CONTRACTS OF POLITICAL SUBDIVISIONS IN IOWA—PROCEDURE, DEFECTS, RECOVERY

The purpose of this article is to analyze public contracting in Iowa from the view point of (I) the statutory procedure for entering into contracts; (II) the sources of defective public contracts; and (III) recovery under defective public contracts. The contracts with which this article is concerned are those entered into by political subdivisions below the state level, *e.g.*, the contracts of counties, municipalities, townships, water districts, levee and drainage districts, and school districts.

Part I of this article represents a compilation of the Iowa statutes and case material concerned with the procedure to be followed by political subdivisions in entering into contracts. The procedure to be followed by any given political subdivision could also be affected by local ordinances or regulations, but this factor is not discussed either from the view point of scope or effect, because the content of these ordinances vary greatly among the political subdivisions. The procedure discussed is that from the time the governmental unit begins negotiations until the contract is formed. The analytical approach is to determine if some kind of competitive bidding system is required and if so to determine the components of such a system as to notice, bid deposits, rejection of bids, awarding the contract, and content and form of the contract.

Part II points out the various factors that make defective and may invalidate a public contract. One of these factors, of course, is a failure to follow the contracting procedure discussed in Part I; but a defective contract may also result from a deviation in the governmental procedure required to be followed before the contracting stage is reached, or from a lack of official consent to the contract, or because one or more of the individuals who are to act for the governmental unit in letting contracts is personally interested in a given contract.

Part III discusses the remedial devices available to the private party who has entered into a public contract which is defective because of the occurrence of one or more of the factors discussed in Part II. When attempting to recover for a breach of a defective public contract on the contract itself available arguments are ratification, estoppel, and waiver, but it may be necessary to urge the state Legislature to pass a special act curing the defect. If no remedy is available under the express contract, perhaps recovery may be possible under an implied in fact or quasi-contractual (implied in law) theory. A last ditch effort by one faced with no other means of recouping his losses may be to reclaim any performance under the defective contract. The right to keep what has been voluntarily paid by the political subdivision under a defective contract may be treated differently from the right to force the political subdivision to pay under a defective contract.

I. CONTRACTING PROCEDURE

CHART[1]

Contracting procedures prescribed by IOWA CODE (1958).

General Provisions	
coal[2]	73.7
public improvements[3]	23.7
Cities and Towns	
building	
joint city and county[4]	368.22
docks	384.3(9)
flood control	395.6-.10
public improvements[5]	391A.15-.17,.19
public utility plants[6]	397.16-.18
streets and sewers	
generally[7]	391.28-.33
cities over 125,000[8]	417.50-.52
transit system	
generally[9]	386B.9
operation	Iowa Laws ch. 285, § 1 (1959)
urban renewal	403.8(2)
Counties	
bridges[10]	309.40-.41,.43
building	
generally[11]	332.7-.8
joint city and county[12]	368.22
hospitals	347.13(2)
roads	
farm to market[13]	310.14
secondary[14]	309.40-.41,.43
support of poor	252.38
Levee and Drainage Districts[15]	455.40-.44
Schools	
sale[16]	297.23-.24
school houses[17]	297.7
text books	301.7-.8,.10-.11
Township	
town hall	360.5
Water Districts	357.14-.17

Footnotes for chart on P. 55.

A. When Must Bids Be Taken

Public contracts do not have to be entered into by competitive bidding unless an applicable statute provides for such a method.[18] Even though the governmental unit purports to use a competitive bidding system for letting contracts, in the absence of a statute requiring such procedure it is not bound to enter into the contract on such a basis.[19]

In those instances where the statutory requirement of competitive bidding is not absolute but depends upon the amount of money involved, the Court will not allow this requirement to be avoided by dividing what is one project into several smaller contracts.[20]

In only three instances does the statutory language specifically demand

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[1] It should be noted that this chart does not cover all possible contracting situations, for in several areas (either as to particular subject matter or as to particular subdivisions) there either is no statutory procedure governing the negotiation and formation of contracts, for example Soil Conservation Districts, IOWA CODE ch. 467A (1958), or the statutory procedure to be followed is that used in another area, for example Sanitary Districts, IOWA CODE § 358.22 (1958) (procedure to be governed by chapters 391 and 391A).

[2] Applicable only when annual consumption exceeds $300. These provisions are not applicable to municipal public utilities, school townships, and rural independent districts. IOWA CODE § 73.10 (1958).

[3] Applicable only when public improvement is to cost $5,000 or more. "Public improvement" is used here to mean "any building or other construction work to be paid for in whole or in part by use of funds of any municipalities". IOWA CODE § 23.1 (1958). Purchase and installation of machinery is not a "public improvement". Johnston v. City of Stuart, 226 N.W. 164 (Iowa 1929). Note that this provision applies only when there has been an appeal and an accompanying certification of the appeal board. Johnson v. Town of Remsen, 215 Iowa 1033, 247 N.W. 552 (1933).

[4] Applicable only when expenditure involved is $5,000 or more.

[5] Term "public improvement" includes sewers, drainage channels and levees, streets, street lighting, sewage pumping, treating plants, underground utility connections, sidewalks, water works and lines, IOWA CODE § 391A.1(4) (1958).

[6] Applicable only when cost is $5,000 or more, and only when the contract is to be paid for by earnings. The term "plant" includes distribution equipment, wires and transmission lines even when not being built in conjunction with a plant. Poor v. Town of Duncombe, 231 Iowa 907, 2 N.W.2d 294 (1942).

[7] For alternative provisions see Public Improvements, note 5 *supra*. For definitions see IOWA CODE § 391.1 (1958). This section was amended in 1959 to include sidewalks. Iowa Laws ch. 286, § 4 (1959). The competitive bidding provisions provided for by this chapter are also applicable to contracts for extension of water mains costing more than $2,500. IOWA CODE § 401.6 (1958). "The city may oil, oil and gravel, shale or chloride the streets without letting a contract therefore." IOWA CODE § 391.29 (1958); Jackson v. City of Creston, 206 Iowa 244, 220 N.W. 92 (1928) (coating ½ inch thick is not oil). At one time the Court took the position that the competitive bidding provisions of section 391.31 were only applicable if the contract was to be paid for by assessments. Dunn v. Sioux City, 206 Iowa 908, 221 N.W. 571 (1928); City of Des Moines v. Horrabin, 204 Iowa 683, 215 N.W. 967 (1927). This position has been abandoned. Johnson County Sav. Bank v. City of Creston 212 Iowa 929, 231 N.W. 705 (1931).

[8] Note that all matters not covered by special provisions for cities over 125,000 are governed by general provisions applicable to all cities and towns. IOWA CODE § 417.70 (1958). See IOWA CODE § 391.28-.33, 391A. 15-.17, 391A.19 (1958) for applicable general provisions.

[9] Mandatory only when the expense will exceed $1,000.

[10] Mandatory only when engineer's estimate exceeds $5,000, but not applicable to surfacing materials obtained from local pits or quarries.

[11] Applicable only when probable cost will exceed $2,000.

[12] Applicable only when contract involves expenditure of $5,000 or more.

[13] Applicable only if estimated cost exceeds $1,000.

[14] See note 10, *supra*.

[15] The provisions applicable to original construction apply to any subsequent change only if it involves $5,000 or more. IOWA CODE § 455.73 (1958).

[16] Applies only to independent districts composed wholly or in part of a special charter city of 50,000 or more population. IOWA CODE § 297.22 (1958).

[17] Applicable only when cost exceeds $2,500. If emergency repairs are needed the competitive bidding provisions do not apply. IOWA CODE§ 297.8 (1958).

[18] Dunn v. City of Sioux City, 206 Iowa 908, 221 N.W. 571 (1928); City of Des Moines v. Horrabin, 204 Iowa 683, 215 N.W. 967 (1927); Lee v. City of Ames, 199 Iowa 1342, 203 N.W. 790 (1925) (in the absence of some controlling statute, fraud or bad faith, the method of chosing those with whom they will contract with is up to the individual governmental unit); see Poor v. Town of Duncombe, 231 Iowa 907, 2 N.W.2d 294 (1942); Johnston v. City of Stuart, 226 N.W. 164 (Iowa 1929). For statutes requiring the taking of bids see chart pages 54-55.

[19] Lee v. City of Ames, *supra* note 18.

[20] Horrabin Paving Co. v. City of Creston, 221 Iowa 1237, 262 N.W. 480 (1936); Johnson County Sav. Bank v. City of Creston, 212 Iowa 929, 231 N.W. 705 (1930); State of Iowa v. Garretson, 207 Iowa 627, 223 N.W. 390 (1929); see IOWA CODE § 386B.9 (1958) (specifically provides that transit system contracts shall not be divided into parts for purpose of avoiding the bidding requirements and such divided contracts will be void). *But see* Carlson v. City of Marshalltown, 212 Iowa 373, 236 N.W. 421 (1931) (held to be a day to day arrangement, each day costing less than statutory amount).

sealed bids;[21] however, in most of the remaining competitive bidding situations the statutory language, although not specifically requiring the contract to be let by sealed bids, seems to assume that the bids will be sealed.[22] There are no Iowa cases to indicate the Court's approach to a situation where, although the statute requires bids, it neither expressly or by implication requires the bids to be sealed. The Court could easily take the position that, since in the absence of such a restriction the political subdivision could contract without bids of any kind,[23] the available methods of choosing contractors should be limited only by the language, expressed or implied, of the statute. However the Court could also reason that the purpose of requiring competitive bids would be defeated unless the bids are sealed.

B. Notice

1. Contents Of Notice

With varying degrees of detail, individual statutes in most instances prescribe the contents of the notice that must be given to prospective bidders.[24] The most common provision, and many times the only one, is a requirement of some statement in the notice as to the time and place bids will be received and acted upon.[25] Illustrative of the most exacting provisions is the notice prescribed for improvements contracted for under the provisions of chapter 391A of the *Iowa Code*.[26]

In determining the sufficiency of the contents of a notice, plans and specifications[27] or proposed form of contract[28] on file are considered part of the advertisement itself if sufficient reference is made in the advertisement to them.[29] The plans referred to must not be so general[30] or indefinite[31] that they do not reveal the required information, but the law does not require the proposals to be complete in all details;[32] for the office of the

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[21] IOWA CODE §§ 386B.9, 391.31, 395.7 (1958). Under section 386B.9 all bids are void if there is a premature disclosure.

[22] IOWA CODE §§ 73.7, 252.38, 309.43, 384.3(9), 391A.16, 417.51 (1958). In section 391A.16 the language is so strong, "the notice to bidders shall state . . . the time and place for filing *sealed proposals*," that this could actually be considered an express requirement. In the other sections the implication of a requirement of sealed bids is derived from provisions as to the *opening* of the bids. Whether statutes require bids to be sealed or not, if sealed bids are used their contents are not to be divulged by any public official. IOWA CODE § 72.3 (1958).

[23] See note 18 *supra*.

[24] See chart pages 54-55.

[25] *E.g.*, IOWA CODE § 332.8 (1958)

[26] IOWA CODE § 391A.16(1) (1958) provides: "the notice to bidders shall state: (a) the time and place for filing sealed proposals. (b) the time and place such proposals will be opened and considered by the council. (c) the general nature and approximate extent of the work. (d) when the work shall be commenced and when it shall be completed. (e) the terms and method of payment. (f) that each bidder shall accompany his bid with a cashier's or certified check as security."

