



Town of Berkshire

Procurement and Conflict of Interest

2023M-84 | December 2023

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Report Highlights

Town of Berkshire

Audit Objective

Determine whether Town of Berkshire (Town) officials sought competition for purchases while avoiding conflicts of interest.

Key Findings

The Town Board (Board) did not consistently seek competition for purchases or avoid conflicts of interest. As a result, goods and services may not have been procured in a cost-effective manner.

- Of the 113 purchases totaling \$771,727 we reviewed, officials did not seek or could not support that they sought competition for 36 purchases totaling \$211,171, or 27 percent of the dollar amount of purchases reviewed.
- The Town may have saved \$3,891 (6 percent) on diesel fuel purchases if Town officials had used the New York State Office of General Services (OGS) contract to purchase diesel fuel.
- The Highway Superintendent (Superintendent) had a prohibited interest in a contract between the Town and his construction company, providing construction services totaling \$3,000 during our audit period.

Key Recommendations

- Adhere to New York State General Municipal Law (GML) and the Town's procurement policy.
- Ensure that officials and employees are familiar with and follow the requirements of GML Article 18 as they relate to conflicts of interest.

Town officials agreed with our findings and indicated they plan to initiate corrective action.

Background

The Town is located in Tioga County (County) and is governed by the elected five-member Board including the Town Supervisor (Supervisor). The Board is responsible for the general oversight of Town operations and finances.

The Supervisor serves as the chief fiscal officer and is responsible for the day-to-day operations. The former Supervisor was in office prior to the start of our audit period and resigned February 15, 2023. On this same date, the current Supervisor was appointed.

The Town has a separately elected Superintendent, who is responsible for overseeing all highway department operations, which includes purchasing highway-related goods and services.

Quick Facts

Total Non-Payroll Disbursements	
Number	637
Dollar Amount	\$1.7 million
Non-Payroll Disbursements Reviewed	
Number	59
Dollar Amount	\$771,727

Audit Period

January 1, 2021 – September 30, 2022. We extended our audit period to April 17, 2023, to determine whether competition was sought for selected public works contracts.

Procurement and Conflict of Interest

How Should Town Officials Procure Goods and Services?

Town officials should ensure compliance with GML Section 103, which generally requires purchase contracts in excess of \$20,000 and contracts for public work in excess of \$35,000 to be competitively bid and awarded to the lowest responsible bidder. Town officials must determine whether individual or repetitive purchases will exceed the dollar thresholds for purchase contracts or contracts for public work when aggregated over a 12-month period. In lieu of soliciting competitive bids, town officials are authorized to make purchases using other publicly awarded government contracts, such as those of a county or OGS. This allows a town to benefit from the competitive process already undertaken by the county or New York State.

GML Section 104-b requires town boards to adopt written policies and procedures governing the procurement of goods and services that are not subject to competitive bidding requirements. These help ensure the prudent and economical use of public funds in the best interest of taxpayers to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost. The procurement policy generally requires that alternative proposals or quotations for goods and services be secured by use of written or verbal proposals or quotations. Hence, an effective procurement policy outlines when town officials should use a request for proposals (RFP) process to obtain proposals or obtain written or verbal quotes and describes the procedures for maintaining adequate documentation to support and verify the actions taken. The policy should be reviewed annually.

Officials should comply with the Board’s procurement policy, adopted in 1997, which outlines requirements for officials to follow when making purchases of supplies, equipment or public works contracts (Figure 1).

FIGURE 1: Town Procurement Policy Thresholds

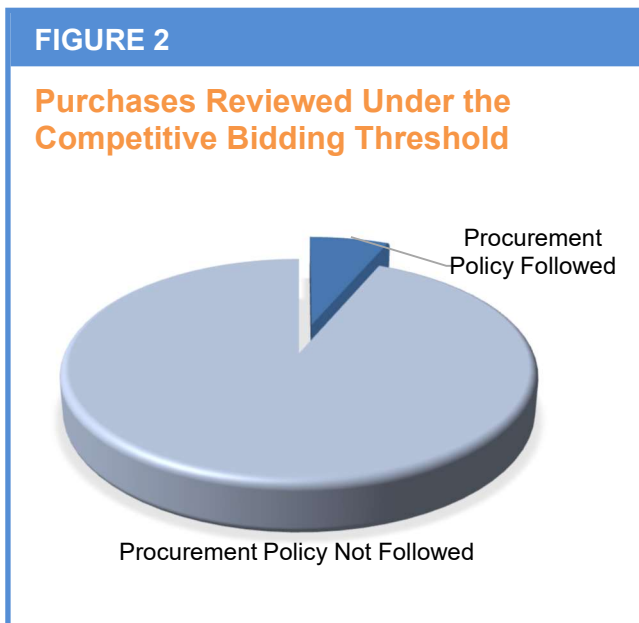
Purchase Contracts	
Less than \$250	No requirement for quotes
Greater than \$250 but less than \$1,000	Left to the discretion of the purchaser
Greater than \$1,000 but less than \$3,000	Verbal quotes from two vendors
Greater than \$3,000 but less than \$10,000	Written quotes from three vendors
Public Works Contracts	
Less than \$500	No requirement for quotes
Greater than \$500 but less than \$3,000	Left to the discretion of the purchaser
Greater than \$3,000 but less than \$10,000	Written quotes from two vendors
Greater than \$10,000 but less than \$20,000	Written quotes from three vendors

