



County Controller

Stephen J. Barron, Jr., CFE

Audit Manager

Frank S. Kedl, CIA

Solicitor

Timothy P. Brennan, Esq.

County Executive

John A. Brown

County Council

Margaret Ferraro, President
Glenn A. Geissinger, Vice-President
Mathew M. Benol
Kenneth M. Kraft
Lamont G. McClure, Esq.
Leonard S. Parsons
Hayden Phillips
Seth Vaughn
Robert F. Werner

Audit Report

**ADMINISTRATIVE
CODE -
ARTICLE XIII**

As of October 2014

**Office of the Controller
County of Northampton
Pennsylvania**



STEPHEN J. BARRON, JR., CFE

CONTROLLER OF NORTHAMPTON COUNTY

NORTHAMPTON COUNTY COURTHOUSE
669 WASHINGTON STREET
EASTON, PENNSYLVANIA 18042

FRANK S. KEDL, CIA
Audit Manager

TIMOTHY P. BRENNAN, ESQ.
Solicitor

PHONE (610) 559-3186
FAX (610) 559-3137

February 9, 2014

Members of the Northampton County Council
John A. Brown, County Executive
County of Northampton, Pennsylvania

We have completed an audit of Administrative Code Article XIII as of October 2014.

The Executive Summary on page 1 summarizes the audit results, while the Audit Results section provides a detailed explanation.

We acknowledge the cooperation and assistance we received from the Procurement Division and the County Solicitor's Office. Their help was essential to the performance of this audit.

Our report was discussed with management at our exit conference on January 23, 2014. Management's response is included in the Audit Results section of the report.

Very truly yours,

Stephen J. Barron, Jr., CFE
County Controller

Anthony D. Sabino, CIA
Lead Auditor

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EXECUTIVE SUMMARY

We believe that there are many aspects of Article XIII of the Administrative Code which are unclear, inconsistent, and in some cases, overly restrictive. As a result, it does not always provide clear and reasonable guidance for the procurement of goods and services for the County of Northampton. We did find a number of exceptions in the awarding of contracts and compliance with the Code, but a number of these were caused by misinterpretations of unclear Code provisions. A comprehensive revision of Article XIII is merited; this should be a cooperative effort between representatives of both the Administration and County Council. This should be combined with an effort to complete and publish a revision to the Procurement Manual, which will refine the broad guidance provided by the Code into a set of detailed and easy-to follow procedures.

INTRODUCTION

Section 901 of the County Home Rule Charter states that the County Council and County Executive shall enact an Administrative Code (the Code) which shall set forth in detail the organization and administrative structure and procedures of the County. This includes the procedures for purchasing goods and services including provisions for competitive bidding, exceptions to competitive bidding, and the terms of contracts.

