

The Role of a State's Attorney in Local Government

Wade G. Enget, Mountrail County State's Attorney

Introduction:

Who is your State's Attorney?

Why should a State's Attorney talk to their County Engineer and vice-versa?

How can your State's Attorney assist you?

What should you be talking to your State's Attorney about?

- road projects
 - right-of-way acquisition
 - call for bids
 - contracts with outside engineering firms
 - contracts with successful bidders
- personnel matters (along with HR)
- open records requests
- open meeting requirements

What you never want to see:

Thank you for sending the contract.

I've reviewed the contract and the dispute resolution portion of the contract does not trigger NDIRF coverage.

If Construction Company files a lawsuit, NDIRF coverage would be then be triggered and NDIRF would hire counsel to represent the County.

Please contact me if you have questions.

NDIRF

So what are the statutory duties of a State's Attorney:

11-16-01. Duties of the state's attorney.

1. The state's attorney is the public prosecutor, and shall:
 - a. Attend the district court and conduct on behalf of the state all prosecutions for public offenses.

b. Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when the state's attorney has information that such offenses have been committed, and for that purpose, when the state's attorney is not engaged in criminal proceedings in the district court, the state's attorney shall attend upon the magistrates in cases of arrests when required by them except in cases of assault and battery and petit larceny.

c. Attend before, and give advice to, the grand jury whenever cases are presented to it for consideration.

d. Draw all indictments and informations.

e. Defend all suits brought against the state or against the county.

- f. Prosecute all bonds forfeited in the courts of record of the county and prosecute all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or to the county.
- g. Deliver duplicate receipts for money or property received in the state's attorney's official capacity and file copies thereof with the county auditor.
- h. On the first Monday of January, April, July, and October in each year, file with the county auditor an account, verified by the state's attorney's oath, of all money received by the state's attorney in an official capacity in the preceding three months, and at the same time, pay it over to the county treasurer.

- i. Give, when required and without fee, the state's attorney's opinion in writing to the county, district, township, and school district officers on matters relating to the duties of their respective offices.
- j. Keep a register of all official business in which must be entered a note of each action, whether civil or criminal, prosecuted officially, and of the proceedings therein.
- k. Act as legal adviser of the board of county commissioners, attend the meetings thereof when required, and oppose all claims and actions presented against the county which are unjust or illegal.

l. Institute an action in the name of the county to recover any money paid upon the order of the board of county commissioners without authority of law as salary, fee, or for any other purpose, or any money paid on a warrant drawn by any officer to that officer's own order or in favor of any other person without authorization by the board of county commissioners or by law.

m. Institute an action in the name of the county to restrain the payment of any money described in any order or warrant of the kind described in subsection 13 when the state's attorney secures knowledge of such order or warrant before the money is paid thereon.

- n. Assist the district court in behalf of the recipient of payments for child support or spousal support combined with child support in all proceedings instituted to enforce compliance with a decree or order of the court requiring such payments.
- o. Institute proceedings under chapter 25-03.1 if there is probable cause to believe that the subject of a petition for involuntary commitment is a person requiring treatment.
- p. Institute and defend proceedings under sections 14-09-12 and 14-09-19 and chapters 14-15, 27-20.1, 27-20.2, 27-20.3, 27-20.4, and 50-01 upon consultation with the human service zone director or the executive director of the department of health and human services.

q. Act as the legal advisor and represent a human service zone as set forth in a plan approved under section 50-01.1-03. The state's attorney within the human service zone, by way of agreement, shall designate a singular state's attorney's office, within or outside the human service zone, to act as legal advisor of the human service zone. The host county state's attorney shall serve as the legal advisor if no agreement is reached. The agreement may not limit a state's attorney's individual discretion in court filings and representation.

r. Act as the legal advisor and represent the human service zone regarding employer actions, including grievances and appeals, taken against the human service zone team member. The state's attorney of the county by which the human service zone team member is employed shall act as the legal advisor of the human service zone, unless a different agreement is established by the affected state's attorney.

2. The state's attorney may not require any order of the board of county commissioners to institute an action under subdivision l or m of subsection 1.

11-16-01.1. Restitution collection and enforcement.

Except as provided in this section, the county and state offices performing restitution collection and enforcement activities as of April 1, 2001, shall continue to perform those activities. In counties in which a county office performs those activities, a county may transfer responsibility for the activities to another county office.

11-16-02. Assistant - Appointment - Duties.