[27] In several instances, there is a statutory requirement that plans and specifications be on file before soliciting any bids. IOWA CODE §§ 332.8, 357.14, 384.3(9), 391A.15 (1958). The plans and specifications need not be filed until actually needed for the purpose of securing bids. City of Bloomfield v. Standley, 174 Iowa 114, 156 N.W. 307 (1916). The requirement of filing can be fulfilled by actual notice to the bidders. See Wigodsky v. Town of Holstein, 195 Iowa 910, 192 N.W. 916 (1923).

[28] Only when contracting under chapter 391A is there a statutory requirement of filing a proposed form of contract before solicitations of bids. IOWA CODE § 391A.15 (1958).

[29] Miller v. Town of Milford, 224 Iowa 753, 276 N.W. 826 (1937) (proposed form of contract); Vowles v. Town of Kenwood Park, 198 Iowa 517, 199 N.W. 1009 (1924); Dubbert v. City of Cedar Falls, 149 Iowa 489, 128 N.W. 947 (1910); Fullerton v. City of Des Moines, 147 Iowa 254 126 N.W. 159 (1910) (at least in absence of fraud or timely objection); Arnold v. City of Fort Dodge, 111 Iowa 152, 82 N.W. 495 (1900); Jeneny v. City of Des Moines, 103 Iowa 347, 72 N.W. 550 (1897).

[30] Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908) (plans covering whole city are too general in relation to project which encompasses only a part).

[31] Northwestern Light & Power Co. v. Town of Grundy Center, 220 Iowa 108, 261 N.W. 604 (1935).

[32] Pennington v. Town of Sumner, 222 Iowa 1005, 270 N.W. 629 (1936).

notice is to appraise the public and persons interested of the general character of the project, and to give opportunity for investigation.[33] Thus the detail is sufficient if a reasonable person reading them would have no difficulty in understanding what is desired.[34] Notwithstanding the above rules there often is a litigable issue as to the sufficiency of any particular notice in light of the information that an applicable statute requires to be in that notice.[35] There are no Iowa cases indicating the minimum content of a notice to the prospective bidder absent any statutory direction.

If proposals are requested for "materials, products, supplies, provisions and other needed articles to be purchased at public expense" by a political subdivision, then the notice is required by statute to be made "in general terms and by general specification and not by brand, tradename, or other individual mark."[36] Even though a particular contract is not within the contemplation of this requirement, the proposals, including the plans and specifications, must not be so specific as to cut off competition in those instances where the statutes require competitive bidding.[37] Yet no Iowa case has gone so far as to promulgate a rule that would interfere with the use of patented and like articles by governmental units.[38] The Court does not limit its disapproval merely to "too detailed specification", but frowns upon any requirement that unduly limits competition and thus defeats the purpose of requiring competitive bidding,[39] such purpose being to aid the public contracting unit to get the best bargain for the least money.[40] Not every limitation narrowing the field of possible bidders is considered to be an illegal restriction on bidding, but only those which are unreasonable in light of the above stated purpose of competitive bidding.[41] All proposals

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[33] Royal v. City of Des Moines, 195 Iowa 23, 191 N.W. 377 (1923).

[34] Brutsche v. Coon Rapids, 223 Iowa 487, 272 N.W. 624 (1937); see Arnold v. City of Fort Dodge, 111 Iowa 152, 82 N.W. 495 (1900); Jenney v. City of Des Moines, 103 Iowa 347, 72 N.W. 550 (1897).

[35] Pennington v. Town of Sumner, 222 Iowa 1005, 270 N.W. 629 (1936) (method of payment); Royal v. City of Des Moines, 195 Iowa 23, 191 N.W. 377 (1923) (extent of work and terms of payment); Dubbert v. City of Cedar Falls, 149 Iowa 489, 128 N.W. 947 (1910) (terms of payment and when work shall be commenced and completed); Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908) (extent of work); Owens v. City of Marion, 127 Iowa 469, 103 N.W. 381 (1905); Polk v. McCartney, 104 Iowa 567, 7 3N.W. 1067 (1898) (extent of work); Windsor v. City of Des Moines, 101 Iowa 343, 70 N.W. 214 (1897); Coggeshall v. City of Des Moines, 78 Iowa 235, 41 N.W. 617 (1889) (material to be furnished).

[36] Iowa Code §§ 73.1-.3 (1958). This section has been held not to apply to construction of municipal waterworks even though incidental thereto is the purchase of machinery. Keokuk Water Works Co. v. City of Keokuk, 224 Iowa 718, 277 N.W. 291 (1938) (the Court also relied on fact that the contract was payable from earnings only). An Attorney General opinion characterized this section "as not intended to be so literally construed that articles of a technical or professional nature known only by a brand or trade name could not be so designated in Requisitions" 1928 Iowa Op. Atty. Gen. 199.

[37] Brutsche v. Coon Rapids, 223 Iowa 487, 272 N.W. 624 (1937).

[38] Keokuk Water Works Co. v. City of Keokuk, 224 Iowa 718, 277 N.W. 291 (1938) (named articles were followed by the term "or equal" and in addition the Court found that there was no evidence that these items were not available to all bidders); Hoffman v. City of Muscatine, 212 Iowa 867, 232 N.W. 430 (1931) (fact that one of four alternative materials is patented does not unlawfully limit competition); Saunders v. City of Iowa City, 134 Iowa 132, 111 N.W. 529 (1907) (must be competition only where competition is possible).

[39] Iowa Elec. Co. v. Town of Cascade, 227 Iowa 480, 288 N.W. 633 (1939) (dicta) (upheld minimum wage limitation necessary to get federal aid).

[40] Iowa Elec. Co. v. Town of Cascade, *supra* note 39; Iowa Elec. Light & Power Co. v. Grand Junction, 216 Iowa 1301, 250 N.W. 136 (1933); see Weiss v. Town of Woodbine, 228 Iowa 1, 289 N.W. 469 (1940) (to obtain the most reasonable, economical, and practical price); Atkinson v. City of Webster City, 177 Iowa 659, 158 N.W. 473 (1916) (to curb favoritism, corruption, improvidence, and extravagance).

[41] *Unlawful limitations:* Weiss v. Town of Woodbine, 228 Iowa 1, 289 N.W. 469, 25 Iowa L. Rev. 828 (1940) (cumulative effect of three factors: (1) must bid on whole project; (2) must take revenue bonds in payment; and (3) must advance city $8,000.00); *cf.* Diver v. Keokuk Sav. Bank, 126 Iowa 691, 102 N.W. 542 (1905). *Lawful limitations:* Interstate Power Co. v. Town of McGregor, 230 Iowa 42, 296 N.W. 770 (1941) (no separate proposals on labor and materials); Weiss v. Town of Woodbine, 229 Iowa 978, 295 N.W. 873 (1941) (take revenue bonds in payment); Iowa Elec. Co. v. Town of Cascade, 227 Iowa 480, 288 N.W. 633 (1939) (minimum wages).

for materials, products, etc., to be purchased at public expense must contain a specific paragraph as set out in section 73.2, 1958 *Code of Iowa*, which in effect informs the bidder that preference will be given to Iowa products and coal.

2. Publication

With a few exceptions, each statutorily prescribed competitive bidding situation includes a provision describing the method of notifying prospective bidders.[42] The universally prescribed conduit is a newspaper.[43] If the governmental unit involved is a county,[44] school district,[45] water district, or levee and drainage district,[46] the advertisement is to be in a newspaper published in the county involved.[47] If a city or town is involved, some statutes require the newspaper to be one published in that particular municipality[48] while under the remaining statutes it is sufficient if the newspaper is one of general circulation within that municipality.[49] With a single exception,[50] the statutes prescribing the length of publication require publication once each week for two consecutive weeks.[51] The second publication must be on the same day of the week as the first publication.[52]

Only a few of the statutorily prescribed competitive bidding situations set any definite time schedule for receiving bids,[53] and in those instances where the statute prescribes a definite period before the bidding closes, such a period is measured from the publication of the notice[54] and varies according to the particular statute—the range being from seven to thirty days.[55]

C. Bid Deposit

Statutes requiring that a deposit accompany each bid are found only in those situations involving cities or towns.[56] The required deposit varies

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[42] See chart pages 54-55.

[43] However IOWA CODE § 391.31 (1958) (municipal streets and sewers) provides that when there is no newspaper published within the city, notice is to be given by posting in three public places within the city. For definition of "newspaper", see IOWA CODE § 618.3 (1958). The newspaper must be one published wholly in the English language. IOWA CODE § 618.1 (1958).

[44] With the exception of a county building the probable cost of which exceeds $2,000.00, where notice must be published in *all* the official newspapers of that county. IOWA CODE § 332.7 (1958).

[45] With the exception of independent school districts wholly or partly composed of a special charter city of over 50,000 when selling its property, where the newspaper must be one having general circulation in that district. IOWA CODE §§ 297.22-.23 (1958).

[46] However, if the estimated cost of the levee and drainage district improvement exceeds $15,000.00, *in addition* to the normal publication the notice must be published for two consecutive weeks in a contractors' journal of general circulation. IOWA CODE § 455.40 (1958).

[47] See chart pages 54-55.

[48] IOWA CODE §§ 391.31, 395.7 (1958). In the case of public improvements under chapter 391A the newspaper must be one that is "published in and having general circulation in such municipality," unless there is none so published, then a newspaper having general circulation therein is sufficient. IOWA CODE §§ 391A.16, 618.14 (1958).

[49] IOWA CODE §§ 384.3(9), 386B.9, 397.16, 403.8(2) (1958). In the case of public utility plants under chapter 397, the publication must also be in some newspaper of general circulation in Iowa. IOWA CODE § 397.16 (1958).

[50] County building contracts where probable cost exceeds $2,000.00 require publication for three weeks. IOWA CODE § 332.7 (1958).

[51] See chart pages 54-55.

[52] IOWA CODE § 618.9 (1958).

[53] See chart pages 54-55.

[54] If more than one publication is required, the time is measured from the last of the publications, Comstock v. City of Eagle Grove, 133 Iowa 589, 111 N.W. 51 (1907), in the absence of contrary statutory direction.

[55] *30 days:* IOWA CODE §§ 384.3(9), 397.16, 403.8(2) (1958); *15 days:* IOWA CODE §§ 73.7, 391.31 (1958); *14 days:* IOWA CODE§ 297.24 (1958); *12 days:* IOWA CODE § 391A.16 (1958); *10 days:* IOWA CODE § 386B.9 (1958); *7 days* IOWA CODE §357.14 (1958).

[56] See chart page 54. It should be noted that the amount of the deposit is for the benefit of the governmental unit and a bidder cannot set up as a defense that the city required less than the statute demanded. Tony Amodeo Co. v. Town of Woodward, 192 Iowa 535, 185 N.W. 95 (1921) (dicta).

from five to ten percent of either the amount of the bid or estimated cost[57] with the exception of those situations where the amount of deposit is left to the discretion of the contracting unit.[58] The statutorily prescribed form of the deposit is usually that of a certified check.[59]

These statutes leave two questions unanswered. First, is the purpose of the bid deposit to protect against a withdrawal of the bid before the political unit can act upon it or is the deposit merely security that if his bid is accepted, the bidder will enter into a formal contract and give the required performance bond? Generally the statutory language suggests that it is not the purpose of these deposits to give any protection until the bid has been accepted.[60] Secondly, the statutes do not give any clear answer as to what is to happen to the deposit of the successful bidder if he, without legal excuse, fails to enter into a formal contract or give a sufficient bond.[61] In light of the general policy against implying forfeitures[62] it would be improbable that the courts would find an implication of a forfeiture of the deposit in excess of actual damages arising from the mere fact that these statutes prescribe deposits or from the fact that the parties themselves required a deposit.[63] If the parties expressly provide for a forfeiture of the deposit without statutory authorization, then there is the classical problem of "penalty versus liquidated damages."[64]

D. Awarding The Contract

1. Rejection of Bids

In most instances the statutes provide that the contracting unit may reject any or all bids.[65] However, even in the absence of such statutes, a governmental unit may abandon its intention to enter into a contract and rescind what action it has taken, unless other parties have valid and enforceable contract rights.[66] This position is further strengthened by the rule that a governmental unit cannot enter into a contract that it will in the future exercise its discretion in a certain way.[67] Even in the absence of the above considerations, when competitive bidding is required and only one bid has been submitted, this bid can rightfully be rejected.[68]

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[57] IOWA CODE §§ 357.14 (5% of bid), 391.32 (10% of bid), 391A.16 (5-10% of engineer's estimate) (1958).