The Board Did Not Consistently Seek Competition for Purchases

Town officials did not always seek competition in accordance with GML Sections 103 and 104-b when procuring goods and services. We reviewed 113 purchases, totaling \$771,727, made during the audit period to determine whether Town officials solicited competitive bids, or obtained quotes, as appropriate. Officials did not seek competition or did not maintain supporting documentation to show they sought required competition for 36 purchases, totaling \$211,171.

Purchases Subject to Competitive Bidding – We reviewed seven purchases, totaling \$528,265, to determine whether Town officials properly bid these purchases. One purchase for installing and paving a walking path at a Town park, totaling \$62,800, was not awarded pursuant to competitive bidding requirements. Instead, the former Supervisor provided three quotes received by the Town for the project. However, all three quotes were less than half the amount of the final purchase. Additionally, the contract amount exceeded the statutory dollar threshold set forth in GML Section 103, and there was no indication that an exception to the competitive bidding requirements applied here. Therefore, officials were required to advertise for the contract, receive sealed bids and award the contract to the lowest responsible bidder. The former Supervisor told us a Town committee was tasked with collecting quotes for the project and suggesting which vendor should complete the project. The invoices requesting payment did not have quotes attached for comparison and the former Supervisor told us the Board would pay amounts, as requested, for the project. However, the Board is ultimately responsible for ensuring financial operations, including procurement of goods and services, meet the requirements of GML Section 103.

Purchases Under the Competitive Bidding Threshold – We reviewed 37 purchases, totaling \$158,520, to determine whether Town officials obtained the minimum number of quotes as required by the Town’s procurement policy. Town officials did not obtain the minimum required number of quotes or did not maintain documentation of such quotes if they were obtained, for 35 purchases totaling \$148,371 (Figure 2). For example, officials could not provide quotes for the following:



-
- 12 purchases, totaling \$37,413, for highway supplies and equipment repairs,
 - Two purchases, totaling \$35,000, for excavating, installing and paving the Town's walking path,
 - Seven purchases, totaling \$31,123, for highway commodities,
 - Three purchases, totaling \$14,300, for road maintenance,
 - Five purchases, totaling \$13,355, for information technology infrastructure and software,
 - Four purchases totaling, \$7,720, for refuse removal,
 - One purchase, totaling \$5,900, for the Town hall sign, and
 - One purchase, totaling \$3,560, for lawn mowing services at Town properties.

The remaining two purchases were properly procured in accordance with the Town's procurement policy.

Additionally, the Town's procurement policy was outdated, not reviewed annually as required and did not outline procedures for procuring all goods and services that are not subject to competitive bidding – specifically, purchase contracts between \$10,000 and \$20,000 or public works contracts between \$20,000 and \$35,000.

The Board and the former Supervisor told us they were unaware a Town procurement policy existed and there were no predetermined monetary thresholds when they expected quotes. Instead, the Board and former Supervisor would discuss whether quotes were necessary on a case-by-case basis. The Superintendent told us that multiple quotes for highway purchases were solicited but were not always documented. However, when officials do not use a competitive process to procure goods and services, there is an increased risk that goods and services may not be procured in the most cost-effective manner to help ensure the most prudent and economical use of public money.

Fuel Purchases – We reviewed 69 fuel purchases, totaling \$84,942, and determined that Town officials purchased fuel at prices awarded through a County contract. We compared prices Town officials paid for diesel fuel to prices available from the OGS contract. To obtain the contract pricing offered through OGS, Town officials would need to submit the Town's necessary fuel requirements for the upcoming contract period to OGS, prior to the awarding of such contracts, or reach an agreement with the OGS contract vendor. If Town officials had used the OGS contract pricing option, the Town may have saved \$3,891 (6 percent) on diesel fuel purchases.