The state's attorney may appoint assistant state's attorneys, who, when qualified by filing the required oath of office, shall have the same powers as, and shall perform any and all duties required of, the state's attorney. The state's attorney is responsible, under the state's attorney's official bond, for any and all acts of such assistant. The work of an assistant state's attorney must be assigned by the state's attorney.

11-16-03. Person receiving receipt from state's attorney to file the same.

Any person who shall receive duplicate receipts from the state's attorney for moneys paid to the state's attorney shall file one copy of each such receipt in the office of the county treasurer.

11-16-04. Penalty for failure to pay over moneys.

Whenever the state's attorney shall refuse or neglect to account for or pay over the public moneys received by the state's attorney, the state's attorney is guilty of an infraction.

11-16-05. Restrictions on powers of state's attorney – Option regarding full-time state's attorneys - Penalty for breach of duty.

The state's attorney shall not:

1. Present a claim, account, or other demand for allowance against the county, except for the state's attorney's own services, nor in any way advocate the relief asked for by the claim or demand of another.
2. Be eligible to or hold any state or federal judicial office except that of United States commissioner.
3. Receive a fee or reward from or on behalf of a prosecutor or other individual for services in any prosecution or business to which it is the state's attorney's official duty to attend.

4. Be concerned as attorney or counsel for any party, other than the state or county, in any civil action depending upon, or arising out of, a state of facts upon which a pending and undetermined criminal prosecution depends.
5. Be concerned as attorney or counsel for any party, other than the state or county, or other than a city within the county, when so authorized by resolution of the board of county commissioners, in any action or proceeding whatsoever when employed by a county having a population exceeding thirty-five thousand or by any other county whose board of commissioners has, by resolution, determined that the state's attorney shall be restricted in this manner. A board of county commissioners may adopt or rescind a resolution under this subsection in any year.

However, in the general election year in which the state's attorney is to be elected, such action must be taken prior to June first. Such adoption or rescission shall not be effective during the state's attorney's current term of office unless agreed upon between the board and the state's attorney.

A violation of any provision of this section shall constitute an infraction, and the offender may be removed from office.

11-16-06. Failure of state's attorney to perform duty - Power of court – Appointment of acting state's attorney.

If it shall appear, by affidavit or otherwise, to the satisfaction of a judge of the district court of the judicial district in which the county is situated, that the county has no state's attorney, or that the state's attorney is absent or unable to attend to the state's attorney's duties, or that the state's attorney has refused or neglected to perform any of the duties prescribed in subdivisions b through f of subsection 1 of section 11-16-01, or to institute any civil suit to which the state or the county is a party after the matter has been properly brought to the attention of such state's attorney, and that it is necessary that some act be performed, the judge shall:

1. Request the attorney general or an assistant attorney general to take charge of such prosecution or proceeding; or
2. Appoint an attorney to take charge of such prosecution or proceeding and fix the attorney's fee therefor by an order entered upon the minutes of the court, and the attorney so appointed shall be vested with the powers of the state's attorney for the purposes of that action, but for no other purpose, and shall be the only person authorized to proceed in such action. The fee specified in the order shall be allowed by the board of county commissioners and, if so ordered by the court, the amount of such fee shall be deducted from the salary of the state's attorney.

11-16-07. District judge may appoint special counsel to assist state's attorney - Compensation.

The judge of the district court may appoint special counsel to assist the state's attorney in any important case. The county for which the services were rendered shall pay such special counsel a reasonable fee therefor to be approved by the court.

11-16-08. County commissioners may employ special counsel for the county.

The board of county commissioners, in cases of public importance and with the advice and consent of the state's attorney, may employ additional counsel to assist the state's attorney. Such counsel shall receive such compensation as may be agreed upon between the parties.

ROADS/BUILDINGS/SUPPLIES/FUEL

11-11-26. When board shall advertise for bids for fuel.

For the purchase of fuel when the amount exceeds four thousand dollars, the board of county commissioners shall seek bids either by telephone solicitation from at least two suppliers, or by an advertisement for bids to be published at least once each week for two successive weeks in the official newspaper of the county and in other newspapers as the board deems advisable.

11-11-27. Contents of fuel bids advertisement - When bids may be opened – Lowest bidder accepted.