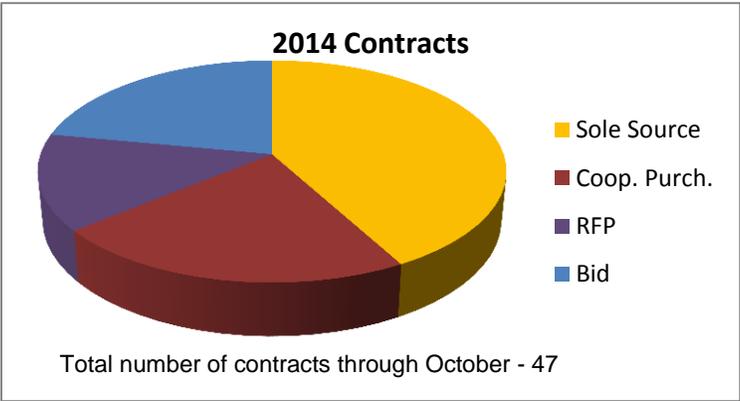
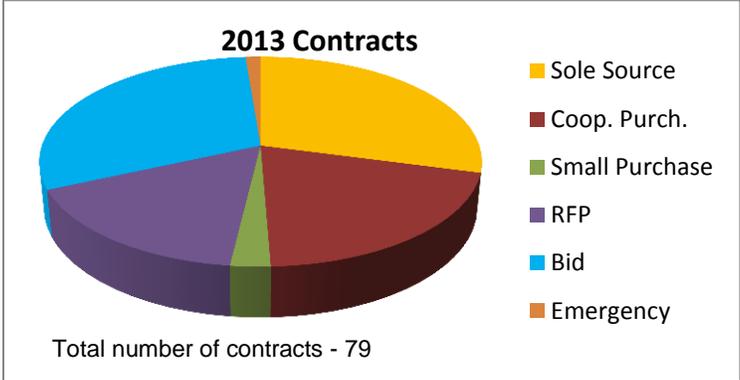
To comply with the above requirement, Article XIII of the Code has been established which is entitled "Procurement and Disposition of County Property." This Article assigns procurement authority and responsibility to the County Executive; this authority is officially delegated to the Purchasing Manager and the function is centralized in the Procurement Office. Restrictions are placed on this authority throughout the Article, with County Council generally acting as a check and balance, especially in instances where procurement methods are used which feature lesser amounts of competition than the Sealed Bidding method. The Article also acknowledges the autonomous nature of the Court system and exempts this branch of government from Council or Executive approval with regard to professional service agreements entered into by Judges of the Court of Common Pleas.

Article XIII is long and rather complex, with many requirements related to the methods used to acquire County property and the construction of County contracts and agreements. Contracts must be awarded using one of the following six methods:

- Competitive Sealed Bidding (Bid method)
- Competitive Negotiation (RFP method)
- Noncompetitive Negotiation (Sole Source method)
- Small Purchase Procedures (these are purchases under \$25,000, which, under Article XIII do not require a contract, but the Administration may obtain one, if it chooses.)
- Emergency Procurements
- Cooperative Purchasing

All County contracts must be prepared and executed as directed by the County Executive by way of the Executive Order.

The following charts represent all contracts (excluding Human Service Contracts and Professional Service contracts awarded through the Courts), broken down by purchasing method, for the years 2013 and 2014 (through October), using information from the Executive Orders and the County's Contract Management system:



The Article has also been amended several times, most notably a major overhaul approved in 2004. These amendments have, for the most part, added restrictions and constraints. As a result, compliance with the Code requires expertise and comprehensive knowledge of all sections of Article XIII.

PURPOSE AND SCOPE

The overall purpose of our audit was to review Article XIII for possible modifications to make the Procurement process more efficient, and to review recently awarded contracts to determine the level of compliance with the Code.

In order to perform a comprehensive review of compliance, we reviewed all Executive Orders from January 2013 through October 2014, which included contracts awarded by two separate administrations.

METHODOLOGY

We performed a critical analysis of Article XIII to discover inconsistencies, contradictions, cumbersome restrictions, and other anomalies. In this process, we consulted with the Purchasing Manager and the Deputy Purchasing Manager; their input was essential to uncovering any problems as the Procurement Division is the primary entity affected by Article XIII.

To test compliance, we reviewed Executive Orders where a contract was issued, supplemented by information available in the Contract Management system. We compared the process used to make the award with the requirements of Article XIII. All exceptions were reviewed with the Purchasing Manager, Deputy Purchasing Manager and County Solicitor.

