



## NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

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June 16, 2022

Earl McNutt, Chairman  
Red Willow County Board of Commissioners  
502 Norris Avenue  
McCook, NE 69001

Dear Mr. McNutt:

As you know, the Nebraska Auditor of Public Accounts (APA) has received concerns regarding the gravel bidding and procurement practices of Red Willow County (County). Responding thereto, the APA began limited preliminary planning work to determine if a full financial audit or attestation would be warranted. In doing so, the APA requested specific financial records and other relevant documentation from the County. Based on the outcome of this preliminary planning work, including a review of the information obtained, the APA has determined that a separate financial audit or attestation is unnecessary at this time.

Nevertheless, during our preliminary planning work, the APA noted a certain issue that merits corrective action.

### **Background Information**

Red Willow County, Nebraska, (County) is a political subdivision established under and governed by the laws of the State of Nebraska (State). The County Board of Commissioners (Board) is the governmental body responsible for exercising financial accountability and control over activities relevant to the operations of the County. Board members are elected by the public and have broad decision-making authority, including the power to levy taxes, the ability to exert significant influence over all County operations, and primary responsibility for related fiscal matters.

The following comment and recommendation, which has been discussed with the appropriate members of the County and its management, is intended to improve internal control or result in other operating efficiencies.

### **Comment and Recommendation**

#### **Gravel Bidding and Procurement Procedures**

The APA obtained from the County's website ([https://co.red-willow.ne.us/board\\_meetings/history.aspx](https://co.red-willow.ne.us/board_meetings/history.aspx)) the minutes of the Board's meeting on June 21, 2021. These minutes show that the Board approved bids submitted by Paulsen, EIA, and Southwest Gravel Products for 40,000 tons of gravel to be delivered between July 1, 2021, and June 30, 2022. The precincts for which each vendor was awarded is shown on the following worksheet, which was included in the meeting minutes:

PROPOSALS COMPARISON WORKSHEET						
6/21/2021						
THE COUNTY RESERVES THE RIGHT TO WAIVE INFORMALITIES AND TO REJECT ANY OR ALL BIDS.						
We hereby propose to furnish all labor, materials and equipment and other items required to complete the project in the allotted time and at the prices stated below for the various precincts as tabulated.						
PRECINCT	BIDDER	Paulsen PRICE PER TON	EIA PRICE PER TON	Southwest PRICE PER TON	Platte Valley PRICE PER TON	Richards PRICE PER TON
T1N, R26W	LEBANON	*12.56	19.00			
T1N, R27W	BEAVER	*11.93	18.00			
T1N, R28W	DANBURY	*11.65	17.25			
T1N, R29W	GERVER	13.28	16.20	*13.75		18.84
T1N, R30W	GRANT	14.52	13.90	*13.75		18.84
T2N, R26W	TYRONE	*11.84	15.80			
T2N, R27W	MISSOURI RIDGE	*11.27	14.90			
T2N, R28W	BONDVILLE	*11.73	17.20			
T2N, R29W	VALLEY GRANGE	12.30	*11.95	13.75		18.84
T2N, R30W	DRIFTWOOD	12.49	*11.90	13.75		18.84
T3N, R26W	EAST VALLEY	*11.20	17.20			21.00
T3N, R27W	INDIANOLA	*11.04	14.50			21.00
T3N, R28W	RED WILLOW	*11.04	14.90			21.00
T3N, R29W	WILLOW GROVE	*11.13	13.70	13.75	19.95	16.44
T3N, R30W	PERRY	11.93	*11.50	13.75	19.95	16.44
T4N, R26W	NORTH VALLEY	*11.60	19.00			21.00
T4N, R27W	ALLIANCE	*11.02	19.00			21.00
T4N, R28W	FRITSCH	*11.59	17.60		19.95	21.00
T4N, R29W	BOX ELDER	*12.12	16.90	13.75	19.95	16.44
T4N, R30W	COLEMAN	13.23	*12.80	13.75	19.95	16.44
FOB Price:		8.80	10.00	9.65		9.00

The winning bids are indicated with an asterisk. The meeting minutes also contain this statement:

*The Board accepted all bids and reserved the right to have a non-awarded supplier provide gravel at his bid price, if necessary.*

(Emphasis added.) The APA noted that, subsequent to the June 21, 2021, meeting, the Board approved the following payments to a non-awarded supplier, Richards Gravel Pit, Inc.:

Date	Vendor	Amount
7/12/2021	Richards Gravel Pit, Inc.	\$ 9,720.00
8/9/2021	Richards Gravel Pit, Inc.	\$ 5,103.00
9/13/2021	Richards Gravel Pit, Inc.	\$ 2,673.00
10/18/2021	Richards Gravel Pit, Inc.	\$ 9,963.00
<b>Total</b>		<b>\$ 27,459.00</b>

However, State statute does not permit the County to use a “non-awarded supplier” when, as stated in the meeting minutes, all submitted bids have been accepted. Neb. Rev. Stat. § 39-810(1) (Cum. Supp. 2020) provides, in relevant part, the following:

*(c) All contracts for materials . . . for the purchase of gravel for roads, the cost and expense of which exceed twenty thousand dollars, shall be let to the lowest responsible bidder, but the board may reject any and all bids submitted for such materials.*

*(d) Upon rejection of any bid or bids by the board of such a county, such board shall have power and authority . . . to purchase gravel for roads.*

(Emphasis added.) Per the above statutory provisions, the Board may utilize a “non-awarded supplier” only after having previously rejected the submitted bids. In this case, the meeting minutes contain no indication that the original bids were rejected; to the contrary, they state unequivocally that the Board “accepted all bids.”

