To All Pennsylvania Municipalities and Counties:

As the result of recent audit findings by the Department of the Auditor General (Auditor General) concerning liquid fuels expenditures by municipalities for traffic signal maintenance services, the Department of Transportation (PennDOT), with the concurrence of the Auditor General, is issuing the enclosed guidance to assist you in procuring these services going forward.

In short, these services need to be advertised and procured competitively in accordance with the applicable municipal code or relevant PennDOT policies, and not as no-bid items.

Thank you for your attention to this matter. If you have any questions, please contact Kristen Sims, Audit Manager, in the Center for Program Development and Management, (717) 214-6161, or krsims@pa.gov.

Sincerely yours,

James D. Ritzman, P.E.
Deputy Secretary for Planning

Enclosure
PROCUREMENT OF MAINTENANCE AND REPAIR SERVICES FOR TRAFFIC SIGNALS WITH LIQUID FUELS FUNDS:

GUIDANCE TO POLITICAL SUBDIVISIONS

The Department of Transportation is providing this guidance, including supporting legal analysis, to political subdivisions regarding procurement of maintenance and repair services for traffic signals as the result of findings in liquid fuels audits performed by the Department of the Auditor General (Auditor General) that various municipalities have not complied with the advertising, bidding and contracting requirements of the applicable municipal codes in expending liquid fuels funds (LFF) for these services.

Advertising and bidding of traffic signals are required for the following reasons:

1. Traffic signals represent an element of highway maintenance; and procurement of highway maintenance services requires advertising and bidding, in accordance with a long-standing series of decisions by the appellate courts of the Commonwealth.

2. To the extent that a political subdivision requires traffic signal repair services on an emergency basis, a competitively bid maintenance contract can and should include emergency call-out requirements, in accordance with PennDOT guidance on the subject.

3. Traffic signals are not “public works” of the political subdivision. “Public works” as the term is used in the various municipal codes is limited to public utilities.

4. Traffic signal maintenance, being part of highway maintenance, is not a professional service. Alternatively, if we assume it so qualifies, PennDOT’s own requirements in procuring electrical services for facilities within its own right-of-way and also the competitive procurement requirements for certain professional services, particularly engineering services, to which political subdivisions are subject when they receive federal or state funding for local projects, operate in favor of competitive procurement of traffic signal maintenance services where only LFF are involved.

Each of these reasons is discussed in detail below.
1. **Highway Maintenance.** Section 9101 of the Vehicle Code, 75 Pa. C.S. § 9101, defines “highway maintenance” in pertinent part as

A program to preserve, repair and restore a system of existing State roadways with its elements to its designed or accepted configuration. System elements include but are not limited to travelway surfaces, shoulders, roadsides, drainage facilities, bridges, tunnels, signs, markings, lighting and fixtures. *Included in the program are such traffic services as lighting and signal operation, snow and ice removal and operation of roadside rest areas.* (Emphasis added.)

This definition of “highway maintenance” concerns state highways and does not apply directly to LFF expenditures; however, because Act 655 and Section 9010 of the Vehicle Code, 75 Pa. C.S. § 9010, are silent on the definition of maintenance, other statutory provisions relating to highways are instructive by analogy. By reason of this definition, traffic signal maintenance is specifically an element of highway maintenance; it is not a distinct discipline.

Under the municipal codes, contracts for highway maintenance require advertising and bidding if they exceed a certain dollar threshold, as specified in the respective municipal codes and periodically adjusted.¹

Competitive bidding with award to the lowest responsive and responsible bidder is the operative requirement (with limited exceptions) for municipal and other public agency procurements because of its salutary benefits, as the Commonwealth’s appellate courts have repeatedly recognized. As the Supreme Court of Pennsylvania stated in *Yohe v. City of Lower Burrell*, 208 A.2d 847, 850 (Pa, 1965), bidding requirements “are for the purpose of inviting competition, to guard against favoritism, imprudence, extravagance, fraud and corruption in the awarding of municipal contracts.” *Accord, Perrotto Builders v. Reading School District*, 108 A.3d 175, 179 (Pa. Cmwlth. 2015).

There is no carve-out to exempt traffic signal maintenance from competitive bidding, in light of its status as an element of highway maintenance.