We also developed a method, using ACL data analysis software, to combine vendor transactions purchased with the County's Purchasing Card (PCard) with purchases made through the AP system. We created a report which will determine if PCard transactions, when added to AP transactions, cause a vendor total to exceed the \$25,000 threshold, beyond which a contract is required.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

AUDIT RESULTS

Section A - Policies and Procedures

1. Article XIII Analysis

OBSERVATION

We reviewed and analyzed Article XIII in depth and found that there are anomalies, inconsistencies and unnecessary restrictions which can hamper Procurement in its effort to purchase County goods and services in an effective and efficient manner. Specifically, the following are areas of concern:

- Code section 13.16c (1) states that County Council approval is required for any contract exceeding \$100,000 which was awarded using the Competitive Negotiation, Negotiation After Competitive Sealed Bidding, and Noncompetitive Negotiation source selection methods. Unfortunately, the Code does not provide any guidance regarding what action should be taken if Council chooses to reject an award the Executive wishes to make. Section 302 (4) of the County Home Rule Charter assigns the County Executive the duty to sign or cause to be signed on behalf of the County all deeds, contracts and other instruments. Neither the Charter nor the Code gives Council or any other official the authority to compel the Executive to sign a contract nor does either document grant Council the power to award a vendor contract without the cooperation of the County Executive. (Section 708 of the Home Rule Charter does grant Council the authority to appoint the County's independent CPA firm which performs the annual year-end financial audit. This selection, however, is still subject to the competitive award methods outlined by the Code and said contract would still need to be signed by the County Executive.)

Therefore, Council's exercising of its authority to reject an award under Code section 13.16c (1) can create a legal stalemate which can cause significant delays in the awarding of County contracts, and potential lawsuits from vendors.

- Section 13.02 includes a definition of Professional Services which is somewhat vague and, as a result, this has sparked much debate and caused unresolved disputes.
- Section 13.07b requires that the procurement of County property over \$25,000 shall be by Competitive Sealed Bid, Competitive Negotiation or Cooperative Purchasing unless, prior to the solicitation of any contract, the

County Executive shall, with the approval of County Council, determine that these methods are not practical. This restriction applies mostly to the Noncompetitive Negotiation (Sole Source) selection method. However, through consultation with representatives of the Procurement Division, we found that it is impractical to obtain Council approval for the use of this method prior to the solicitation of the contract, since it is through the solicitation process that it is determined that the Noncompetitive Negotiation selection method must be used. In addition, the Code does not define the word "property" as it relates to this section. Our research revealed that term is often defined as only including tangible property, but other definitions exist which include intangible property such as services as well. In our testing sample, we noted that in no instances had the Procurement Division appealed to County Council for approval to use the Noncompetitive Negotiation method prior to solicitation of a vendor (see section B-1 on page 9). In addition, as noted above, section 13.16a 1) states that contracts exceeding \$100,000 awarded through the Noncompetitive Negotiation method must be approved by Council. Therefore, if the County wishes to use this method, it must gain approval of Council prior to solicitation and then again after the contract is awarded if it exceeds \$100,000. This seems excessive.

- The definition for Noncompetitive Negotiation in section 13.02h of the Code states that this is a method of contract selection that may be used to purchase a product or service that can be obtained only from one source. However section 13.10 of the Code, which provides more detail on the usage of this selection method, may be interpreted to mean that the Executive has more leeway to select a vendor that is preferred rather than one that is strictly the only one who can provide the service or supply. It is important to clarify this matter, since, as noted in the introduction of this report, Noncompetitive Negotiation makes up a large percentage of contract awards each year.
- As noted above, the Code gives the Executive the authority to award a contract to a sole source using the Noncompetitive Negotiation method when suppliers are limited. However, section 13.09a states that all Professional Services shall be selected using the Competitive Negotiation (RFP) method. Based on the specific wording of this section, it would appear that it would be impermissible to use the Noncompetitive Negotiation to contract for a Professional Service even if there is only one supplier. (See section B-1 on page 9 for exceptions in this regard.)
- Section 13.08b details a number of methods that can be used to notify potential bidders of an upcoming contract when using Competitive Sealed Bidding source selection. Five are listed, two must be used. Item number (3) indicates that one of the methods is to issue Invitations for Bid to all bidders on the bidders' list, as well as the incumbent vendor. Since this is only one of five methods listed, an inclusion of all bidders on the bidders' list may not necessarily occur. However, the corresponding Code section for Competitive Negotiation states that Procurement is required to send RFPs to all entities on the applicable bidders list. This is inconsistent. In addition, one of the available notification methods listed in section 13.08b includes the placement of newspaper advertisements. According to representatives of the Procurement Division, with the prevalence of electronic advertising on the

Internet and the wider audience this attracts, the placement of newspaper advertisements and their associated costs are unnecessary.