According to the meeting minutes, the Board also “reserved the right to have a non-awarded supplier provide gravel at his bid price, if necessary.” Given that, as stated explicitly in the meeting minutes, the Board “accepted all bids,” there does not appear to have been any right to reserve under § 39-810(1) to purchase gravel from a “non-awarded supplier” – especially when subsection (1)(d) of that statute requires “rejection of any bid or bids” before enlisting another vendor. It should be noted that Neb. Rev. Stat. § 39-810(1)(a) (Cum. Supp. 2020) states, in relevant part, the following:

*The county board of each county may . . . make improvements on roads, including the purchase of gravel for roads, and stockpile any materials to be used for such purposes, the cost and expense of which shall for no project exceed one hundred thousand dollars.*

(Emphasis added.) As used in § 39-810(1)(a), “improvements” does not appear to include mere road repairs and other types of routine maintenance. In Cheney v. Cty. Bd. of Sup’rs, 123 Neb. 624, 243 N.W. 881 (1932), the Nebraska Supreme Court (Court) reviewed the purchase of gravel by Buffalo County for road “resurfacing,” opining that such repair work did not fall within the category of “improvements” that would trigger the statutory bidding requirement. The Court explained as follows:

*But the expenditures challenged and the services in dispute in the instant case were made and performed exclusively in “resurfacing” highways. “Resurface,” as defined by the Century Dictionary is, “To put a new surface on; renew the surface of.” To resurface, therefore, does not imply a new or additional construction, but the reverse. Ordinarily resurfacing occurs in highways when the original gravel surface, by reason of travel and the elements, has been in part worn, wasted, or destroyed by removal from, or being imbedded in, the highway. The original basic construction which constituted the highway “resurfaced” at all times remains; indeed, its continued existence is implied in the very use of the term “resurface.” Nothing in the record before us tends to cast doubt on this conclusion. “Resurfacing” a gravel highway, in the absence of controverting evidence, is, in its essential nature, a repair, a term we have judicially defined, in relation to bridges in the road law, as “to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.” Brown County v. Keya Paha County, 88 Neb. 117, 129 N.W. 250; Platte County v. Butler County, 91 Neb. 132, 134, 135 N.W. 439.*

Id. at 629, 243 N.W. at 883. The distinction between the term “improvements,” as used in § 39-810(1)(a), and other types of road upkeep, including “repairs” and “maintenance,” for which gravel would otherwise be purchased pursuant to § 39-810(1)(c) & (d), was driven home further by the Court of Appeals of Kentucky, which cited the Court’s Cheney decision in explaining the following:

*A distinction in the use of these words has been recognized in statutes concerning highways and roads. “Improvement” has been held to embrace construction or reconstruction work of a character distinguished from repair. “Maintain” has been accorded the same meaning as “repair”. “Maintenance” was held to mean “not creation of something new”. Ordinary gravel resurfacing of public highways was held to be in the nature of “repair” and not “improvement”.*

*In short, “improve” and “construct” mean to make better the original status, while “maintain” and “repair” mean to preserve or remedy the original condition.*

*To hold that the words “improve and construct” . . . include maintenance and repair of roads would be giving these ordinary words a strained and unwarranted meaning.*

Thompson v. Bracken Cty., 294 S.W.2d 943, 946 (Ky. 1956) (internal citations omitted). Thus, unlike gravel purchased for a major improvement project under § 39-810(1)(a), gravel acquired for more routine road repair and maintenance at a cost exceeding \$20,000 is subject to the competitive bidding requirement set out in § 39-810(1)(c). Only when the Board has formally rejected the bid(s) received for such a gravel purchase may a “non-awarded supplier” be considered under § 39-810(1)(d).

According to the Nebraska Attorney General, “The question of awarding or rejecting bids must be decided by a majority of supervisors present at a regular or special meeting of the Board, provided that a quorum is present.” Op. Att’y Gen. No. 88036 (July 25, 1988). Thus, the Board’s actual “rejection” under § 39-810(1)(d) should, at the very least, be documented in that body’s meeting minutes. This would ensure compliance with Neb. Rev. Stat. § 84-1413 (Supp. 2021) of the Open Meetings Act, which requires, among other things, the following:

*(1) Each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed.*

*(2) Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted or if the member was absent or not voting . . . .*

(Emphasis added.) As pointed out already, however, the minutes for the Board’s meeting on June 21, 2021, documented the acceptance of all bids, not the rejection thereof – rendering improper the subsequent purchase of gravel from a “non-awarded supplier.”

Good internal control requires procedures to ensure adherence to applicable statutory bidding requirements for County purchases and contracts. Without such procedures, there is an increased risk of not only loss or misuse of County funds but also noncompliance with State statute.

We recommend the Board work with the County Attorney to implement procedures for ensuring that County purchases and contracts are awarded in compliance with applicable statutory bidding requirements.

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Our audit procedures are designed primarily on a test basis and, therefore, may not bring to light all weaknesses in policies or procedures that may exist. Our objective is, however, to use our knowledge gained during our work to make comments and suggestions that we hope will prove useful to the County.

Draft copies of this letter were furnished to the County to provide its management with an opportunity to review and to respond to the comment and recommendation contained herein. The County declined to respond.

This communication is intended solely for the information and use of the County and its management. It is not intended to be, and should not be, used by anyone other than these specified parties. However, this communication is a matter of public record, and its distribution is not limited.

If you have any questions regarding the above information, please contact our office.

Audit Staff Working on this Examination:  
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Sincerely,



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cc: Red Willow County Attorney