

A. ESSENTIAL ELEMENTS OF A RESOLUTION:

The "resolution" consists of 2 parts: Cover Memorandum and the Resolution itself.

1.) The Cover Memorandum - This serves several purposes:

- i. It explains the purpose and terms of the contract.
- ii. It contains the reasons WHY the Board of A&C should adopt this resolution (*i.e.-the sales pitch*)
- iii. To record your compliance with the laws governing procurement.
- iv. To explain any "history" related to this contract that the Board of A&C wants to know about. (*e.g. - in contract extensions, it must explain: when the original contract was adopted; how many extension options were granted in the original resolution; how many of those extensions have already been exercised to date.*)
- v. Unless there is discussion of the contract on the record at the A&C meeting, this is the only record of WHY the Board of A&C authorized this contract, should there ever be a legal challenge to the award of the contract by the Board.

2.) The Resolution itself -

- i. This is the legal authorization that allows the County to enter into the contract as required by the County Charter.
- ii. It should only contain the essential elements of the contract and the specific action(s) you are asking the Board of A&C to take. (*i.e. - all the other detail goes in the cover memorandum*).

B. CONTENTS OF AN A&C RESOLUTION

GENERAL RULE: THE RESOLUTION MUST STATE AS SUCCINCTLY AS POSSIBLE ALL SALIENT FACTS REGARDING THE PROPOSED CONTRACT, WHICH ARE NECESSARY FOR THE BOARD TO MAKE AN INFORMED DETERMINATION.

A material provision or term of a proposed agreement that is omitted from a Resolution is not authorized, except in the case of public bids under Section 103 of the General Municipal Law, where the Board is deemed to have knowledge of the Bid Specification (providing the bid was conducted by the Board). However, in practice, the Board still wants to see the essential elements of the winning bid in the Resolution.

A RESOLUTION MUST CONTAIN THE FOLLOWING:

- 1. Who** - state the correct legal name, which usually includes the organizational structure of the contractor (e.g., Inc., LLC, LLP, etc.).
- 2. What** - clearly identify the purpose or subject matter of the proposed contract and what is sought to be accomplished (i.e.-scope of services).
- 3. Where** - identify the various County Departments and/or locations on which the contractor's activities will take place or have an impact, if location of the work is a critical element of the deal (e.g.-janitorial contracts).
- 4. When** - the time period during which the activities that are the subject matter of the contract must take place. At a minimum, this includes the term of the Agreement. It also can include other key dates, if time is of the essence or if it is the intent of the parties to do the job in phases, where meeting interim deadlines is critical (such detail can be in the scope of work.).
- 5. How Much** - All cost information must be explicitly set forth, such as whether it is paid as a lump sum, periodically, on a time and materials basis (including the specific hourly costs and whether there is any mark-up on materials) or at a specific hourly rate. The total amount not to exceed value of the contract must be stated, if the payment is not fixed amount. Payment of incidental costs, particularly in consulting or other services contracts must be spelled out.
- 6. If Board of Legislators Approval was required for the Agreement**, (e.g. for Intermunicipal Agreements, for certain leases and for contracts with the Westchester County Health Care Corporation) the Cover Memorandum

should mention the Act or Local Law number and the date it was adopted by the BOL.

7. In Public Bidding Situations:

The General Rule is that municipal procurements of goods and services must be publicly bid. The rules for bids are very formal and are found in the New York State General Municipal Law and the County Charter. The Charter makes the Board of A&C responsible for conducting public bids, except for those purchases of materials, supplies and equipment that are specifically the responsibility of the County's Purchasing Agent.

Compliance with the Public Bidding Laws: If you are doing a contract that must be publicly bid, you first have to issue of public advertisement of the bid. A resolution must be prepared to seek *Authority to Advertise* from the Board of A&C.

The Authority to Advertise Resolution must follow a specific format as there are certain legal requirements.

However, you don't need to do a resolution for permission to advertise for non-bid contracts, such as an RFP for professional services.