[58] IOWA CODE §§ 386B.9, 395.8 (1958).

[59] Only exceptions are IOWA CODE §§ 386B.9, 391.32 (1958) which provide for an alternative in the form of a cashier's check, and section 386B.9 also permits a cash deposit.

[60] *cf.* Cedar Rapids Lumber Co. v. Fisher, 129 Iowa 332, 105 N.W. 595, (1906) (by implication) (alternative holding) (no statutory requirement of deposit involved).

[61] The single exception is IOWA CODE § 391A.17 (1958) (amount retained as liquidated damages). Although the low bidder at the first bid opening refused to enter into a contract, in Hoffman v. City of Muscatine, 212 Iowa 867 232 N.W. 430 (1931), the record does not indicate any forfeiture of his deposit. However, the successful bidder, at the second bid opening, whose qualifications were at issue in the case, submitted a bid identical in amount to that of the low bid at the first opening

[62] See generally MCCLINTOCK, EQUITY § 83 (2d ed. 1948).

[63] *Cf.* Cedar Rapids Lumber Co. v. Fisher, 129 Iowa 332, 105 N.W. 595 (1906) (alternative holding) (can retain only the difference between defaulter's bid and the next highest bid).

[64] See generally 5 CORBIN, CONTRACTS §§ 1054-1075 (1950); Hudson, *Contracts in Iowa Revisited —Performance, Breach and Remedies*, 9 DRAKE L. REV. 66, 82 (1960).

[65] See chart pages 54-55.

[66] Erickson v. City of Cedar Rapids, 193 Iowa 109, 185 N.W. 46 (1921). In addition, the body having the power to contract has discretion to select which of alternative proposed methods, plans or improvements shall be contracted for, and to reject bids on other alternatives. Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W. 2d 310 (1949); Collins v. City of Keokuk 147 Iowa 233, 124 N.W. 601 (1910); Swan v. City of Indianola, 142 Iowa 731, 121 N.W. 547 (1909).

[67] Stewart v. City of Council Bluffs, 50 Iowa 668 (1879). *Contra*, Tuttle Bros. & Bruce v. City of Cedar Rapids, 176 Fed. 86 (8th Cir. 1910) (a pre-*Erie* decision).

[68] Vincent v. Ellis, 116 Iowa 609, 88 N.W. 836 (1902) (alternative holding). However the sole bid can be accepted. Dubbert v. City of Cedar Falls, 149 Iowa 489, 128 N.W. 947 (1910); Ottumwa Brick & Constr. Co. v. Ainley, 109 Iowa 386, 80 N.W. 510 (1899).

2. Interpretation of Bids

It is firmly established that, unless a bid substantially corresponds with the advertised notice, it is not a bid at all.[69] Mere irregularities or surplusage will not justify the rejection of a bid[70] or, at least, this irregularity can be waived by the public contracting unit.[71] Although a bid will, when ambiguous, be construed most strongly against the bidder in the light of the surrounding circumstances,[72] a bidder can assume that the governmental unit will give his bid a valid and binding interpretation rather than one that will render it a farce.[73] It should also be noted that the statutory rule that writing controls over printing applies to bids.[74]

3. To Whom is the Contract to be Awarded

The individual statutes requiring competitive bidding, with the exception of those concerning farm-to-market and secondary roads[75] and those cases where advertising for bids is required solely because of chapter 23, of the *Iowa Code*[76] prescribe the party to whom the contract is to be awarded.[77] Farm-to-market and secondary roads contracts are covered by a general statute prescribing various factors to be considered in awarding the contract without regard as to whether competitive bidding is required.[78] The most frequent test of qualification is the "lowest responsible bidder", with the "lowest bidder" next in frequency.[79] In determining the element of "responsibility" of the bidder the decision cannot be purely arbitrary.[80] The lowest price is not in every instance a controlling factor[81] and, in the absence of a controlling standard as to whom the contract is to be awarded, the contract doesn't have to be let to the "lowest bidder" or even to a bidder;[82] however there must be some reasonable basis for rejecting the lowest bidder.[83]

The amount of the bid in relation to the estimated cost is generally not a controlling fact in awarding the contract[84] except to the extent that it

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[69] Iowa-Nebraska Light & Power Co. v. City of Villisca, 220 Iowa 238, 261 N.W. 423 (1935); Urbany v. City of Carroll, 176 Iowa 217, 157 N.W. 852 (1916).

[70] North View Land Co. v. City of Cedar Rapids, 185 Iowa 1032, 169 N.W. 644 (1918); Miller v. City of Oelwein, 155 Iowa 706, 136 N.W. 1045 (1912). The surplusage rule announced in these cases is not applicable when the nonresponsiveness is the result of contradiction. Urbany v. City of Carroll, *supra* note 69.

[71] Interstate Power Co. v. Town of McGregor, 230 Iowa 42, 296 N.W. 770 (1941).

[72] James Horrabin & Co. v. City of Des Moines, 195 Iowa 712, 190 N.W. 380 (1923).

[73] Miller v. City of Oelwein, 155 Iowa 706, 136 N.W. 1045 (1912); see Wigodsky v. Town of Holstein, 195 Iowa 910, 192 N.W. 916 (1923) (can ignore obvious mistake and treat bid as it really was intended to be).

[74] Urbany v. City of Carroll, 176 Iowa 217, 157 N.W. 852 (1916).

[75] IOWA CODE §§ 309.40, 310.14 (1958).

[76] IOWA CODE § 23.7 (1958).

[77] See chart pages 54-55.

[78] IOWA CODE § 314.1 (1958) (price, equipment, financial responsibility and experience).

[79] IOWA CODE § 391.31, 391A.17, 395.7 (1958) ("lowest bidder"). Other tests used are "best bid", IOWA CODE § 297.23 (1958); "best interests of the municipality", IOWA CODE § 397.18 (1958), Interstate Power Co. v. Town of McGregor, 230 Iowa 42, 296 N.W. 770 (1941) (doesn't mean lowest bidder or lowest responsible bidder but those are things to be taken into consideration); "in the public interest and in furtherance of the purposes of this chapter", IOWA CODE § 403.8(2) (1958).

[80] Miller v. City of Des Moines, 143 Iowa 409, 122 N.W. 226 (1909) (union v. nonunion); see 1934 IOWA OP. ATTY. GEN. 371 (home town versus out of town concern).

[81] Miller v. City of Des Moines, *supra* note 80.

[82] Interstate Power Co. v. Town of McGregor, 230 Iowa 42, 296 N.W. 770 (1941); Johnson v. Town of Remsen, 215 Iowa 1033, 247 N.W. 552 (1933).

[83] See Poor v. Town of Duncombe, 231 Iowa 907, 2 N.W.2d 294 (1942) (alternative holding) [interpreting IOWA CODE § 397.18 (1958)]; Johnson v. Town of Remsen, *supra* note 82; Miller v. City of Oelwein, 155 Iowa 706, 136 N.W. 1045 (1912).

[84] The only exception is contracts by Benefited Water Districts where the amount of the accepted bid can not exceed the estimated cost by more than 10%. IOWA CODE §§ 357.15-.16 (1958).

effects the ability to levy an assessment to pay for the performance under the contract.[85]

Since the awarding of the contract is considered discretionary even when it must be exercised within the framework of a statutory description such as the "lowest responsible bidder",[86] the decision as to who fits this test, in the absence of fraud, is not subject to judicial review.[87] Thus the "lowest bidder" cannot by mandamus compel the governmental unit to award the contract to him,[88] nor can the unsuccessful bidder recover damages in the absence of fraud.[89]

In awarding contracts involving purchase of "materials, products, supplies, provisions and other articles purchased at public expense" or coal, preference must be given to those bids based on "products and provisions grown and coal produced" within Iowa when the cost is no higher and the domestic products are found in marketable quantities of a quality suitable for the use intended.[90] Along this same vein all political subdivisions are to give preference to those bidders who will use "Iowa labor in the constructing or building of any public improvement or works."[91]

E. Performance Bonds

There is a mandatory general statutory requirement applicable to all political subdivisions[92] that contracts involving $1,000 or more for the construction of "public improvements"[93] shall be accompanied by a bond with surety conditioned upon the performance of the contract and any other lawful requirement.[94] The amount of the bond is to be fixed and approved by those empowered to contract for the political subdivision.[95]

In addition to this overall requirement, several contracting situations not meeting the above definition of "public improvement" provide for performance bonds.[96] A few other contracting situations apparently within the contemplation of the general statute are also covered by individual statutes

[85] For example, no assessment can be levied under chapter 391 which is more than 10% in excess of the estimated cost of the improvement. IOWA CODE §§ 391.20(5), 391.49 (1958).

[86] Mortland v. Poweshiek County, 156 Iowa 720, 137 N.W. 1009 (1912) (alternative holding); Vincent v. Ellis, 116 Iowa 609, 88 N.W. 836 (1902) (alternative holding).

[87] *Cf.*, e.g., Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W.2d 310 (1949); Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910); Swan v. City of Indianola, 142 Iowa 731, 121 N.W. 547 (1909).

[88] Vincent v. Ellis, 116 Iowa 609, 88 N.W. 836 (1902) (alternative holding).

[89] Mortland v. Poweshiek County, 156 Iowa 720, 137 N.W. 1009 (1912) (alternative holding). It should be noted that even though the unsuccessful bidder has no remedy, the landowners or taxpayers are not remediless. See cases cited note 138 *infra*.

[90] IOWA CODE §§ 73.1-.2,.6 (1958). The original act provided for preference to be given to products "produced, manufactured, compounded, made or grown in Iowa." Iowa Laws ch. 27, § 1 (1927). Whether the amendment to its present form in effect excludes from the operation of the domestic preference law all Iowa products manufactured and compounded but not grown within the state has not been judicially determined. These provisions do not apply to purchase of machinery incidental to the construction of a self-liquidating waterworks. Keokuk Water Works Co. v. City of Keokuk, 224 Iowa 718, 277 N.W. 291 (1938) (relied not only on technical definition of items within meaning of "materials, products, supplies, provisions" but also that payment was to be out of earnings and therefore was not to be purchased "at public expense").

[91] IOWA CODE § 73.3 (1958) (doesn't apply to road or highway contracts). It should be noted that contracts within the contemplation of this section must contain a provision that preference will be given to Iowa Labor.

[92] IOWA CODE § 573.1(1) (1958).

[93] " 'Public improvement' is one, the cost of which is payable from taxes or other funds under the control of the public corporation. . . ." IOWA CODE § 573.1(2) (1958). "Construction" also means repair and alteration. IOWA CODE § 573.1(3) (1958).

[94] IOWA CODE § 573.2-.3 (1958).

[95] IOWA CODE § 573.5 (1958).