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¹ See, e.g., County Code—16 P.S. § 1802(a)-(b); Third Class City Code—11 Pa. C.S. § 11901.1(a)-(b); Borough Code—8 Pa. C.S. § 1402(a)-(a.1); First Class Township Code—53 P.S. § 56802(a)-(a.1); Second Class Township Code—53 P.S. § 68102(a)-(b). In the case of boroughs and both classes of townships, price quotations, rather than advertising and bidding, are required from “at least three qualified and responsible contractors” for contracts below that statutorily-specified threshold but in excess of $10,000.
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2. PennDOT Guidance on Selection of Traffic Signal Contractors,
Including Emergency Service. Because 67 Pa. Code § 212.5 makes municipalities
responsible for installation, maintenance and operation of traffic signals on both state and
local highways in accordance with permits issued by PennDOT, PennDOT has a
compelling role and interest in prescribing how these services are procured, in addition
to its role in administering and enforcing the liquid fuels statutes. PennDOT’s guidance
to municipalities strongly favors competitive selection.

PennDOT Publication 191, Guidelines for the Operation and Maintenance of Traffic
Signals, offers guidance and assistance to municipalities on the maintenance and
operation of traffic signals. Chapter 8 of Publication 191 describes the following options
for selecting a traffic signal contractor:

- Low bid;
- Qualifications-based selection; or
- A two-step process (first low bid, then a request for qualifications from the
two or three lowest bidders, with final selection based on perceived qualifications).²

In addition to providing options for selecting a contractor, Publication 191
includes a sample agreement for maintenance of traffic control signals (Appendix I). The
scope of services in this sample agreement contains a requirement for on-call emergency
service or repair. The potential need for emergency traffic signal service is sufficiently
foreseeable that a requirement for a response time can be written into the specifications
of a general signal maintenance contract, rather than being obtained on an ad hoc basis
every time an emergency arises. Furthermore, if contractors can respond promptly to
emergency situations, as one municipal solicitor observed in questioning the need for
competitive procurement, it is not burdensome to either the contractor or the
municipality to require the inclusion of emergency services in a competitively-bid signal
maintenance contract.

3. Not “Public Works.” PennDOT’s determination that traffic signals do not
qualify as “public works” and therefore do not represent an exception to the bidding
requirement of the municipal codes results from a 1998 memorandum prepared by the
Office of Chief Counsel of the Department of the Auditor General concerning the
purchase by Butler County (County) of lumber for County bridges without competitive

² By way of analogy, the Commonwealth Procurement Code regards qualifications-based selection
as a form of competitive bidding; see 62 Pa. C.S. §§ 513 (competitive sealed proposals) and 518 (competitive
selection procedures for certain services).
bids, using County Liquid Fuels Tax Fund moneys. The County contended that the lumber was purchased for "maintenance, repairs or replacements for . . . public works" and was therefore exempt from the bidding requirements pursuant to 16 P.S. § 1802(h)(1). According to the County, the bridge was a "public work," based on the use of the term in 16 P.S. § 1802(i) (added by Act 232 of 1978, repealed by Act 142 of 2000). Although 16 P.S. § 1802(i) did not define the term "public work," it stated that "[e]very contract for the construction, reconstruction, alteration, repair, improvement or maintenance of public works shall comply with the provisions of the act of March 3, 1978 (P.L. 6, No. 3), known as the 'Steel Products Procurement Act.'" The Steel Products Procurement Act (Steel Act) defines "public works" as encompassing a variety of structures and facilities, including bridges. 73 P.S. § 1886.

The memorandum concluded that the Steel Act's definition of "public works" applied only to compliance with the Steel Act by the counties and did not expand the definition of "public works" elsewhere in the County Code, which are exempt from bidding requirements, beyond utility facilities.

The memorandum concluded that the broad definition of "public works" contained in the Steel Act was not incorporated into 16 P.S. § 1802(h)(1) either expressly or implicitly. It cited the following reasons in support of this conclusion: (1) the nearly contemporaneous enactment of the Steel Act and Subsection 1802(i), (2) absence of a definition for "public works" in the County Code itself, (3) different purposes served by the two subsections, (4) adverse consequences of incorporating the Steel Act definition into the rest of the County Code and (5) lack of persuasiveness and precedential value in the one case construing the definition.