- Section 13.08e states that contracts shall be awarded within 60 days after bid opening. However, section 13.16c (2) also states that any contract funded with monies outside the County's General Fund must be approved by County Council. The Purchasing Manager stated to us that the required approval by Council makes it very difficult to comply with the 60-day deadline for the award.
- Section 13.11 requires the Procurement Division to submit an annual recommendation to Council regarding the dollar limit for small purchases. According to the Purchasing Manager, there is no annual recommendation made. One would only be made if a change in the current level was merited.
- Section 13.18 (Disposition of County Personal Property Other Than Real Estate) requires that the sale of all surplus capital assets shall be deposited into the Fund out of which the capital assets were originally purchased. The Purchasing Manager stated that currently all assets sales are deposited into the General Fund. Also, surplus County personal property is not stored at a central location, as required by this section. The Purchasing Manager also said that the County now uses the on-line service PublicSurplus.com which is not mentioned in the Code.

RECOMMENDATION

Article XIII would benefit from another comprehensive revision. Such revision should provide the Purchasing Division with the ability to perform its function without unreasonable restrictions, while at the same time preserving Council's role as a check and balance on the powers of the County Executive. A committee should be formed to study all the relevant issues. To ensure that all affected parties have an equal voice and that a general consensus is reached, the committee should include at minimum:

- Purchasing Manager
- County Solicitor
- Council Solicitor
- At least one member of County Council

The committee should keep in mind that competitive source selection methods should be formally encouraged wherever possible. Well documented competitive award processes ensure that the County is getting the best quality products and services at the best prices.

MANAGEMENT RESPONSE

See Appendix A

2. Procurement Manual

OBSERVATION

According to the Purchasing Manager, an overhaul of the County Procurement Manual is a “work in progress.” Five sections have been completed in draft form, but these have yet to be finalized and published. The lack of a published policies and procedures manual was noted in our audit of the Contract Process as of December 31, 2010. In the final follow-up to that audit, dated May 14, 2013, the Purchasing Manager stated that the target completion date for the full manual was the third quarter of 2014. At that time, four sections had been completed and several areas were identified as in process. As of the time of this audit, one additional area had been completed and the target completion date has been delayed until 2015.

In our conversations with the Purchasing Manager, we found that the delay is partially caused by the perception that the manual must be approved by County Council, and that the Administration would prefer that the manual be complete before seeking approval. However, section 13.05 of the Code states that the Procurement Officer has the authority to approve changes to the County Procurement Manual. County Council need only be notified of these changes, unless the changes conflict with policies required in the Administrative Code. Then an Ordinance would need to be passed amending the Code.

RECOMMENDATION

The Purchasing Manager should officially approve the completed sections of the Procurement Manual revisions and publish them (via posting on the County’s intranet). County employees and Council should be notified of the changes. We encourage the Procurement Division to continue to work on documenting additional policies and procedures and publish them as they are completed.