[96] IOWA CODE §§ 252.38 (contracts for support of poor), 252.39 (contracts for medical and dental service for poor), 301.11 (text books and supplies) (1958).

which specifically require performance bonds without regard to the $1,000 limitation of the general statute.[97]

F. The Public Contract

1. Form

Some of the statutes requiring competitive bidding also require that the contract be written.[98] In addition, in the case of secondary and farm-to-market roads a general statute requires the contract to be written without regard to any requirements of competitive bidding. There are several instances where, although there is no express requirement of written contracts, the statutorily prescribed system for entering into contracts might by implication be construed as requiring the contract to be in writing because the statute talks in terms of written contracts.[100] But in the absence of a statute limiting contracting to a prescribed form or a conflict with the Statute of Frauds[101] a governmental unit can contract verbally[102] or by factual implication[103] the same as any private individual.

2. When Formed

The answer to the question of when does the preliminary procedure end and the binding contract begin is found in the general contract law of offer-acceptance and intention of the parties.[104] However in those cases where the statutes require the contract to be written,[105] for the Court to hold that there is a valid contract before it it reduced to writing would be inconsistent with the position the Court might later have to take if this requirement were never fulfilled.[106] There appears to be no definite pattern of reaction by the Iowa Court to the factor that, in the absence of a statutory requirement, the parties themselves have contemplated that the bidding process shall be followed by a formal written contract.[107]

3. Contents—Variance from Notice to Bidders

If competitive bidding is required, the contract as entered into must

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[97] IOWA CODE §§ 314.1 (highways), 357.17 (water districts require 100% of the contract price.) 391.33 (street and sewers), 391A.19 (public improvement along lines of streets and sewers, 395.10 (flood control), 455.43 (levee and drainage improvements) (1958).

[98] IOWA CODE §§ 73.7, 297.7, 332.7, 455.44 (1958).

[99] IOWA CODE § 314.1 (1958).

[100] IOWA CODE §§ 391.28, 391A.17, 395.7-.8 (1958).

[101] IOWA CODE § 622.32 (1958).

[102] Duntz v. Ames Cemetery Ass'n, 192 Iowa 1341, 186 N.W. 443 (1922); Bellmeyer v. Independent Dist. of Marshalltown, 44 Iowa 564 (1876); Duncombe v. City of Ft. Dodge, 38 Iowa 281 (1874); Baker v. Johnson County, 33 Iowa 151 (1871); City of Indianola v. Jones, 29 Iowa 282 (1870).

[103] Carlson v. City of Marshalltown, 212 Iowa 373, 236 N.W. 421 (1931); City of Davenport v. Peoria Marine & Fire Ins. Co., 17 Iowa 276 (1864).

[104] See Pennington v. Town of Sumner, 222 Iowa 1005, 270 N.W. 629 (1936) (acceptance of bid forms binding contract); Capital City Brick & Pipe Co. v. City of Des Moines, 152 Iowa 354, 132 N.W. 188 (1911) (no acceptance until council has approved the form and contents of the proposed contract and the contractor's bond); Ketterman v. City of Ida Grove, 120 N.W. 641 (Iowa 1909) (bid was phased in alternatives; *held* acceptance of such a bid does not form a contract); Cedar Rapids Lumber Co. v. Fisher, 129 Iowa 332, 105 N.W. 595 (1906) (alternative holding) (before there is a binding contract acceptance must be communicated to the bidder); Marion Water Co. v. City of Marion, 121 Iowa 306, 96 N.W. 883 (1903) (resolution to effect that a certain proposed contract should be closed is not an acceptance); Starr & Rand v. Board of Supervisors of Des Moines County, 22 Iowa 491 (1867) (authorization of electorate is not an acceptance). See generally Hudson, *Contracts in Iowa Revisited—Offer and Acceptance*, 8 DRAKE L. REV. 91 (1959).

[105] See notes 98-100 *supra*.

[106] See part II C *Deviation from Required Procedure in Letting the Contract, infra* p.....

[107] *Compare* City of Fort Madison v. Moore, 109 Iowa 476, 80 N.W. 527 (1899) (contract formed by acceptance of bid notwithstanding advertisement provided for a formal instrument), *with* Weitz v. Independent District of Des Moines, 79 Iowa 423, 44 N.W. 696 (1890) (alternative holding) (contract was not formed by acceptance of bid because there was an agreement that contract should be reduced to writing).

correspond substantially with the advertisement for bids and if it fails to do so, such a contract is treated the same as if all the provisions for competitive bidding had been ignored *ab initio,* and is invalid.[108] The variance contemplated by this rule is from the total picture painted by the notice, which includes the actual advertisement, and the plans, specifications, and proposed form of contract[109] and is not to be measured by the proposed form of contract alone,[110] or by the plans alone.[111] On a few occasions the Court has indicated the above rule applies only when the contract materially deviates from the notice in a *manner beneficial to the contractor.*[112] It has been said that if only one bid is submitted the matter of variance cannot be raised, because there could be no question of stifling competition.[113]

If the variance was inserted into the contract unintentionally, then the contract is not invalidated but can be enforced as it was intended to read, without going through the formal procedure of reformation.[114] Even if the variance was intentionally inserted, if the variance is separable from the contract as it should have read to conform to the notice, the contract can be enforced to the extent it conforms to the notice, in absence of fraud or bad faith.[115]

II. SOURCES OF DEFECTIVE PUBLIC CONTRACTS

In addition to defective contracts resulting from the fact that the political subdivision did not have the general power to contract in relation to the subject matter, a factor which has been arbitrarily excluded from this discussion, public contracts may be defective because of (a) a prohibited interest in the contract, or (b) a deviation from required precontracting procedure, or (c) a deviation from required procedure in letting the contract, or (d) a lack of official consent. Each of these situations will be discussed in turn below.

At this time it should be noted that for purposes of recovery, defective public contracts arising from the above four situations fall into two classes;

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[108] Greaves v. City of Villisca, 221 Iowa 776, 266 N.W. 805 (1936) (change in horsepower requirements); Brutsche v. Town of Coon Rapids, 220 Iowa 1295, 264 N.W. 696 (1936) (change in time of commencement and completion and change in control of test); Iowa-Nebraska Light & Power Co. v. City of Villisca, 220 Iowa 238, 261 N.W. 423 (1935) (elimination of $11,000.00 in materials to be furnished); Northwestern Light & Power Co. v. Town of Grundy Center, 220 Iowa 108, 261 N.W. 604 (1935); Iowa Elec. Light & Power Co. v. Town of Grand Junction, 216 Iowa 1301, 250 N.W. 136 (1933) (change in price); Chicago, R.I. & P. Ry. v. Town of Dysart, 208 Iowa 422, 223 N.W. 371 (1929) (addition of "cost plus" provision); Richardson v. City of Denison, 189 Iowa 426, 178 N.W. 332 (1920) (decrease in thickness of cement); Atkinson v. City of Webster City, 177 Iowa 659, 158 N.W. 473 (1916) (substituting a more expensive material); Capital City Brick & Pipe Co. v. City of Des Moines, 127 N.W. 66 (Iowa 1910); Hedge v. City of Des Moines, 141 Iowa 4, 119 N.W. 276 (1909); Osburn v. City of Lyons, 104 Iowa 160, 73 N.W. 650 (1897) (moving back completion date). *Contra,* Ottumwa Brick & Constr. Co. v. Ainley, 109 Iowa 386, 80 N.W. 510 (1899) (alternative holding) (additional provision would have been implied by law). This rule is applied more strictly before performance than after. North View Land Co. v. City of Cedar Rapids, 185 Iowa 1032, 169 N.W. 644 (1918) (dicta); Hedge v. City of Des Moines, *supra.* The question of variance cannot be raised by the contractor or his bonding company in an action upon the contract. American Bonding Co. v. City of Ottumwa, 137 Fed. 572 (8th Cir. 1905).

[109] See notes 27-28 *supra.*

[110] Poor v. Town of Duncombe, 231 Iowa 907, 2 N.W.2d 294 (1942).

[111] Interstate Power Co. v. Forest City, 225 Iowa 490, 281 N.W. 207 (1938).

[112] Iowa-Nebraska Light & Power Co. v. City of Villisca, 220 Iowa 238, 261 N.W. 423 (1935) (dicta); see *In Re* Appeal of Mayden, 156 Iowa 157, 135 N.W. 571 (1912); Capital City Brick & Pipe Co. v. City of Des Moines, 127 N.W. 66 (Iowa 1910); Hedge v. City of Des Moines, 141 Iowa 4, 119 N.W. 276 (1909) (dicta). *Contra,* Atkinson v. City of Webster City, 177 Iowa 659, 158 N.W. 473 (1916).

[113] Ottumwa Brick & Constr. Co. v. Ainley, 109 Iowa 386, 80 N.W. 510 (1899) (dicta).

[114] Pennington v. Town of Sumner, 222 Iowa 1005, 270 N.W. 629 (1936); Fullerton v. City of Des Moines, 147 Iowa 254, 126 N.W. 159 (1910).

[115] North View Land Co. v. City of Cedar Rapids, 185 Iowa 1032, 169 N.W. 644 (1918); see Gjellefald v. Hunt, 202 Iowa 212, 210 N.W. 122 (1926).

those where the power to contract has been withheld or where the contract is prohibited by a statutory provision,[116] and those where the power to contract is present but has been exercised irregularly. The contracts of the first class are considered unauthorized (ultra vires), and it is horn book law that such contracts are void.[117] The contracts of the second class are characterized as "irregular" and are treated as being voidable.[118] The really difficult question is whether defective public contracts resulting from a failure to follow the prescribed statutory procedure [(a) & (b) above] are to be treated as unauthorized and void or merely irregular and voidable; as will be shown in the discussion below, the Court has no all-inclusive solution to this dilemma.[119]

A. Interest

A series of overlapping statutes provide that those who have the power of decision shall not be directly or indirectly interested in certain specified contracts[120] or other indicated business transactions with the individual governmental units they represent.[121] Although an indirect interest would be sufficient under these statutes, there is a point at which an interest can be too remote and incidental to be within the contemplation of such statutes.[122] Even though these statutes do not limit the forbidden interest to a financial one,[123] all the reported cases arising under these statutes have been concerned with a personal financial interest.[124] In applying these statutes not only must the interest be sufficient, but the interested party must be connected in the required manner with the particular political subdivision contemplated by the statute,[125] and the contract must be of the type prohibited by

[116] Horrabin Paving Co. v. City of Creston, 221 Iowa 1237, 262 N.W. 480 (1936). Political subdivisions have only powers expressly granted, powers implied from these granted and powers essential to the declared purpose of their creation. *E.g.*, Central States Elec. Co. v. Town of Randall, 230 Iowa 376, 297 N.W. 804 (1941); Iowa Elec. Co. v. Town of Cascade, 227 Iowa 480, 288 N.W. 633 (1939); Brooks v. Town of Brooklyn, 146 Iowa 136, 124 N.W. 868 (1910); City of Keokuk v. Scroggs, 39 Iowa 447 (1874).

[117] *E.g.*, Brooks v. Town of Brooklyn, *supra* note 116; Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 234, 91 N.W. 1081 (1902). See also 10 McQUILLIN, MUNICIPAL CORPORATIONS § 29.10 (3rd ed. 1950).

[118] If the contract is irregular, then while executory it is subject to rescission by either party and its performance is enjoinable at the urging of disgruntled taxpayers or landowners. *E.g.*, Miller v. City of Oelwein, 155 Iowa 706, 136 N.W. 1045 (1912); Diver v. Keokuk Sav. Bank, 126 Iowa 691, 102 N.W. 542 (1905) (dicta). *Cf.* Weiss v. Town of Woodbine, 228 Iowa 1, 289 N.W. 469 (1940). It should be noted that a taxpayer has standing without any showing that his taxes will be increased. Miller v. City of Des Moines, 143 Iowa 409, 122 N.W. 226 (1909).

