000, the contractor must comply with the Illinois Public Construction Bond Act, meaning that the contractor must furnish payment and performance bonds to the governmental unit.

As always, we recommend that each construction contract, including those resulting from cooperative purchases, be reviewed by legal counsel to verify that appropriate provisions have been made for liability insurance, indemnification, and termination rights, all of which are critical to protecting a public project owner.

Lastly, each governmental unit must remain conscious of its own policies and procedures concerning procurements. This means that even where the JPA or another statute authorizes a particular procurement, an internal board policy or administrative procedure may require additional steps in that procurement process, and these additional steps must be respected by the administrators responsible for the procurement. Furthermore, cooperative purchasing may not always be the best business choice, even if it is a legally permissible option. Governmental units should know their markets and local options, and use discretion and prudence in utilizing cooperative purchasing.

Conclusion

When properly utilized, the Illinois Joint Purchasing Act is a great tool for making competitively priced procurements with a relatively small investment of administrative time and effort. The JPA is indeed an “easy button.” However, careful adherence to the JPA, and to the governmental unit’s governing laws, and to its internal policies and procedures, is vital to a successful procurement that is both supported by the governing board and safe from any outside challenge.

We continue to observe an increase in construction-related and other cooperative procurements, and we will continue to support these transactions, provided that they are structured to comply with the JPA and/or other applicable law. Please contact a Robbins Schwartz attorney to learn more about cooperative purchasing.