If you are doing an *authority to advertise resolution*, you should consider stating what the *Performance Security for the contract will be on the Resolution page. Performance Security is required under the County Charter.*

Section 161.11(b) of the County Charter requires that

"The successful bidder must give security for the faithful performance of his contract, the adequacy and sufficiency of which shall be approved by the Board of Acquisition and Contract."

Note: This requirement applies to non-bid contracts as well.

The Law Department has interpreted this to mean that *if your resolution doesn't contain a clause on performance security, it has to be 100% of the contract amount.* This is because the Charter requires it and unless A&C approves a lesser amount, Law will insist that it be 100%. If circumstances require you to have *less than 100%*, then you *must have a clause in the contract award resolution that sets the amount.*

If you choose a lower amount of security than 100%, you should be prepared to defend why it is a lesser amount. At a minimum, it should be adequate to provide sufficient money for emergency provision of services after the contractor defaults and also should include the costs of re-bidding the contract, if any.

Bid Sheet: If you are doing a resolution to award a contract that was publicly bid, you must *attach* the bid sheet *in back of the award resolution*. This is a list of all the companies that bid and the price of their bids. The Bid Sheet should **confirm that the contract is going to the lowest bidder, unless** the cover memorandum and the resolution *explain that the lowest bidder was not responsible or was not responsive to the bid*.

Also, if you receive *less than 3 bids*, the Board of A&C requires an *appropriate explanation* of the circumstances resulting in the lack of bidders should be annexed *in back of the bid sheet*.

Special Circumstances: When it comes time to do your contract award resolution for a public bid, the contract *must be awarded to the Lowest Responsible Bidder, except in rare and limited circumstances*. If the contract award is going to someone other than the lowest bidder, the cover memo to the Award resolution must explain why and must cite *one or both* of the *only 2 legal exceptions* for doing so: (a) the low bidder's bid was *not responsive* to the bid specification; (b) the low bidder is *not a responsible bidder*.

Non-responsive bids mean that the apparent low bidder has *not responded to some material element of the bid specification*. The Board of A&C does *not* have to *offer* the apparent low bidder *notice and an opportunity for a hearing*.

If this occurs and you want to award to the second lowest bidder or get permission to reject the bids and re-advertise, the cover memo for the resolution to seek permission to do this must specify the elements of the bid that were not responsive to the bid specification, in order to avoid a lawsuit and getting the resolution pulled at Pre-Board.

Non-responsible bidder means the apparent low bidder is either *not financially responsible* (i.e.-doesn't objectively have the financial resources to carry out the job); has *not performed past work in a satisfactory manner; lacks the experience* necessary to do the work; has been *convicted of a crime* indicating *corrupt conduct* that is related to the work that the contract calls for, etc.

If the low bidder is not responsible and you want to award to the second lowest bidder or get permission to reject the bids and re-advertise, you must cite the reason or reasons why the lowest bidder was not responsible in the cover memo of the resolution or risk a lawsuit and having your resolution pulled at Pre-Board.

Under case law, the apparent low bidder is entitled to ***notice and an opportunity to be heard before the Board of A&C if you award the contract to the second lowest bidder.*** You also must ***be prepared for a hearing before the Board of A&C on this issue, if the apparent low bidder requests it.***

It is your Department's job to make the Secretary of the Board of A&C aware of such a situation. This is so that the proper notice can be sent out to the apparent low bidder, in advance of the date that the Board is scheduled to meet on the resolution to declare the low bidder not responsible and award the contract to the second lowest bidder, who is responsible.

Also, check with the Law Department in these circumstances!

- 8. In Situations Where the Public Bidding Laws Don't Apply:** In all circumstances where you don't have to do a public bid, the procurement is governed by the County Procurement Policy. The cover memorandum to the Award resolution ***must include a section that describes how the Department complied with the applicable requirements of the County Procurement Policy in selecting the vendor*** that the Department is asking the Board of A&C to award the contract to.

MISTAKES TO AVOID

- 1. Don't assume that last year's resolution was O.K., because it passed last year.** The biggest mistake one can make is to simply copy last year's resolution, because it passed last year. The ***law or Administration policy may have changed since then.***

On the other hand, it may have passed with a mistake last year, because the mistake was either missed at PreBoard or because a policy decision was made to let it go through despite the mistake. Therefore, it is important to take a fresh look at each resolution!