[119] The classic theoretical approach is that mere deviation from the prescribed procedure does not make an act ultra vires. 10 McQUILLIN, *op. cit. supra* note 117, § 29.10. The Iowa Court does not always indulge in this technical distinction, as will be shown, *infra*.

[120] It is immaterial whether an implied or express contract is involved. Nelson v. Harrison County, 126 Iowa 436, 102 N.W. 197 (1905).

[121] The following sections of IOWA CODE (1958) are pertinent. *Cities & towns:* §§ 368A.22 ("job of work or material or the profits thereof or services"), 372.16 (river front commission), 386B.9 (board of transit trustees), 403.16 (urban renewal). *Counties:* §§ 252.29 (poor support), 314.2 (highways—including farm-to-market and secondary roads), 347.15 (hospitals), 741.11 ("supplies, material or labor"). *Townships:* § 741.11. *Sanitary Districts:* § 358.15. *Schools:* § 741.6 (only applies to educational institutions supported at least in part by the state). There is a general statute applicable to all public officials prohibiting directly or indirectly receiving a gratuity or commission. IOWA CODE § 741.1 (1958).

[122] Wayman v. City of Cherokee, 204 Iowa 675, 215 N.W. 655 (1927) (councilman prior to his election had leased machinery to be paid for out of earnings to a person now contracting with the city). It should be noted that sufficiency of interest is a jury question. Wayman v. City of Cherokee, *supra*; State of Iowa v. York, 135 Iowa 529, 113 N.W. 324 (1907).

[123] With the exception of the statute applicable to county hospitals. IOWA CODE § 347.15 (1958).

[124] See Wayman v. City of Cherokee, 204 Iowa 675, 215 N.W. 655 (1927); Town of Hartley v. Floete Lumber Co., 185 Iowa 861, 171 N.W. 183 (1919); Peet v. Leinbaugh, 180 Iowa 937, 164 N.W. 127 (1917); State of Iowa v. York, 135 Iowa 529, 113 N.W. 324 (1907); Diver v. Keokuk Sav. Bank, 126 Iowa 691, 102 N.W. 542 (1905); Nelson v. Harrison County, 126 Iowa 436, 102 N.W. 197 (1905); DeWitt v. Mills County, 126 Iowa 169, 101 N.W. 766 (1904). Mere family relationship would not be sufficient. Kagy v. Independent Dist. of West Des Moines, 117 Iowa 694, 89 N.W. 972 (1902) (dicta) (involved common law rule prohibiting interest).

[125] DeWitt v. Mills County, *supra* note 124.

the state.[126] Even though a particular contracting situation is not within the purview of one or more of the "interest prohibiting" statutes, the contract may be prohibited by common law rules concerning contracts against public policy[127] or general rules of agency.[128] The fact that part of the common law rule prohibiting such contracts has been enacted into statutory form does not abrogate the remainder of the common law rule.[129]

On the question of whether a contract in violation of an applicable interest rule is unauthorized and consequently void or merely irregular and voidable, the cases are clearly not in agreement.[130]

B. Deviation from Required Precontracting Procedure

Although the nature of the governmental steps leading up to the contracting stage is beyond the scope of this article, when the statutes require a resolution of necessity[131] or similar action by the governing body or a vote of the electorate,[132] a contract entered into without such is unauthorized and void.[133] However a mere ministerial nonperformance will not invalidate such proceedings or ensuing contract,[134] but the contract as entered into must substantially conform with the contract as auhorized.[135]

C. Deviation from Required Procedure in Letting the Contract

In light of the rule that where power is granted to be exercised in a

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[126] Liggett v. Shriver, 181 Iowa 260, 164 N.W. 611 (1917) (statute applied here was subsequently repealed); Bay v. Davidson, 133 Iowa 688, 111 N.W. 25 (1907) [statute in effect at this time did not contain the term "materials", as present applicable statute, IOWA CODE § 368A.22 (1958), does].

[127] It is considered against public policy for one entrusted with a public trust to act in a situation where his private interest may conflict with the interest of the public. James v. City of Hamburg, 174 Iowa 301, 156 N.W. 394 (1916); Bay v. Davidson, 133 Iowa 688, 111 N.W. 25 (1907) (alternative holding); see Kagy v. Independent Dist. of West Des Moines, 117 Iowa 694, 89 N.W. 972 (1902); Weitz v. Independent Dist. of Des Moines, 78 Iowa 37, 42 N.W. 577 (1889). *But see* Liggett v. Shriver, *supra* note 126 (this rule doesn't apply when there is a higher authority to safeguard the public interest).

[128] Bay v. Davidson, *supra* note 127 (alternative holding); Kagy v. Independent Dist. of West Des Moines, *supra* note 127.

[129] Bay v. Davidson, 133 Iowa 688, 111 N.W. 25 (1907). *But cf.* Liggett v. Shriver, 181 Iowa 260, 164 N.W. 611 (1917) (will be presumed that legislature included all it deemed necessary to prohibit and by implication left township free to contract in all other matters).

[130] *Void:* Bay v. Davidson, *supra* note 129; Nelson v. Harrison County, 126 Iowa 436, 102 N.W. 197 (1905); Weitz v. Independent Dist. of Des Moines, 78 Iowa 37, 42 N.W. 577 (1889) (even in absence of fraud); *cf.* James v. City of Hamburg, 174 Iowa 301, 156 N.W. 394 (1916). *Voidable:* Town of Hartley v. Floete Lumber Co., 185 Iowa 861, 171 N.W. 183 (1919); Diver v. Keokuk Sav. Bank, 126 Iowa 691, 102 N.W. 542 (1905); Kagy v. Independent Dist. of West Des Moines, 117 Iowa 694, 89 N.W. 972 (1902).

[131] *E.g.*, IOWA CODE § 391.18 (1958).

[132] *E.g.*, IOWA CODE § 397.5 (1958).

[133] Lytle v. Ames, 225 Iowa 199, 279 N.W. 453 (1938) (resolution of necessity not properly passed); Doonan v. City of Winterset, 224 Iowa 365, 275 N.W. 640 (1937) (resolution didn't get majority vote); C. W. Roland Co. v. Town of Carlisle, 215 Iowa 82, 244 N.W. 707 (1932) (no vote by electorate); Iowa Elec. Co. v. Town of Winthrop, 198 Iowa 196, 198 N.W. 14 (1924) (no vote by electorate); Dunker v. City of Des Moines, 156 Iowa 292, 136 N.W. 536 (1912) (resolution of necessity contained only legal conclusions); Citizens Bank v. City of Spencer, 126 Iowa 101, 101 N.W. 643 (1904) (council's resolution didn't carry by proper majority); City of Keokuk v. Fort Wayne Elec. Co., 90 Iowa 67, 57 N.W. 689 (1894) (no vote by electorate); Manning v. District Township of Van Buren, 28 Iowa 332 (1869) (no vote by electorate). *But see* First Nat'l Bank v. City of Emmetsburg, 157 Iowa 555, 138 N.W. 451 (1912).

[134] Poor v. Town of Duncombe, 231 Iowa 907, 2 N.W.2d 294 (1942) (no showing that the irregularities had changed the outcome of the election); Long v. Boone County, 36 Iowa 60 (1872) (failure to record vote); *cf.* Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910) (failure to file contract).

[135] See City of Ida Grove v. Ida Grove Armory Co., 146 Iowa 690, 125 N.W. 866 (1910) (inexpensive and advantageous changes); King v. Mahaska County, 75 Iowa 329, 39 N.W. 636 (1888) (additional amount void); Reichard v. Warren County, 31 Iowa 381 (1871) (additional amount void).

certain way there is an implied prohibition upon doing it any other way,[136] the competitive bidding statutes are considered mandatory.[137]

Whether nonobservance of a statutorily prescribed competitive bidding system leaves the political subdivision without power to contract is a controversial problem. In the case of complete deviation, that is, no attempt to comply with the statutory procedure for letting contracts, the Court has steadily held that such a contract is ultra vires and consequently void.[138] A failure to award the contract to "the lowest bidder" when such is required, is logically treated as if the bidding statute has been completely ignored.[139] But when there has been an attempt to comply with the bidding statute and the effort falls short, an analysis of the Iowa cases reveals two distinct lines of authority. The Court originally took the position that the observance of such statutes was a condition precedent to the existence of the power of the political unit to contract, was therefore jurisdictional and must be strictly complied with and that a contract made without such compliance was unauthorized (void).[140] The newer line of reasoning is that these same shortcomings are not jurisdictional but mere irregularities[141] leaving the road open for waiver or estoppel in relation to such defects. There is no indication under the new approach of whether there is a point at which the deviation from the prescribed system of competitive bidding is so great that the contracting unit loses jurisdiction. However, in light of the Court's position on complete noncompliance,[142] it would seem that some partial noncompliances would be so material the Court would find the jurisdiction had been lost.[143]

D. Lack of Official Consent

Even if the political subdivision has fulfilled every requisite necessary for contracting, and thus has the power to contract, there is the problem of who can act for the political subdivision in relation to this contract. In the absence of lawful delegation,[144] individual members of the decision making

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[136] Ebert v. Short, 199 Iowa 147, 201 N.W. 793 (1925); City of Des Moines v. Gilchrist, 67 Iowa 210, 25 N.W. 136 (1885); District Township of City of Dubuque v. City of Dubuque, 7 Iowa 262 (1858); see Johnson v. Town of Remsen, 215 Iowa 1033, 247 N.W. 552 (1933). *But see* Parish & Porterfield v. Elwell, 46 Iowa 162 (1877) (if no negative words restricting and nothing showing a different intent, such prescriptions are merely directory.

[137] Horrabin Paving Co. v. City of Creston, 221 Iowa 1237, 262 N.W. 480 (1935) [interpreting IOWA CODE § 391.31 (1958)]; Johnson v. Town of Remsen, 215 Iowa 1033, 247 N.W. 552 (1933) [interpreting IOWA CODE § 23.7 (1958)]; Polk v. McCartney, 104 Iowa 567, 73 N.W. 1067 (1898) [interpreting what is now IOWA CODE § 391.31 (1958)]. *But cf.* Tony Amodeo Co. v. Town of Woodward, 192 Iowa 535, 185 N.W. 94 (1921) (alternative holding).

[138] Horrabin Paving Co. v. City of Creston, *supra* note 137; Johnson County Sav. Bank v. City of Creston, 212 Iowa 929, 231 N.W. 705 (1931); *cf.* Dively v. City of Cedar Falls, 21 Iowa 556 (1866). *Contra*, City of Des Moines v. Welsbach St. Lighting Co., 188 Fed. 906 (8th Cir. 1911) (a pre-*Erie* case).

[139] Miller v. City of Des Moines, 143 Iowa 409, 122 N.W. 226 (1909).

[140] Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908) (contents of notice); Comstock v. City of Eagle Grove, 133 Iowa 589, 111 N.W. 51 (1907) (period for submitting bids); Polk v. McCartney, 104 Iowa 567, 73 N.W. 1067 (1898) (contents of notice); Windsor v. City of Des Moines, 101 Iowa 343, 70 N.W. 214 (1897) (contents of notice); Coggeshall v. City of Des Moines, 78 Iowa 235, 41 N.W. 617 (1889) (contents of notice).