The advertisement must state what type of fuel is required and when the bids will be opened and passed upon by the board of county commissioners. The bids may be opened and passed upon at a regular or adjourned session of the board, or at a meeting called by the county auditor as provided in section 11-11-05. The bid of the lowest responsible bidder must be accepted, but the board may reject any or all bids

24-05-04. **Contracts to be advertised - Road construction - Requirements for rental contracts.**

1. If a contract for a highway improvement exceeds one hundred thousand dollars, the board of county commissioners shall seek bids by publishing an advertisement at least once each week for two consecutive weeks in the official newspaper of the county and in other newspapers as the board deems advisable. The first publication must be made at least fifteen days before the day set for the opening of the bids. For any contract for a highway improvement that exceeds fifty thousand dollars but does not exceed one hundred thousand dollars, the county, when possible, shall seek quotes from at least two contractors.

2. Except as provided in section 54-44.4-13, a purchase of county road machinery and any rental contract or agreement for the use of road machinery and other articles, except necessary repairs for road machinery, which exceeds the sum of one hundred thousand dollars must be advertised by publishing an advertisement for bids at least once each week for two consecutive weeks in the official newspaper of the county and in any other newspapers as the board deems advisable. The first publication must be made at least fifteen days before the day set for the opening of the bids.

The board of county commissioners may not enter a rental contract or agreement for the use of road machinery and other articles for a longer period than twelve months from the date of the rental contract or agree to pay rental for the use of road machinery and other articles which would result in the lessor receiving rental at a rate in excess of twenty percent per year of the cash sale price of the road machinery or other articles. The cash sale price of the road machinery and other articles must be clearly set forth in any rental contract for road machinery and other articles and failure to include this data in any rental contract for the use of road machinery and other articles renders the rental contract void. A payment made under a void rental contract is recoverable from the county commissioners making the contract, jointly and severally.

3. Notwithstanding the provisions of this section relating to the duration of rental contracts, the board of county commissioners may enter lease-purchase agreements for the road machinery and articles covered by this section if those agreements provide for the complete performance and full payment of the purchase price of the machinery or articles within seven years from the date of the execution of the lease-purchase agreement according to section 44-08-01.1.

4. Notwithstanding the provisions of this section relating to bidding of road machinery, the board of county commissioners or its designee may purchase used road machinery at public auction or as surplus property from the office of management and budget.

5. Bids received under this section must be opened and awarded under the procedure provided in section 48-01.2-07.

48-01.2-02. Plans and specifications for a public improvement contract.

Except as otherwise provided in this chapter, if the estimated cost for the construction of a public improvement is in excess of the threshold established under section 48-01.2-02.1, the governing body shall procure plans, drawings, and specifications for the improvement from an architect or engineer.

For a public building in use by or to be used by the North Dakota agricultural experiment station in connection with farm or agricultural research operations, the plans, drawings, and specifications, with the approval of the state board of higher education, may be prepared by an engineer in the regular employment of the agricultural experiment station. For a public building in use by or to be used by the department of transportation for the storage and housing of road materials or road machinery, equipment, and tools, the plans, drawings, and specifications may be prepared by an engineer employed by the department of transportation. Plans, drawings, and specifications of an architect or engineer must be stamped and sealed by the date of the initial bid advertisement.

48-01.2-02.1. **Public improvement construction threshold.**

1. The threshold for bidding construction of a public improvement is two hundred thousand dollars. The threshold for procuring plans, drawings, and specifications from an architect or engineer for construction of a public improvement is two hundred thousand dollars.
2. Notwithstanding the thresholds in subsection 1, if the state or a political subdivision undertakes the construction of a public improvement and there is reason to believe that engineering or architectural services are necessary to protect the health, safety, or welfare of the public, the state or political subdivision shall consider consulting with an engineer or architect.

44-08-01. Preference to North Dakota bidders, sellers, and contractors.

1. The office of management and budget, any other state entity, and the governing body of any political subdivision of the state in purchasing any goods, merchandise, supplies, or equipment of any kind, or contracting to build or repair any building, structure, road, or other real property, shall give preference to bidders, sellers, or contractors resident in North Dakota. The preference must be equal to the preference given or required by the state of the nonresident bidder, seller, or contractor.

2. A state entity authorized to accept bids shall give preference to a resident North Dakota bidder when accepting bids for the provision of professional services, including research and consulting services. The preference must be equal to the preference given or required by the state of the nonresident bidder.

3. The office of management and budget, any other state entity, and the governing body of any political subdivision of the state in specifying or purchasing any goods, merchandise, supplies, or equipment, may not specify any trademarked or copyrighted brand or name, nor the product of any one manufacturer, nor any patented product, apparatus, device, or equipment, when the same will prevent proper competition, unless bidders also are asked for bids or offers upon other articles of like nature, utility, and merit.