MANAGEMENT RESPONSE

See Appendix A

Section B – Compliance

1. Review of Executive Orders

OBSERVATION

According to Section 13.16a of the Code, all contracts and agreements shall be prepared and executed as directed by the County Executive by way of the Executive Order. In our review of all contracts awarded through Executive Orders from January 2013 through October 2014, we found a number of violations with other sections of the Code, as noted below:

- Section 13.10 of the Code requires the County Executive, when using Noncompetitive Negotiation, to issue an Executive Order stating the specific reason why this method must be used. We found thirteen instances (nine in 2013 and four in 2014) where, in our judgment, the justification for the use of this method was inadequate. It should be noted that we included as an exception any instance where the explanation included a justification for using a preferred vendor but did not describe the vendor as the only one that could provide the good or service.
- As noted in A-1 on page 5, Procurement must obtain the approval of County Council prior to the solicitation of any contract involving the acquisition of County property using the Noncompetitive Negotiation method. We found seven instances (four in 2013, three in 2014) in which this approval was not obtained. (We only included instances where tangible property was purchased, not intangible property such as services.)
- As noted in A-1 on page 5, section 13.09a of the Code states that all Professional Services shall be selected using the Competitive Negotiation (RFP) method. We found four instances (two in 2013 and two in 2014) where the Noncompetitive Negotiation (Sole Source) method was used to acquire what appear to be Professional Service contracts.
- We found seven instances (four in 2013 and three in 2014) where a Memorandum of Understanding, insurance policy or signed letter served as a contract in instances where a contract was required because an expenditure was over \$25,000. However, section 13.16g of the Code includes a number of requirements for written clauses that must be present in all County contracts, including provisions regarding non-appropriation of funds, and restrictions on contractual arrangements with vendors that are delinquent on County taxes. This wording was not present in the exceptions noted here.
- In 2013, two Professional Service contracts were written involving the same vendor for very similar services. Neither contract exceeded \$25,000

(therefore a written contract would not have been necessary in either case), but when added together, the expenditure would have exceeded \$25,000 and required the use of the Competitive Negotiation (RFP) source selection method, rather than the Noncompetitive Negotiation (Sole Source) method which was used. This may be a violation of Code section 13.16g (8) which prohibits entering into piece-meal contracts to evade other requirements of the Code.

- One 2013 contract was paid for from the County's Workers Compensation Self-Insurance Trust Fund. Section 13.16g (2) of the Code states that Council approval is required in instances where the costs of a contract are funded with monies outside of the County's General Fund. Council approval was not obtained in this instance.
- Section 13.16a of the Code states that written contracts are required for purchases of all goods and services over \$25,000. In one instance in 2013, a purchase was made for goods which, per the Executive Order cost less than \$10,000 in one year, however, our relationship with this vendor extended over three years, and the three-year total expenditure was listed at over \$28,000. No contract was obtained; the goods were acquired using a Purchase Order.

RECOMMENDATION

The Procurement Division should make every attempt to comply with the requirements of the Article XIII of the Administrative Code. If areas of the Code are impractical, confusing or cumbersome, the Division should approach Council and request changes as noted in A-1 on page 5.

MANAGEMENT RESPONSE

See Appendix A

Appendix A – Audit Response – Luis Campos, Director of Administration

Procurement Response to Article XIII Audit

While Procurement agrees with the audit findings that the Administrative Code as written is unclear, inconsistent and in some cases overly restrictive, the department has always and continues to strive for adherence requesting interpretation and guidance by the Solicitor's office. As part of the Department's review of the audit, we would like to offer our responses to some of the observations made and offer comment to other areas of concern.

As Section 13.16a of the Code states all contracts and agreements shall be prepared and executed as directed by the County Executive by way of an Executive Order. Procurement is tasked with the responsibility of preparing contract related Executive Order language and the accompanying Request-for-Executive Orders memo and often lack the intimate knowledge of the scope of work and/or the rationale for selection. This information is often not provided by the department requiring the services. Additionally, in the cases of contracts for the Non-Competitive Negotiation (Sole-Source) category, a realistic change is needed to allow a broader sub-set of sole source (preferred source) selection to include expertise, familiarity, and continuity to the selection process when it will have definite benefit to the County.