2. **Failure to mention the Procurement Policy in Matters not covered by public bidding requirements.** If your contract is not subject to public bidding, and is subject to the Procurement Policy, the cover memo to the Award resolution must say how you complied with the procedures of that Policy.

Even though it is called a policy, *the Procurement Policy is a law* adopted by the Board of Legislators to comply with State law that requires adoption of a local procurement policy for procurements not subject to the State's public bidding law.

If the procurement is exempt from such procedures under the exemptions listed in *Section 3 of the Policy*, then there must be a sentence in the *cover memorandum* stating that the procurement is exempt *which cites the specific exemption that you are relying on*. If you are relying on more than one exemption, cite them all.

3. **Failure to give specific information or make certain recommendations required by the Procurement Policy.** In addition, you must carefully read the provisions of the Procurement Policy that are applicable to your procurement, because they sometimes require you to give certain information or make certain recommendations to the Board of A&C.

For example:

In a Competitive Procurement with total contract value estimated to be \$75,000 or more under Section 6 of the Procurement Policy (i.e. those that require you to do a formal requests), the Department must recite *"the top-ranked proposals in order of preference and shall, if the recommendation is for a proposer who did not offer the lowest net cost or, if a net revenue is proposed, the greatest net revenue, explain why the proposed contract award is a prudent and economic use of public moneys in the best interests of the County."* [section 6(i)] . This information must go in the cover memo to the Award resolution.

For non-bid contracts below \$75,000 under Section 5 of the Procurement Policy, the cover memo to the resolution must either say that the vendor being awarded the contract offered the lowest net cost, or if revenue was projected, then the highest net revenue proposal. If you do not pick the lowest net cost vendor, you must state that and then *"explain why the proposed contract award furthers the purposes of" the Procurement Policy.*" [section 5(c)] You have to put this language in the cover memo to the Award resolution.

4. **Failure to recite the proper exemption from Procurement Policy.** Section 3 of the Procurement Policy lists numerous exemptions for specific types of

contracts, which permit you not to follow the procedures of the Procurement Policy. If you didn't follow the procedures for procurement set out in the procurement policy to select the proposed contract vendor, then the cover memorandum to the Award resolution must say that and recite the specific exemption in Section 3 of the Policy that you are relying on. If in doubt, call the Law Department.

5. **Failure to comply with the Administration's policy on extensions.** At the beginning of the Spano Administration, it was determined that the Administration should have the policy discretion to decide whether it is preferable to renew a contract or to instead rebid/re-procure those goods and/or services. To allow the Administration the time to make this decision, you *must submit the item to PreBoard well in advance of the time that the contract will expire so as to allow sufficient time for a new bid or a new procurement.* Six months is a good rule of thumb. However, complicated RFPs or procurements that will involve SEQRA review should be given longer time frames, because the process can take a year or more. Exemptions from this rule require 9th floor waiver.

6. **Failure to show that extension of the contract was authorized in the original contract.**

You cannot extend a contract that was publicly bid, unless the original bid specification contained options for extension or renewal.

For *non-bid contracts*, the *Law is not as clear*. The Procurement Policy does not have an explicit restriction on extensions or renewals, like the case law for public bids.

However, it is generally accepted that public policy would dictate conducting a new procurement when a contract expires. The *underlying principle is that government should regularly go out and test the markets to get the best deal possible for the taxpayer.*

For this reason, the *Board of A&C has a policy that unless the prior contract award gave the County the option to extend it, you must do a new procurement.* If you are late in doing a new RFP and the County must have this service, the Board will sometimes allow you to renew for a month or two to carry you over, but don't count on it.