When it is advantageous that the purchase be of a particular brand of product or products of a particular manufacturer to the exclusion of competitive brands or manufacturers, the purchasing board or entity must document those circumstances and provide written justification for the proprietary specification or purchase. The purchasing board or entity shall procure the proprietary product through a competitive process unless the needed product is available exclusively from one source of supply or other circumstances exist under which competition can be waived.

44-08-01.1. Bids to be sealed - Designation of time and place for opening – Preference for tie bids.

Notwithstanding any other provisions of the North Dakota Century Code, the governing bodies of the political subdivisions of the state of North Dakota shall accept only sealed bids, whenever by law or administrative decision they are required to call for, advertise, or solicit bids for the purchase of personal property and equipment. Whenever a political subdivision of this state calls for, advertises, or solicits sealed bids, it shall designate a time and place for the opening of such bids.

If all of the bids are not rejected, the purchase must be made from the bidder submitting the lowest and best bid meeting or exceeding the specifications set out in the invitation for bids. In the event that two or more bids contain identical pricing or receive identical evaluation scores, preference must be given to bids submitted by North Dakota vendors.

44-08-02. Resident North Dakota bidder, seller, and contractor defined.

The term "a resident North Dakota bidder, seller, or contractor" when used in section 44-08-01, unless the context thereof clearly provides otherwise, means a bidder, seller, or contractor who has maintained a bona fide place of business within this state for at least one year prior to the date on which a contract was awarded.

24-08-01. Construction of bridges by board of county commissioners - Petition – Bids - Rejection.

Whenever a majority of the freeholders of a civil township, or a majority of the freeholders living within a radius of three miles [4.83 kilometers] of the proposed location, petition the board of county commissioners for a bridge at a specified location within such township, or within any incorporated city, if the cost of the bridge exceeds the sum of five hundred dollars, the board of county commissioners shall view and investigate the necessity of the proposed bridge.

If the board approves the petition, it shall proceed to advertise in the official newspaper of the county, for a period of thirty days, the plans and specifications of the proposed bridge, asking for sealed bids for the building of such bridge, to be submitted to it at the next regular or special meeting, at which the board shall proceed to examine all proposals or bids for the building of such bridge. The board shall award the contract to the lowest responsible bidder, requiring the bidder to give a bond in a sum not less than the amount stipulated in the bid or contract, conditioned for the faithful compliance with the terms of the bid or contract, the bond to be approved by the board and filed in the office of the county auditor but the board may reject all bids.

If all bids are rejected, the board shall readvertise as provided herein. Provided, however, that if the amount of the lowest responsible bid is less than fifteen thousand dollars, the board may refuse all bids received and proceed to construct the bridge under its own supervision as it deems most expedient and may enter into contracts for the labor or material to be used in the construction of the bridge.

24-08-02. Expense of bridge - How paid.

The expense of constructing a bridge built as provided in section 24-08-01 must be paid out of the county bridge fund, if such bridge is accepted and approved by the board of county commissioners.

24-08-02.1. County to furnish and pay for culverts on township roads.

The county shall furnish and install, at county expense, such culverts as are necessary to be used along township roads at points of intersection with established drains, in accordance with sections 24-08-01 and 24-08-02.

24-08-03. Bridges - Supervision, repairs, bids, signs - Liability.

1. Each bridge built under the provisions of section 24-08-01 is under the supervision of the board of county commissioners, and the county shall pay the cost of rebuilding or repairing these bridges.

2. If the cost of rebuilding or repairing a bridge would exceed thirty thousand dollars on estimate of the county engineer and upon the approval of the estimate by the department, the county commissioners shall advertise for bids and award the contract pursuant to section 24-08-01. If a bridge is destroyed by flood, fire, or other casualty and the public interest would suffer by the delay from advertising for bids and awaiting the contract pursuant to section 24-08-01, the county commissioners may promptly contract for the rebuilding or repair of the bridge without advertising for bids, regardless of the cost.

3. The board of county commissioners at least every four years, and so far as time and conditions may permit, shall cause an inspection to be made of all bridges on the county road system in the county.

4. If any bridge on the county road system is deemed unsafe for public use by the board of commissioners, it immediately shall take steps to close the bridge and prevent its use by the public.

5. If any bridge on the county road system is deemed unsafe for loads in excess of a certain weight, the board of commissioners shall post, by January 1, 1985, load limit signs which must comply with the standards for uniform traffic control devices prescribed by the director under section 39-13-07.

6. The county is not immune from claims or suits for damages arising out of negligent failure to perform the inspection, signing, and repair duties required by this section.