The Superintendent told us that the Town had been procuring fuel from the same vendor since prior to his tenure. However, in the future, Town officials should

compare County contract pricing to OGS contracts and contracts bid by other governments that have extended their prices to local governments to help ensure future purchases of fuel are made in the best interest of the taxpayers.

We met with officials to discuss guidance available in our publication, *Seeking Competition in Procurement*.¹ In addition, we referred officials to the OGS website for information on the procurement of aggregate commodity products (e.g., stone) and fuel products (e.g., diesel, fuel oil and gasoline).

How Can a Board Prevent Conflicts of Interest?

A board should ensure contracts do not conflict with GML Article 18, which prohibits municipal officers and employees from having an “interest” in contracts with the municipality for which they serve when they also have the power or duty, either individually or as a board member:

- to negotiate, prepare, authorize or approve the contract;
- to authorize or approve payment under the contract;
- to audit bills or claims under the contract; or
- to appoint an officer or employee with any of those powers or duties.

For this purpose, a “contract” includes any claim, account, demand against or agreement with a municipality, express or implied. Municipal officers and employees have an interest in a contract when they receive a direct or indirect pecuniary (monetary) or material benefit as a result of a contract. Municipal officers and employees are also deemed to have an interest in the contracts of, among others, a firm, partnership or association of which they are a member or employee.

The Superintendent Had a Prohibited Conflict of Interest

The Superintendent owns a construction company (company), organized as a sole proprietorship, from which the Town purchased certain services. During the audit period, the Board approved the payment of one claim to the Superintendent’s company, totaling \$3,000.

The invoice submitted by the company for construction services during our audit period was an agreement for services purchased by the Town and, therefore, a “contract” for purposes of GML Article 18. As the sole proprietor of the company, the Superintendent had an interest in the contract because he received a direct

¹ <https://www.osc.ny.gov/files/local-government/publications/pdf/seeking-competition-in-procurement.pdf>

or indirect pecuniary (monetary) or material benefit as a result of the contract. Additionally, the Superintendent had one or more of the powers set forth in GML Section 801 as he either prepared or authorized the contract by signing the highway fund claim, which was subsequently submitted to the Board for audit and approval. Therefore, unless a statutory exception applied, the Superintendent would have a prohibited interest in the contract.

The former Supervisor told us the Superintendent was compensated for the work separate and apart from his role as Superintendent (i.e., independent contractor) because his work was performed outside the Superintendent's normal work hours. However, the explanation provided by the former Supervisor does not qualify as an exception under GML Article 18 with respect to having a prohibited interest in contracts. Therefore, in the absence of any other statutory exception, the Superintendent had a prohibited interest in the contract between the Town and the company.

Furthermore, we reviewed documentation to determine whether there were any prohibited interests in contracts with the former Supervisor and other Board members. Based on our review, we did not find any other prohibited conflicts of interest with the former Supervisor or Board members.

When officials, in their private capacities, conduct business with the municipality for which they serve, the public may question the appropriateness of these transactions.

What Do We Recommend?

The Board should:

1. Ensure Town officials comply with GML and the Board-adopted procurement policy requiring competition when procuring goods and services.
2. Update the procurement policy to include procedures for all goods and services that are not subject to competitive bidding, and annually review the policy.
3. Ensure that officials and employees are familiar with and follow the requirements of GML Article 18 as they relate to conflicts of interest.

Town officials should:

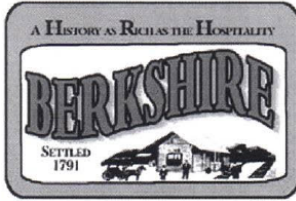
4. Adhere to the procurement policy and retain supporting documentation of the actions taken.

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5. Periodically compare quotes from vendors to county, OGS and other government contracts that are in compliance with GML, to help ensure purchases are cost effective and in the best interest of taxpayers.

The Superintendent should:

6. Review the pertinent sections of GML Article 18 and make sure not to enter into additional contracts with the Town that would result in a prohibited conflict of interest.

Appendix A: Response From Town Officials



TOWN OF BERKSHIRE

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Berkshire, NY 13736

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As the new Town Supervisor, I am responding to the Audit of the Previous Supervisor and part of the current board. The Town officials, agree with the finding that the Procurement Policy is out of date. The Town Officials are in the process of updating the procurement policy to reflect the current changes for all goods and services that are not subject to competitive bidding, and will follow through with required competition when procuring goods and services that are. The Procurement policy will be reviewed annually.

General Municipal law Article 18, will be handed out to the board members and town staff. The article will be reviewed in the next town board meeting to ensure that officials and employees are familiar with and follow the GML Article 18.