In addition, the Board of Legislators (which reviews the A&C calendar each week) usually requests all the prior A&C resolutions authorizing the original contract and any prior extensions that were granted. To save the Board from having to make requests to each Department for these, *Departments are required to submit copies of such prior approved resolutions with the new resolution to authorize an extension.*

7. **Information Technologies/Telecommunications:** If a resolution has anything to do with information technologies (services, hardware and software) or telecommunications, *the Chief Information Officer must also sign the resolution* (i.e. - you can't procure these things unless Department of Information Technology has OK'd it.) There are certain exceptions, like the D.A.'s Office, which has a separate system and isn't under the County Executive's jurisdiction and WCC, which has been granted certain authority. Everybody else has to go to the CIO first.
8. **Typographical or Grammatical Errors.** Proof your resolutions before you submit them to Pre-Board. Don't rely on Spell-Check, it's not foolproof.
9. **Grant Agreements.** The Board of A&C *authorizes contracts, not whether the County accepts grants*, which is done by the County Executive and/or the Board of Legislators in accordance with the Charter. Accordingly, resolutions that authorize the County to accept the grant will be rejected. If the grant requires signing a grant agreement, then you seek permission to sign that contract from A&C. **Please Note:** For such resolutions, the *submitting Department must complete a Grant Financing Form, which is approved by the Finance Department*. Three copies of this form must be submitted to the Board of A&C with the resolution.
10. **Resolutions that Authorize the Board of A&C to do something it is legally empowered to do.** The Board of A&C's powers come from and are set out in the Laws of Westchester County. It *does not have to adopt resolutions to authorize it to do something*. This mistake often occurs in resolutions to amend a prior resolution or to amend a contract. For example, *it is a mistake to say "RESOLVED, the Board of A&C is hereby authorized to amend the resolution dated..."* Rather, you just say, *"RESOLVED, the resolution dated X is hereby amended to read as follows: ..."*
11. **Amending Prior Resolutions vs. Amending Prior Agreements.** When there has been a change in circumstances requiring an amendment, the resolution *must state whether the previously authorized agreement was signed or not*. If it *was signed*; then you must get authority *to amend the agreement*. If it was *not signed*, then you seek authority *to amend the prior resolution*.
12. **Consistency of the Re: clause, the body of the memorandum and the resolution.** One of the most common errors is inconsistency of some material term of the agreement that is recited in the Re: clause of the memorandum, the body of the memorandum and the resolution. Please proof your resolutions before submission for consistency in all of these locations.

13. **Does the matter fall within the Board of A&C's Jurisdiction.** The Board of A&C *must approve all contracts except* those delegated to *the Bureau of Purchase and Supply or short form* contracts delegated to the Heads of Departments. Contracts that qualify under *those two exceptions do not go to A&C*. There are some *exceptions where/or policy reasons* we submit matters that would otherwise be short-forms to the Board (e.g. licenses for special events that might create noise at Playland).
14. **Resolutions that authorize the County Attorney to approve the agreement.** Another common error is to include a clause in the resolution that A&C authorizes the County Attorney to approve the contract. The County Attorney is required to approve all contracts under the County Charter, so *such clauses are legally meaningless and should be eliminated*. We typically see this in old resolutions that Department's have simply copied.
15. **Authority to Advertise missing required language.** Public bids have to be published in a newspaper. The resolutions for authority to advertise have certain requirements that have been set by law and administration policy. (e.g. - see Joan O'Neill 12/19/96 memo on performance bond and WBE/MBE copy annexed) language requirements. Also, you must list all newspapers that you intend to publish in.
However, newspaper publications cost a lot of money. *Unless there are special circumstances*, such as trying to reach minority-owned businesses or where a law requires you to publish throughout the entire County, then it is the *Administration's policy that publication be limited to the Southern Edition of the Journal News*.
16. **Date on cover memo and reference to such date at the top of the resolution page are inconsistent.** Some of you like to include a line at the top of the resolution that says "Upon a recommendation of the Commissioner of _____ dated _____". That date often doesn't agree with the cover memo where the resolution has been revised. A date on the resolution page in the introduction is not legally required, so just leave it out and avoid this problem.
17. **Failure to comply with SEQRA.** In those circumstances where the contract could have a significant impact on the environment and compliance with the State Environmental Quality Review Act ("SEQRA") has not occurred previously, then the Board of A&C is required to comply with SEQRA. If your contract could have an impact on the environment, SEQRA compliance can mean delays of from a couple of weeks (i.e. - to prepare a *Negative Declaration*), to over a year, if you have to do *a full environmental impact statement*. Therefore your contract could have *any conceivable impact on the environment*, check with the Planning Department before you submit it to A&C, to determine if you need to comply with SEQRA.