[141] Johnson v. Town of Remsen, 215 Iowa 1033, 247 N.W. 552 (1933) (time of opening bids); Tony Amodeo Co. v. Town of Woodward, 192 Iowa 535, 185 N.W. 94 (1921) (alternative holding) (size of deposit); Messer v. Marsh, 191 Iowa 1144, 183 N.W. 602 (1921) (insufficient publication); Koontz v. City of Centerville, 161 Iowa 627, 143 N.W. 490 (1913) (insufficient publication); Clifton Land Co. v. City of Des Moines, 144 Iowa 625, 123 N.W. 340 (1909); Nixon v. City of Burlington, 141 Iowa 316, 115 N.W. 239 (1908) (contents of notice); Owens v. City of Marion, 127 Iowa 469, 103 N.W. 381 (1905) (contents of notice).

[142] See note 138 *supra*.

[143] See Tony Amodeo Co. v. Town of Woodward, 192 Iowa 535, 185 N.W. 94 (1921) (alternative holding).

[144] It would seem that such delegation would be limited to purely administrative functions. See Burge v. Town of Rockwell City, 120 Iowa 495, 94 N.W. 1103 (1903); Young v. County of Blackhawk Township Bd. of Health, 66 Iowa 460, 23 N.W. 923 (1885); Driscoll v. Independent School Dist. of Council Bluffs, 61 Iowa 426, 16 N.W. 291 (1883).

unit[145] acting severally cannot bind their parent body.[146] The doctrine of implied or ostensible agency has very limited application to these political subdivisions because of the public nature of their officials' authority; thus those who deal with them are bound to take notice of such limitations.[147]

III. RECOVERY UNDER DEFECTIVE PUBLIC CONTRACTS

Even if there is a defect in the proceedings leading up to the formation of the contract of a type sufficient to void part of any contract based thereon, this does not mean the whole contract will be unenforceable; if the part not "tainted" can be separated the Court will enforce the contract to that extent.[148] There is also always the possibility that the deviation from the required contracting procedure may be so slight and inconsequential that the Court will not consider the proceedings defective at all[149] and there will be no necessity of showing waiver or estoppel in relation to such irregularity. Substantial compliance with the letter of the statute is all that is required,[150] except in assessment situations[151] and jurisdictional proceedings which require stricter compliance.[152]

A. Ratification

1. Where Applicable

Ratification has been used successfully as a method of sustaining defective contracts in only one type of situation, that is, where a proper authorization from the body having the power to contract in the political unit has not been obtained (a lack of official consent). An analysis of the cases where the principle of ratification has been applied reveals that in each case performance had been completed or at least partly completed and the political subdivision had retained the benefits of such performance.[153] It is therefore

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[145] The body having the power to contract may be designated by a general statute, *e.g.*, IOWA CODE § 386B.7 (1958), or by a statute applicable only to a specific contracting situation, *e.g.*, IOWA CODE § 391A.17 (1958).

[146] Modern Steel Structural Co. v. Van Buren County, 126 Iowa 606, 102 N.W. 536 (1905) (even though a majority acted individually, their action is not binding); Burge v. Town of Rockwell City, 120 Iowa 495, 94 N.W. 1103 (1903) (majority of committee cannot bind city without notice of the meeting to all members of the committee); Mallory v. Montgomery County, 43 Iowa 681 (1875); Herrington v. District Township of Liston, 47 Iowa 11 (1877); Rice & Son v. Plymouth County, 43 Iowa 136 (1876); see City of Sioux City v. Weare, 59 Iowa 95, 101, 12 N.W. 786, 788 (1882) ("where power is entrusted to two or more persons without an express provision that either one alone may exercise it, it can be exercised only by the concurrent action of at least a majority").

[147] S. Goldberg & Co. v. City of Cedar Rapids, 200 Iowa 139, 204 N.W. 216 (1925); see Peterson v. Town of Panora, 222 Iowa 1236, 271 N.W. 317 (1937); Loran v. City of Des Moines, 201 Iowa 543, 207 N.W. 529 (1926); Connolly v. City of Des Moines, 200 Iowa 97, 204 N.W. 284 (1925); State of Iowa v. Young, 134 Iowa 505, 110 N.W. 292 (1907) (dicta); Clark v. City of Des Moines, 19 Iowa 199 (1865); Hull & Argalls v. County of Marshall, 12 Iowa 142 (1861).

[148] See Gjellefald v. Hunt, 202 Iowa 212, 210 N.W. 122 (1926); Patterson v. Baumer, 43 Iowa 477 (1876); *cf.* Kimball v. City of Cedar Rapids, 100 Fed. 802 (C.C. N.D. Iowa 1900); Nelson v. Harrison County, 126 Iowa 436, 102 N.W. 197 (1905) (void to extent of interest therein); Fort Dodge Elec. Light & Power Co. v. City of Fort Dodge, 115 Iowa 568, 89 N.W. 7 (1902); Weitz v. Independent Dist. of Des Moines, 78 Iowa 37, 42 N.W. 577 (1889) (only that part of contract in which a member of board was interested was void); Reichard v. Warren County, 31 Iowa 381 (1871) (amount beyond the limit authorized is void).

[149] Johnson v. Town of Remsen, 215 Iowa 1033, 247 N.W. 552 (1933) [advertising for bid before director's final decision as provided in IOWA CODE § 23.7 (1958)]; Messer v. Marsh, 191 Iowa 1144, 183 N.W. 602 (1921) (one of advertisements for bids was before resolution authorizing the construction of the improvement); Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910) (failure to file contract); Long v. Boone County, 36 Iowa 60 (1872) (failure to record vote).

[150] Tony Amodeo Co. v. Town of Woodward, 192 Iowa 535, 185 N.W. 94 (1921).

[151] Hansen v. Town of Anthon, 187 Iowa 51, 173 N.W. 939 (1919).

[152] City of Keokuk v. Scroggs, 39 Iowa 447 (1874); cases cited note 140 *supra*.

[153] Beck v. Independent Consol. School Dist. of Jefferson Township, 213 Iowa 1282, 241 N.W. 427 (1932); Beers v. Lasher, 209 Iowa 1158, 229 N.W. 821 (1930); S. Goldberg & Co. v. City of Cedar Rapids, 200 Iowa 139, 204 N.W. 216 (1925) (dicta); Hansen v. Town of Anthon, 187 Iowa 51, 173 N.W. 939 (1919); Woods v. Independent School Dist. of Oto, 184 Iowa 902, 169 N.W. 108 (1918); Sawyer v. Wapello County, 152 Iowa 749, 133 N.W. 104 (1911); Hoskins v. Woodbury County, 146 Iowa 165, 124 N.W. 894 (1910); Richards v. School Township of Jackson, 132 Iowa

not surprising that while the court uses the term "ratify" in many instances, it is relying on the underlying theory of equitable estoppel;[154] however, such equitable considerations are not indispensable elements, for the doctrine of ratification can be applied to an executory contract simply on the theory of delayed consent.[155] Only those contracts which the ratifying body had the power in the first instance to make can be ratified.[156] Thus if action of the board or council, such as a resolution of necessity, is required before there exists any power to contract, subsequent ratification of such a contract would be ineffectual.[157] Only those contracts which purport to bind the political subdivision can be ratified by it.[158]

2. When Has There Been a Ratification

Although the Court early announced the principle that the act amounting to ratification must have been done in a corporate capacity by the unit having the power to authorize the contract, and not predicated upon the individual acts of the members of such body,[159] nevertheless the Court's subsequent application of the doctrine of ratification has emasculated this principle and sufficient ratification has been founded upon the factors that members of the body having the power to contract knew of the existence of the purported contract *and* remained silent while this contract was performed[160] *plus* some affirmative act by the body in relation to such contract. Such affirmative action may be an agreement to pay for such performance[161] or allowing a claim for such performance,[162] or merely acceptance of the performance.[163] In addition to the above, of course, ratification can be by formal resolution to that effect[164] or by formal resolution which by necessity implies approval of the contract.[165]

612, 109 N.W. 1093 (1906); Akron Sav. Bank v. School Township of Westfield, 103 N.W. 968 (Iowa 1905); Johnson v. School Corp. of Cedar, 117 Iowa 319, 90 N.W. 713 (1902); Cooper v. City of Cedar Rapids, 112 Iowa 367, 83 N.W. 1050 (1900); Taylor v. Woodbury County, 106 Iowa 502, 76 N.W. 824 (1898); Bellows v. District Township of West Fork, 70 Iowa 320, 80 N.W. 582 (1886); Young v. County of Blackhawk, 66 Iowa 460, 23 N.W. 923 (1885) (no sufficient ratification shown); Stevenson & Rice v. District Township of Summit, 35 Iowa 462 (1872); Athearn v. Independent Dist. of Millersburg, 33 Iowa 105 (1871); Dubuque Female College v. District Township of City of Dubuque, 13 Iowa 555 (1862).

[154] See, *e.g.*, Hansen v. Town of Anthon, *supra* note 153; Marion Water Co. v. City of Marion, 121 Iowa 306, 96 N.W. 883 (1903).

[155] See Young v. County of Blackhawk, 66 Iowa 460, 23 N.W. 923 (1885) (can be a ratification only while contract is executory).

[156] Harrison County v. Ogden, 133 Iowa 9, 110 N.W. 32 (1906); Eggert v. Templeton, 113 Iowa 266, 85 N.W. 19 (1901); City of Sioux City v. Weare, 59 Iowa 95, 12 N.W. 786 (1882).

[157] Lytle v. Ames, 225 Iowa 199, 279 N.W. 453 (1938); see Cooper v. City of Cedar Rapids, 112 Iowa 367, 83 N.W. 1050 (1900); *cf.* Ruan v. Mahaska County, 157 Iowa 48, 137 N.W. 1003 (1912). *But cf.* Dubuque Female College v. District Township of City of Dubuque, 13 Iowa 555 (1862) (contracts made before political corporation has legal existance may be ratified after its incorporation).

[158] Western Publishing House v. District Township of Rock, 84 Iowa 101, 50 N.W. 551 (1891); Long v. Boone County, 36 Iowa 60 (1872).

[159] Young v. County of Blackhawk, 66 Iowa 460, 23 N.W. 923 (1885); Manning v. District Township of Van Buren, 28 Iowa 332 (1869); Taylor v. District Township of Wayne, 25 Iowa 447 (1868).

[160] Mere knowledge of contract together with silence is not a ratification. Marion Water Co. v. City of Marion, 121 Iowa 306, 96 N.W. 883 (1903).

[161] Woods v. Independent School Dist. of Oto, 184 Iowa 902, 169 N.W. 108 (1918).

[162] Beers v. Lasher, 209 Iowa 1158, 229 N.W. 821 (1930); see Stevenson & Rice v. District Township of Summit, 35 Iowa 462 (1872).

[163] Richards v. School Township of Jackson, 132 Iowa 612, 109 N.W. 1093 (1906) (alternative holding) (taking possession); Akron Sav. Bank v. School Township of Westfield, 103 N.W. 968 (Iowa 1905); Cooper v. City of Cedar Rapids, 112 Iowa 367, 83 N.W. 1050 (1900); Bellows v. District Township of West Fork, 70 Iowa 320, 80 N.W. 582 (1886); Stevenson & Rice v. District Township of Summit, *supra* note 162 (alternative holding); Athearn v. Independent Dist. of Millersburg, 33 Iowa 105 (1871); see Hansen v. Town of Anthon, 187 Iowa 51, 173 N.W. 939 (1919); Dubuque Female College v. District Township of City of Dubuque, 13 Iowa 555 (1862). *Contra*, Manning v. District Township of Van Buren, 28 Iowa 332 (1869); Taylor v. District Township of Wayne, 25 Iowa 447 (1868).