After updating and reviewing the Procurement policy, town officials will follow and retain supporting documentation of the actions taken to adhere to the policy.

The town will annually compare quotes from vendors to county, OGS and other government contacts that are in compliance with the General Municipal law, to help ensure purchase are cost effective and in the best interest of taxpayers.

The Superintendent will be given a copy of General Municipal law Article 18 to review and sign, to be sure we are not entering into contracts with the town that would result in prohibited conflict of interest.

Town of Berkshire Supervisor,

Barbara Gehm-Jordan

Appendix B: Audit Methodology and Standards

We conducted this audit pursuant to Article V, Section 1 of the State Constitution and the State Comptroller's authority as set forth in Article 3 of the New York State General Municipal Law. To achieve the audit objective and obtain valid audit evidence, our audit procedures included the following:

- We interviewed Town officials and reviewed Town policies and procedures and Board meeting minutes and resolutions to gain an understanding and evaluate the adequacy of procurement procedures, as well as controls in place used for determining prohibited conflicts of interest.
- We used our professional judgment to select five claims for seven purchases totaling \$528,265 that exceeded the competitive bidding thresholds to determine whether officials properly bid each of the purchases. In our sample we included purchases with aggregated amounts for similar purchases of goods or services over the bidding thresholds. These claims included stone and oil products, a new loader and installing and paving a walking path at a Town park.
- We used our professional judgment to select a sample of 27 claims for 37 purchases totaling \$158,520 that included all thresholds of the Town's procurement policy. We included a sufficient variety of products and vendors throughout the audit period to determine whether officials adhered to the policy. These claims included truck repairs, road reprofiling, calcium chloride, sand and stone, accounting software, a new sign for the Town Hall, snow plow blades, security cameras and various other parts and equipment.
- We used our professional judgment to select all 18 claims for 53 fuel purchases totaling \$42,377 in 2021 and nine claims for 16 diesel fuel purchases totaling \$42,565 in 2022 to determine whether aggregate purchases were subject to competitive bidding or procurement policy requirements and whether officials procured fuel at a competitive rate. We compared fuel purchases to OGS contract prices to determine any potential cost savings for the Town.
- We made inquiries of Town officials to identify their outside employment interest or business ownerships and reviewed the cash disbursements journal, Board-approved abstracts of audited claims and canceled check images to identify payments made to officials, their spouses and dependents or related employers, firms, corporations or associates that may indicate a potential improper or undisclosed interest in contracts.
- We reviewed all claims paid to the Superintendent during our audit period to determine whether officials complied with GML Article 18.

We conducted this performance audit in accordance with generally accepted government auditing standards (GAGAS). 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 objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

Unless otherwise indicated in this report, samples for testing were selected based on professional judgment, as it was not the intent to project the results onto the entire population. Where applicable, information is presented concerning the value and/or size of the relevant population and the sample selected for examination.

The Board has the responsibility to initiate corrective action. A written corrective action plan (CAP) that addresses the findings and recommendations in this report should be prepared and provided to our office within 90 days, pursuant to Section 35 of General Municipal Law. For more information on preparing and filing your CAP, please refer to our brochure, *Responding to an OSC Audit Report*, which you received with the draft audit report. We encourage the Board to make the CAP available for public review in the Town Clerk's office.

Appendix C: Resources and Services

Regional Office Directory

www.osc.ny.gov/files/local-government/pdf/regional-directory.pdf

Cost-Saving Ideas – Resources, advice and assistance on cost-saving ideas

www.osc.ny.gov/local-government/publications

Fiscal Stress Monitoring – Resources for local government officials experiencing fiscal problems

www.osc.ny.gov/local-government/fiscal-monitoring

Local Government Management Guides – Series of publications that include technical information and suggested practices for local government management

www.osc.ny.gov/local-government/publications

Planning and Budgeting Guides – Resources for developing multiyear financial, capital, strategic and other plans

www.osc.ny.gov/local-government/resources/planning-resources

Protecting Sensitive Data and Other Local Government Assets – A non-technical cybersecurity guide for local government leaders

www.osc.ny.gov/files/local-government/publications/pdf/cyber-security-guide.pdf

Required Reporting – Information and resources for reports and forms that are filed with the Office of the State Comptroller

www.osc.ny.gov/local-government/required-reporting

Research Reports/Publications – Reports on major policy issues facing local governments and State policy-makers

www.osc.ny.gov/local-government/publications

Training – Resources for local government officials on in-person and online training opportunities on a wide range of topics

www.osc.ny.gov/local-government/academy

Contact

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<https://www.osc.ny.gov/local-government>

Local Government and School Accountability Help Line: (866) 321-8503

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