18. **MacBride Principles:** Under Act No. 56-1999, approved by the Board of Legislators, we now have to comply with the MacBride principles designed to promote nondiscrimination in the workplace in Northern Ireland. This was an amendment by the Board of Legislators to the Procurement Policy. If your procurement is *subject to the Procurement Policy* (i.e. - it is not subject to the rules of State Law, such as for competitive bidding or a purchase off of a State contract, and it is not exempt under one of the exemptions found in section 3 (a) of the Policy), then your *resolution must recite that the contractor is in compliance with the MacBride Principles*. The contractor or consultant must sign a certification of such compliance prior to the adoption of the award resolution, which is required to comply with a County local law.
19. **MBE/WBE Statement in Bids and Requests for Proposals:** Section 308 of the Laws of Westchester County states that it is the goal of the County to "use its best efforts to encourage, promote and increase participation of business enterprises owned and controlled by persons of color or women (MBE/WBE) in contracts and projects funded by all departments of the County... ". Toward that end, this law requires that a statement be included in all County advertisements for bids and Requests for Proposals that references this law and the policy and goals enunciated in this law. Note: This language also has to go into any RFP advertisements, but you don't need A&C approval to advertise an RFP.
20. **Don't Reiterate Any Terms of the Original Contract in a Contract Amendment Resolution:** The first Resolved Clause in a contract amendment resolution should only include language authorizing the County to amend just the terms of the contract that you intend to amend. The next Resolved Clause should say that "RESOLVED, that all other terms and conditions of the original agreement shall remain the same." *Do Not repeat terms of the original agreement that are NOT being amended*. Reiterating a term of the original contract in a RESOLVED clause can have unintended consequences. For example, if your original contract had three one-year extensions and you reiterate the three extensions in a RESOLVED clause to exercise that first extension, you have just added an additional year to your permitted extensions. (i.e.-this extension, plus three more).
21. **Failure to Recite the Legal Name of the Company in the Resolution:** Many small businesses establish the name that they do business under before incorporating it with the NYS Secretary of State and go by that name instead of the legal name of their corporation. *The A&C resolution must award the contract to the legal name of the company*. This "DBA" or Doing Business As name cannot be used alone in the A&C resolution, but *can only be used if you also recite the legal name of the corporation* (e.g. XYZ Corporation d/b/a John

Jones Plumbing and Heating). Make sure you ask small businesses what the legal name of their business is, because that MUST be in the A&C resolution. If it is not, you will have to go back for a name change resolution, because the Law Department will not be able to sign off on the contract.

RESOLUTION SUBMISSION PROCEDURE

1. Submit by Wednesday at 12 p.m. Note: Follow Acquisition and Contract Schedule for PreBoard and A & C Meeting dates to know when Resolution will be approved.
2. Each resolution must have a cover memorandum, as described above. Submission should be electronically through OnBase.
3. Funding information must be completed on the last page of the resolution and the entire funding code must be included.
4. Bid advertisement resolutions must include: a copy of the bid package; list of bidders-who purchased the bid specs- which appear on the official tab sheet must be submitted no later than the Friday preceding bid opening.
5. Extensions or renewals must include reference to the original contract resolution that authorized an option for extension or renewal. A copy of the prior resolution should be attached to the original submitted to the Secretary of the Board of Acquisition and Contract.
6. You must provide the Board of A&C with the contact person responsible for each and every resolution and their phone number. If that person is not going to be available on Friday, when Pre-Board meets, you should also include the name of a backup person for that day.