[164] Taylor v. Woodbury County, 106 Iowa 502, 76 N.W. 824 (1898); see Richards v. School Township of Jackson, 132 Iowa 612, 109 N.W. 1093 (1906).

[165] Johnson v. School Corp. of Cedar, 117 Iowa 319, 90 N.W. 713 (1902) (alternative holding)

B. Estoppel

A political subdivision cannot be estopped from pleading that the contract is ultra vires and consequently void if that governmental unit simply did not have the authority to make the contract in question.[166] However if the power to contract existed but it has been irregularly exercised, the government unit can be estopped from asserting such irregularity when the contractor has performed in good faith and the benefits of such performance have been accepted and retained by the governmental unit.[167] The Iowa Court on several occasions has implied that the doctrine of estoppel can be applied to public contracts only when the political subdivison is exercising a business power as opposed to a governmental power.[168] But if the power to contract does not exist there simply can be no estoppel and it is immaterial whether the governmental unit was acting in a government or business capacity.[169]

The political subdivision can be estopped even though the power is so irregularly exercised as to release noncontracting parties (that is, landowners to be assessed) from liability,[170] but it cannot be estopped by the fraudulent acts of its officers.[171] When the factor that the political subdivision has got "something for nothing" is not involved (executory contracts) the governmental unit cannot be estopped by unlawful acts of its officers, for everyone is presumed to know the law and thus there can be no reliance.[172]

C. Waiver

Whether the defects in the proceedings upon which a contract is based[173] can be waived by the governmental unit depends upon the same considerations as in estoppel, that is, if the contract was unauthorized there can be no

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(voting down motion to disaffirm); Everts v. District Township of Rose Grove, 77 Iowa 37, 41 N.W. 478 (1889) (ratification of settlement is ratification of underlying contract).

[166] Johnson County Sav. Bank v. City of Creston, 212 Iowa 929, 231 N.W. 705 (1931); Love v. City of Des Moines, 210 Iowa 90, 230 N.W. 373 (1930); Iowa Elec. Co. v. Town of Winthrop, 198 Iowa 196, 198 N.W. 14 (1924); Clifton Land Co. v. City of Des Moines, 144 Iowa 625, 123 N.W. 340 (1909) (dicta); Harrison County v. Ogden, 133 Iowa 9, 110 N.W. 32 (1906); Citizens Bank v. City of Spencer, 126 Iowa 101, 101 N.W. 643 (1904); Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 234, 91 N.W. 1081 (1902); City of Keokuk v. Fort Wayne Elec. Co., 90 Iowa 67, 57 N.W. 689 (1894); Ryce v. City of Osage, 88 Iowa 558, 55 N.W. 532 (1893); Clark v. City of Des Moines, 19 Iowa 199 (1865); *cf.* Burlington, C.R.&M.R.R. v. County of Benton, 56 Iowa 89, 8 N.W. 797 (1881) (public contracting unit can't be estopped from asserting condition precedent). *But see* City of Des Moines v. Horrabin, 204 Iowa 683, 215 N.W. 967 (1927) (alternative holding) (will apply estoppel even though bids were required and none were taken); Turner v. Cruzen, 70 Iowa 202, 30 N.W. 483 (1886) (if consideration can be restored equity will give no relief).

[167] City of Des Moines v. Welsbach St. Lighting Co., 188 Fed. 906 (8th Cir. 1911); Carlson v. City of Marshalltown, 212 Iowa 373, 236 N.W. 421 (1931); Love v. City of Des Moines, *supra* note 166; Duntz v. Ames Cemetery Ass'n, 192 Iowa 1341, 186 N.W. 443 (1922); Hansen v. Town of Anthon, 187 Iowa 51, 173 N.W. 939 (1919); First Nat'l Bank v. City of Emmetsburg, 157 Iowa 555, 138 N.W. 451 (1912); Marion Water Co. v. City of Marion, 121 Iowa 306, 96 N.W. 883 (1903); Johnson v. School Corp. of Cedar, 117 Iowa 319, 90 N.W. 713 (1902) (alternative holding) (even if contract is contrary to public policy). If the contract is executory there can be no estoppel. Marion Water Co. v. City of Marion, *supra* (dicta). For estoppel of landowners see Wingert v. City of Tipton, 134 Iowa 97, 108 N.W. 1035 (1906); Patterson v. Baumer, 43 Iowa 477 (1876); However this area is usually handled under the heading of waiver, see note 176 *infra*.

[168] Carlson v. City of Marshalltown, *supra* note 167; City of Des Moines v. Horrabin, 204 Iowa 683, 215 N.W. 967 (1927); First Nat'l. Bank v. City of Emmetsburg, *supra* note 167; See City of Des Moines v. Welsbach St. Lighting Co., *supra* note 167.

[169] Iowa Elec. Co. v. Town of Winthrop, 198 Iowa 196, 198 N.W. 14 (1924).

[170] First Nat'l Bank v. City of Emmetsburg, 157 Iowa 555, 138 N.W. 451 (1912).

[171] Modern Steel Structure Co. v. Van Buren County, 126 Iowa 606, 102 N.W. 536 (1905).

[172] Modern Steel Structure Co. v. Van Buren County, *supra* note 171; Cedar Rapids Water Co. v. City of Cedar Rapids, 117 Iowa 250, 90 N.W. 746 (1902); Gill v. Appanoose County, 68 Iowa 20 (1885). See note 147 *supra*.

[173] For waiver of *conditions* of the contract, see Capital City Brick & Pipe Co. v. Des Moines, 127 N.W. 66 (Iowa 1910) (can waive strict compliance with the contract); Cedar Rapids Water Co. v. City of Cedar Rapids, 117 Iowa 250, 90 N.W. 746 (1902) (officer must have authority to waive compliance); Burlington, C.R.&M.R.R. v. County of Benton, 56 Iowa 89, 8 N.W. 797 (1881) (waiver can be only by same authority required to enter into the contract).

waiver of this defense by the city.[174] In determining whether the property owner or others concerned must object to these defects in certain specified statutory preceedings[175] or be considered as waiving them, the jurisdictional test of the power of the governmental unit to act is applied,[176] The statute may even spell out that the failure to make a timely objection shall constitute a waiver.[177]

D. Legalizing Act

If the defect in the contractual preceedings is something that the legislature could have dispensed with, then it can be cured by subsequent act of the legislature giving life to what otherwise would be a void contract.[178]

E. Implied in Fact Contract

The reasonable value of the performance under a defective public contract cannot be recovered on the theory of a contract implied in fact or *quantum meruit* when the contract was made without jurisdiction.[179] The rationale now most frequently expounded is that to allow recovery would be permitting the governmental unit to do indirectly what it cannot do directly and thus undermine the purpose of the statutes prescribing the basis upon which the governmental unit can enter into a contract.[180] In addition, the Court is aware of the principle that the necessary implication of a promise to pay cannot arise from acceptance and retention when the performance is of such a nature that the governmental unit had no power or freedom of election.[181] A further principle prohibiting an implication of a promise on the part of the political subdivision is that everyone dealing with a governmental unit is presumed to know the law and thus one performing under an unauthorized contract must be treated as realizing the situation.[182] The mere fact that benefits were retained which could have been returned cannot be the basis of an implied contract, if the contract was made without jurisdiction.[183]

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[174] Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 234, 91 N.W. 1081 (1902) (dicta).

[175] *E.g.*, IOWA CODE §§ 23.3, 391.53-.55, 397.18 (1958).

[176] Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W.2d 310 (1949); *In re* Appeal of Mayden, 156 Iowa 157, 135 N.W. 571 (1912) (contract was unsigned); Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910) (failure of clerk to file contract); Diver v. Keokuk Sav. Bank, 126 Iowa 691, 102 N.W. 542 (1905). Also see cases cited in notes 139-141 *supra*.

[177] *E.g.*, IOWA CODE §§ 391.56, 395.14 (1958).

[178] Iowa Elec. Light & Power Co. v. Town of Grand Junction, 221 Iowa 441, 264 N.W. 84 (1935); City of Ida Grove v. Ida Grove Armory Co., 146 Iowa 690, 125 N.W. 866 (1910); Windsor v. City of Des Moines, 101 Iowa 343, 70 N.W. 214 (1897); Richman v. Supervisors Muscatine County, 77 Iowa 513, 42 N.W. 422 (1889). It is immaterial whether the contract has been performed or not. Windsor v. City of Des Moines, *supra;* see Iowa Elec. Light & Power Co. v. Town of Grand Junction, *supra*.

[179] Horrabin Paving Co. v. City of Creston, 221 Iowa 1237, 262 N.W. 480 (1936); C. W. Roland Co. v. Town of Carlisle, 215 Iowa 82, 244 N.W. 707 (1932); Johnson County Sav. Bank v. City of Creston, 212 Iowa 929, 231 N.W. 705 (1931); Miller v. City of Des Moines, 143 Iowa 409, 122 N.W. 226 (1909) (dicta); Harrison County v. Ogden, 133 Iowa 9, 110 N.W. 32 (1906); Citizens Bank v. City of Spencer, 126 Iowa 101, 101 N.W. 643 (1904); Reichard v. Warren County, 31 Iowa 381 (1871); Manning v. District Township of Van Buren, 28 Iowa 332 (1869).

[180] Horrabin Paving Co. v. City of Creston, *supra* note 179; Reichard v. Warren County, *supra* note 179; Manning v. District Township of Van Buren, *supra* note 179.

[181] Reichard v. Warren County, 31 Iowa 381 (1871); see Modern Steel Structural Co. v. Van Buren County, 126 Iowa 606, 102 N.W. 536 (1905); Ketterman v. City of Ida Grove, 120 N.W. 641 (Iowa 1909).

[182] Reichard v. Warren County, *supra* note 181; see cases cited in note 172 *supra*.

[183] See Manning v. District Township of Van Buren, 28 Iowa 332 (1869). However, in the remainder of the cases where recovery under an implied contract was denied on the basis of a nonjurisdictional contract, the benefits were of such a permanent nature that they could not be returned and were so situated that there was no choice but to use the benefits.

If the contract is to be paid for by assessments, then the application of the implied contract theory in addition to the above considerations is further complicated by the fact that the circumstances do not warrant an inference of a promise as to abutting landowners who, although they receive the benefits, have had no contractual or purportedly contractual relations with the contractor[184] nor do such circumstances warrant the inference of a promise by the governmental unit when it did not purport to bind itself to pay for the improvement.[185]

Even though the underlying contract is void the governmental unit, if it chooses to do so, can pay the reasonable value of the performance it has received.[186]

If the contract was one in which the power to contract existed, but was irregularly exercised,[187] recovery can be obtained for the reasonable value of such performance.[188] But since such a situation would generally be factually identical to the situation covered by the doctrine of estoppel the latter method is logically used, for under the estoppel theory recovery is measured by the express contract, while under the implied contract theory recovery is limited to the reasonable value of the performance.[189]

F. Quasi-contract

Recovery based upon a contract implied in law or unjust enrichment which is measured by actual benefit realized and retained by the political subdivision[190] will not be allowed when the underlying contract is void (that is unauthorized), for to allow such recovery would be against public policy and nullify the law by invasion.[191] Since if the contract was not void, recovery could be attempted on the basis of estoppel for the contract price[192] or for at least the reasonable value under a theory of an implied in fact contract,[193] both of which include profit for the contractor, quasi-contractual recovery is not attempted as a practical matter, for under this theory there can be no profits recovered.[194] Theoretically, however, quasi-contractual recovery is available when the contract is not authorized but is merely irregular.[195]

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[184] Snouffer & Ford v. Grove, 139 Iowa 466, 116 N.W. 1056 (1908).