Procurement takes exception to the Controller's office observation and interpretation as noted in A-1 on page 5 regarding Section 13.09a of the code which references approval of County Council prior to the solicitation of any contact involving the acquisition of County property using the noncompetitive negotiation method. We interpret this section to state approval is required only prior to a contract execution. It would prove to be counterproductive to request approval before and after executing a contract. Furthermore, this section contradicts the amount of the expenditure which is listed as \$100K in Section 13.16C1 but \$25K in section 13.09?

The wording in Section 13.09 of the code which states *all* Professional Services shall be selecting using the Competitive Negotiation is unrealistic and contradicting. The code states the accepted methods of source selection are: competitive sealed bid; competitive negotiation (RFP); noncompetitive negotiation (Sole Source); small purchase procedures; emergency procurements and cooperative purchasing. We interpret this to mean that any of the above could be used for contracting for Professional Services and it does not negate the use of Cooperative and Non-competitive negotiation as an option. However, if a competitive situation is appropriate than the RFP process rather than a sealed bid must be used. Utilizing the sealed bid method would require award to the lowest cost without regard to other factors such as experience, ability to perform the service, etc.

The audit references instances where agreements other than the standard County contract was utilized and took issue with the required languages as per the Code not being included. Procurement always tries to use the County contract in the best interest of the County but it has been deemed and authorized by the Solicitor's office as not always realistic and practical when obtaining goods and services from a specialized provider.

The reference to the possibility of piecemealing contracts for similar services is not easily determined. Not all requirements are known at the onset and there can be instances and circumstances throughout the year where similar or additional services will be required. It would

not be practical to write a contract for services already performed in order to meet a code requirement. Procurement does not agree that this constitutes an attempt to piecemeal and should not be considered a violation of the code.

We acknowledge that in 2013, Procurement did not obtain Council Approval for a contract which was to be paid from the Workers Compensation Self-Insurance Trust Fund. Procurement's interpretation was that the expenditure was County funded thus negating the approval. Although it was County funded, it was not the County General Fund? The department often struggles with the broad requirement in the code which states "*Council approval is required in instances where the costs of a contract are funded with monies outside the County General Fund*". Often we are unaware that some funds even exist. We would request to be provided with further clarification of different funding sources as appropriate to needing Council approval or not helping to eliminate further confusion and possible code violations.

A bigger issue is when a contract is presented to County Council for approval and they reject the award. The Administrative Code as written does not provide any guidance as to what action should be taken.

Procurement offered instances and the Controller's office did recognize in their audit where processes have evolved through the years which warrant a review of the Code requirements for determination if still applicable such as the requirement that bids and Request-for-proposals must be advertised twice in a local newspaper. This may have been a relevant cost back when bids were photocopied and mailed from the Courthouse. Since 2009, we have utilized an online bidding platform which is accessed by suppliers nationwide and also advertise through a free online leading government bid aggregation and e-procurement service provider.

Another area identified to the Controller's office was the code requirement which states that all contracts which are sourced by the competitive sealed bid process must be awarded within 60 days from the bid opening. There are times when the expenditure is paid by bond monies and/or grant monies and in these instances would require Council approval. County Council limits the opportunity for review to once a month at the Finance Committee for initial consideration and the subsequent Council meeting. Depending on the timing of the bid opening, there may be a lag of 5-6 weeks before it can be presented to Council. This limits the chances of Procurement to have the executed contract within the 60 days.

Procurement will make available the finished sections of the Procurement Manual and work to complete the remainder in a timely manner. The delay was a result in part of a format change requested in order to standardize among departments and a miscommunication that County Council had to approve prior to release. Based on that assumption, it was felt that the completed manual should be presented to County Council.

If it is County Council's intent to facilitate a rewrite of Article XIII of the Administrative Code, representatives from the Procurement Department would be available to provide input and review to their processes.

Auditor's Comment

We believe that our interpretations of the various sections of Administrative Code are reasonable and that our findings are accurate. We acknowledge that the Code can be interpreted in different ways, which is precisely why we believe it should be revised in order to provide a definitive guide for the procurement of goods and services.