A&C Resolutions - How to Review for Budgetary Information

1) Basic Fiscal Information Requested in the Body of the Letter and in the Resolution:

- a) When reading Resolutions, check to make sure that all fiscal information makes sense and that all amounts add up properly. This means that if an annual contract is to be paid monthly, then the stated monthly amount must add up to the stated annual amount. If the Resolution is an amendment to a prior Resolution then the current Resolution must make reference to the original contract Resolution and all other prior amendments. Again all of these must add up to the not to exceed amount stated in the current Resolution.

Example:	Original Contract Amount (Date)	\$100,000
	First Amendment (Date)	10,000
	Second Amendment (Date)	<u>10,000</u>
	Total	\$120,000

The dollar amounts stated in the letter must also equal the dollar amounts stated in the Resolution.

2) The Budget Box -

What must be filled in for line (1) of the Budget Box:

Fund	3 digit code represents fund that the Agency is in
Agency	Department's 2 digit code
Capital Project/Org.	4 digit Capital Code or Departments 4 digit Organization code
Object/Sub-object	4 digit account code - sub-object would include 2 additional digits
Trust Account	This is the "T" number assigned by Finance to each and every trust.
Activity	This must be filled out if Resolution is for a Trust.
Dollars	Must be identified for each budget year (Jan.-Dec.). This is important so that it can be determined if Funds are available in the current budget year, and how much will be needed for future years. A different line is required for each fiscal year, <u>only</u> if there is a cost escalation in each year (making 5 years listed). If the annual costs are the same, only one line is needed.
Budget Funding Year:	Years that the dollars are/will be budgeted in.
Start Date:	Date Agreement, Contract, Grant, etc. starts.
End Date:	Date Agreement, Contract, Grant, etc ends.

A&C Resolutions - How to Review for Budgetary Information

Funding Source: Must identify if funds are Tax Levy, Federal Aid, State Aid or other. This can be identified by either stating in each line in dollars, in percentages, or an "X" (if 100% in the listed categories). This should be at least identified for the current year. If funding sources is different in future years that must be noted.

NOTE: The Dollar amount in the Budget Box is for that amount not previously authorized. For example if the resolution is to amend a previous resolution then only the amended dollars should be in the Budget Box.

If the resolution is to extend the term of an agreement or contract then the Budget Box is to be left blank. If the resolution is for final acceptance then the dollar section of the Budget Box should be left blank.

3) Analytical Phase - This is the research part. —

1) Are funds available?

a) If Not - how will this be paid for?
Where are funds coming from?
Budget transfer must be done before Resolution can be put on calendar.

2) Is the Contract to be entered into Budgeted?

a) If Not - why?
b) Where are funds coming from?
If budget transfer is needed it must be done before Resolution can be put on calendar.

3) If the Resolution is for a Grant then this must be compared to the Grant section in the Budget Book.

a) Is the Grant in Budget Book? If Not - why?
b) Is grant different from Budget Book? If So - why?
c) If County contribution is required, is it budgeted?
If Not - are funds available? Where will funds come from?

4) Authority to Advertise - Though no dollars are needed at this time, you must check to make sure the work that is being advertised for is budgeted.

a) If Not - what is the estimate, and where will funds come from?

A&C Resolutions - How to Review for Budgetary Information

This phase is what you should be writing on the Resolution as your notes.

An ok on the Resolution means that:

- funds are available
- it is budgeted
- and there are no issues.

Other Things to Remember:

- 1) Don't assume that last year's Resolution was correct just because it was approved last year.
- 2) If the Resolution has anything to do with another department, it must also be signed by that departments Commissioner.
- 3) If Resolution requires future budget year appropriation then it must be mentioned that future years are subject to appropriation.
- 4) Not all issues are cut and dry. There will be times when you must use judgment, when in doubt ask.
- 5) If a Resolution is incorrect, pull it, unless it is time sensitive. Half of the Resolutions that are wrong are corrected and rushed back on Pre-Board and still end-up being incorrect.
- 6) If the Resolution must be approved by more than one analyst, let the other analyst know. Be considerate and mention it to them and not just put it in someone else's in box. Give them a heads up.
- 7) The reason you review a Resolution is to make sure that all codes are correct, the Dollars add up, Funds are available, and Item is budgeted. Remember if Resolutions are wrong others get embarrassed.