[185] Citizens Bank v. City of Spencer, 126 Iowa 101, 101 N.W. 643 (1904) (alternative holding). *But cf.* note 203 *infra*.

[186] Nelson v. Harrison County, 126 Iowa 436, 102 N.W. 197 (1905).

[187] For attempted recovery of reasonable value of *nonsubstantial performance* under a valid public contract against the *land owners* see Sioux City v. Western Asphalt Paving Corp., 233 Iowa 279, 6 N.W.2d 275 (1937) (dicta) (no recovery allowed, especially when contractor is guilty of fraud); Snouffer & Ford v. City of Tipton, 150 Iowa 73, 129 N.W. 345 (1911) (no recovery, for assessments are forced contributions and can be allowed only in conformity with the contract). *But see* Crawford v. Mason, 123 Iowa 301, 98 N.W. 795 (1904). For attempted recovery of *reasonable* value of *nonsubstantial performance* from *political unit* see Snouffer & Ford v. City of Tipton, *supra* (no recovery against city); Crawford v. Mason, *supra* (no recovery against city); see Sioux City v. Western Asphalt Paving Corp., *supra* (dicta).

[188] Carlson v. City of Marshalltown, 212 Iowa 373, 236 N.W. 421 (1931) (dicta); City of Ida Grove v. Ida Grove Armory Co., 146 Iowa 690, 125 N.W. 866 (1910) (dicta); Miller v. City of Des Moines, 143 Iowa 409, 122 N.W. 226 (dicta); *cf.* Hansen v. Town of Anthon, 187 Iowa 51, 173 N.W. 939 (1919).

[189] See note 167 *supra*.

[190] C. W. Roland Co. v. Town of Carlisle, 215 Iowa 82, 244 N.W. 707 (1932).

[191] Horrabin Paving Corp. v. City of Creston, 221 Iowa 1237, 262 N.W. 480 (1936).

[192] See note 167 *supra*.

[193] See note 188 *supra*.

[194] Johnson County Sav. Bank v. City of Creston, 212 Iowa 929, 231 N.W. 705 (1931); Town of Hartley v. Floete Lumber Co., 185 Iowa 861, 171 N.W. 183 (1919).

[195] Town of Hartley v. Floete Lumber Co., *supra* note 194 (recovery for benefits conferred under voidable contract).

G. Reclaiming the Subject Matter of the Contract

If all other means of recovery fail, the contractor may be able to reclaim the subject of the contract even if it has been attached to the freehold, depending on whether the title to his performance has passed to the governmental unit.[196]

H. Recovery of Money Paid Under Defective Contracts

If the contract has been performed by both parties, the governmental unit cannot recover the money it has paid even if the contract was unauthorized (void) or irregular (voidable). This has been based upon general equitable considerations[197] or upon the rule that money paid under mistake of law cannot be recovered.[198] If the case goes off on equitable principles alone there is the possibility that any excess paid over the reasonable value of the performance may be recovered.[199] The soundness of denying recovery solely on the basis of an arbitrary principle such as "money paid under mistake of law cannot be recovered" has been questioned,[200] and the more recent cases rely solely on equitable principles.

I. Liability of Political Subdivision for Invalid Assessments

Deviating from the required statutory procedure during the precontracting stage or during the letting of the contract often causes both the contract, and any assessment levied to pay for performance under the contract, to be invalidated.[201] In some circumstances the procedure followed has been considered so defective as to invalidate attempted assessments, but the contractor has been able to recover on the contract against the public body by way of waiver or estoppel.[202] But in this situation, when the contract provides for payment to the contractor solely in assessment certificates and because the assessment is invalid any certificates would be worthless, what can the contractor recover? On several occasions the Court's answer has been that the public body itself is liable for the amount of the assessment, based on an implied promise to take the steps necessary to levy a valid assessment.[203] If the inability to levy a valid assessment is due to a substantial

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[196] Snouffer & Ford v. City of Tipton, 161 Iowa 223, 142 N.W. 97 (1913) (contractor removed street he had constructed); *cf.* Guthrie v. McMurren, 167 Iowa 154, 149 N.W. 71 (1914).

[197] City of Des Moines v. Horrabin, 204 Iowa 683, 215 N.W. 967 (1927); Miller v. City of Des Moines, 143 Iowa 409, 122 N.W. 226 (1909); Kagy v. Independent Dist. of West Des Moines, 117 Iowa 694, 89 N.W. 972 (1902).

[198] Painter v. Polk County, 81 Iowa 242, 47 N.W. 65 (1890); Long v. Boone County, 36 Iowa 60 (1872).

[199] See Miller v. City of Des Moines, 143 Iowa 409, 122 N.W. 226 (1909); Kagy v. Independent Dist. of West Des Moines, 117 Iowa 694, 89 N.W. 972 (1902).

[200] The principle was first questioned in King v. Mahaska County, 75 Iowa 329, 39 N.W. 636 (1888), where the Court allowed set off of payments made under void contracts; then in Heath v. Albrook, 123 Iowa 559, 98 N.W. 619 (1904), the principle was held inapplicable because not only was the contract unauthorized, but the actual procedure used for issuing the payment was unauthorized. In State of Iowa v. Young, 134 Iowa 505, 110 N.W. 292 (1907), the principle was held insufficient to prevent recovery of money previously paid, at least to a public official. *Accord*, Peet v. Leinbaugh, 180 Iowa 937, 164 N.W. 127 (1917).

[201] *E.g.*, Jackson v. City of Creston, 206 Iowa 244, 220 N.W. 92 (1928). It is through assessment contests that the greatest number of cases concerning public contracts arise.

[202] First Nat'l Bank v. City of Emmetsburg, 157 Iowa 555, 138 N.W. 451 (1912).

[203] Barber Asphalt Paving Co. v. City of Des Moines, 191 Iowa 762, 183 N.W. 456 (1921); Gilchrest & Co. v. City of Des Moines, 131 N.W. 776 (Iowa 1911); *cf.* Western Asphalt Paving Corp. v. City of Marshalltown, 203 Iowa 1324, 214 N.W. 687, 13 IOWA L. REV. 111 (1927); Younker v. City of Des Moines, 101 N.W. 1129 (Iowa 1905); Iowa Pipe & Tile Co. v. Callanan, 125 Iowa 368, 101 N.W. 141 (1904); Fort Dodge Elec. Light & Power Co. v. City of Fort Dodge, 115 Iowa 568, 89 N.W. 7 (1902); Polk County Sav. Bank v. State of Iowa, 69 Iowa 24, 28 N.W. 416 (1886); Scofield & Cavin v. City of Council Bluffs, 68 Iowa 695, 28 N.W. 20 (1886); Bucroft v. City of Council Bluffs, 63 Iowa 646, 19 N.W. 807 (1884); Note, 13 IOWA L. REV. 81 (1927). It should be noted that the governmental unit not only has an obligation to take these steps

failure of performance by the contractor, the public body could not be held liable on such an implied promise.[204]

CONCLUSION

There are many pitfalls facing those who contract with political subdivisions. If the contract is unauthorized, because the subdivision lacks power to enter into it, the only means of recovery are a special act of the legislature or, perhaps, a partial recoupment by reclaiming the performance under the contract. Unauthorized contracts can arise not only from a lack of power to contract in regard to the subject matter of the contract, but, under certain circumstances, from a failure to follow the required statutory procedure. Even if the deviation from the required statutory procedure is not such as will render the contract a nullity, as long as it is executory on both sides the resulting contract may be unenforceable and subject to rescission or its performance enjoinable by disgruntled taxpayers or landowners.

At the present time the determination of the required statutory procedure, both before and during the negotiation and formation of the contract, is elusive and difficult because of the fragmentation of these provisions throughout the Code. The statutory scheme now in effect has separate provisions based in general upon the subject matter of the contract, each being applicable to a single designated political subdivision. These provisions many times appear to overlap while at the same time they seem to leave other possible contracting situations uncovered. No two provisions are the same; this variance in content seems for the most part to be purely arbitrary. In light of the serious consequences that may follow from failure to follow the statutory procedure, it would seem that a general statue applicable to *all* contracting situations of *all* political subdivisions is needed.

JAMES E. KNOX, JR. (August 1961)

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but must make a reasonable effort to do so, within a reasonable time. Turner Improvement Co. v. City of Des Moines, 155 Iowa 592, 136 N.W. 656 (1912); Morgan v. City of Dubuque, 28 Iowa 575 (1870).

[204] Snouffer & Ford v. City of Tipton, 150 Iowa 73, 129 N.W. 345 (1911); Crawford v. Mason, 123 Iowa 301, 98 N.W. 795 (1904).

CASE NOTES

DAMAGES—In an action for the wrongful death of a minor child, may the parent or parents of such child recover for the loss of possible contributions the deceased child might have made after reaching age twenty-one?

Plaintiff's fifteen year-old daughter was killed in an automobile accident allegedly caused by the defendant's negligence in failing to keep a county road reasonably fit and safe for travel, in violation of its statutory duty. Plaintiff, as special administrator for the decedent's estate, brought an action for wrongful death. The trial court granted defendant a new trial on the ground that the judge had incorrectly charged the jury to consider loss of possible contributions, due to parental dependency, which the minor child might otherwise have made subsequent to her twenty-first birthday. Plaintiff appealed. *Held,* three judges dissenting, that recovery could be had for loss of possible contributions, due to parental dependency, which the minor child might otherwise have made even subsequent to her twenty-first birthday. *Thompson v. Ogeman County Board of Road Commissioners,* 357 Mich. 482, 98 N.W.2d 620 (1959)

At common law there was no cause of action for damages for the wrongful death of a minor child.[1] The right to maintain an action to recover damages caused by wrongful acts first arose in England with the passage of the Lord Campbell's Act in 1846.[2] Today, in practically every jurisdiction, the right to recover for damages caused by the wrongful death of decedent depends upon a statutory provision.[3]

The great majority of jurisdictions allow the parent or parents of the wrongfully killed minor child to recover for loss of services of such child during minority and also allow the parent or parents to recover damages for the loss of possible contributions which the child may have made to them after reaching majority, less the expenses of educating, maintaining, and raising such child.[4] The main point of conflict between jurisdictions concerns the question of whether the parent can recover for loss of possible contributions the child may have made after reaching majority.

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[1] RESTATEMENT, TORTS § 925 (1939).

[2] Ford v. Maney's Estate, 251 Mich. 461, 232 N.W. 393 (1930); RESTATEMENT, TORTS § 925 (1939); PROSSER, TORTS 710 (2d ed. 1955).

[3] PROSSER, TORTS 710 (2d ed. 1955). *E.g.* MICH. STAT. ANN. § 27.711 (Supp. 1957): ". . . whenever the death of a person or injuries resulting in death, shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony, all actions for such death, or injuries resulting in death, shall hereafter be brought under this act." See also: ILL. REV. STAT., c. 70, § 1 (1953) (nearly identical with the Michigan statute); MINN. STAT. § 573.02(1) (1957) ("When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 2 may maintain an action therefor if the decedent might have maintained an action, had he lived, for an injury caused by such wrongful act or omission. . . ."); WIS. STAT. § 331.03 (1955) (identical with the Michigan statute except that the words "and although death shall have been caused under circumstances as amount in law to felony" are omitted and the following is added: "provided that such action shall be brought for death caused in this state.").

[4] Dawkins v. Chavez, 132 Colo. 61, 285 P.2d 821 (1955), affirming McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953), which held that the net pecuniary loss would include what the parents might have expected to receive from the continuation of the daughter's life, less the cost of properly *maintaining* and *educating* her.