Specifically:

- Subsection 1802(i) was added in October 1978, 23 years after the original enactment of 1802(h)(1). The addition of Subsection 1802(i) occurred shortly after the enactment of the Steel Act in March 1978. The nearly contemporaneous enactment of the Act and Subsection 1802(i) suggests that this provision was added to the County Code for the sole purpose of emphasizing the applicability of the Act to counties.
- In contrast to the Steel Act, whose definition of "public works" expressly includes bridges, the County Code does not define "public works." The subsection that waives the bidding requirement, 1802(h)(1), applies to contracts or purchases "for maintenance, repairs or replacements for water, electric light, or other public works of the county where they do not constitute new additions, extensions or enlargements of existing facilities and
equipment” (emphasis added). From the context in which this term is used, “public works” means public utilities.

- The two County Code subsections serve different purposes. The County Code and public contract bidding requirements in general seek to promote competition. By contrast, the Steel Act requires the use of domestic steel for construction or repair of public works by public agencies as a way of aiding the Commonwealth’s economy on account of its status as a major steel producer and thus limits competition.

- Incorporating the Steel Act’s definition of “public works” into the County Code would exempt virtually every public project except new construction from the bidding requirement. Because that definition also includes streets, treating streets as being exempt from bidding for purposes of Subsection 1802(h)(1) would create a conflict with Subsection 1802(h)(2), which requires the bidding of construction materials used in street improvements.

- *Heiges Masonry, Inc. v. Adams County,* 24 D.&C.3d 315 (C.P. Adams 1991), the sole judicial decision considering the Steel Act’s definition of “public works” as it relates to the County Code, is not persuasive, in light of the foregoing statutory analysis, and has limited precedential value. In that case, the court, relying on definitions of “public works” found in various sources, including the Steel Act, concluded that the old Adams County Courthouse was a “public work,” so that a contract to clean and seal the exterior did not require bidding. The court held that the Steel Act’s definition of “public works” was incorporated into Subsection 1802(h)(1) via Subsection 1802(i). In addition to the opinion’s lack of persuasiveness, the memorandum stressed the limited precedential value of the case: having been decided by the Court of Common Pleas of Adams County and never having been considered by an appellate court, it is binding only in that jurisdiction; moreover, it conflicts with the long line of appellate cases affirming the significance of bidding requirements and would not withstand scrutiny by an appellate court.

Act 142 of 2000, approved December 22, 2000, amended the County Code’s requirements regarding compliance with the Steel Act by deleting the language added in 1978 as subsection 1802(i). The legislation replaced this subsection with a new subsection 1802(j), requiring county contracts to comply not only with the Steel Act but also various other Commonwealth legislative enactments applicable to contracts of public agencies. Because the current subsection makes no reference to “public works,” it reinforces the conclusion reached by counsel for the Auditor General that the definition of “public works” exempt from bidding requirements in the County Code is narrow and competitive procurement is the general rule when LFF purchases are involved. In short,
the General Assembly did not intend a wholesale incorporation of the Steel Act’s definition of “public works” into the County Code, so as to exempt all LFF expenditures on highways, streets and bridges from competitive bidding requirements.

Although this legal analysis applies only to the County Code, both PennDOT and the Auditor General have extended its reasoning to LFF expenditures by other categories of political subdivisions because of corresponding statutory provisions relating to public works and the Steel Act. In addition, the general regulations concerning contracts of the First Class Township Code, 53 P.S. § 56802, include Subsection (b)(1), which reads in significant part as follows:

In every instance in which any contract for any public work, construction, materials, supplies, or other matters or things for any township shall be awarded upon competitive bids, it shall be the duty of the authorities authorizing the same to award the contract to the lowest responsible bidder. (Emphasis added.)

This explicit language, at least in the case of townships of the first class, refutes the conclusion that municipal “public works” exempt from bidding requirements encompass any facilities, improvements or structures other than the public utility facilities referenced in 53 P.S. § 56802(d)(1).

Furthermore, amendments made to the Third Class City Code and Borough Code as part of the recent consolidations of these statutes parallel the current County Code language regarding Steel Act compliance and contain no reference to “public works.” These amendments again demonstrate the narrowness of the meaning of “public works” as used in these statutes.

4. Professional Service Issues. Because it is an element of highway maintenance generally, as discussed above in Section 1, traffic signal maintenance does not qualify as a professional service exempt from competitive bidding. Alternatively, if we assume for the sake of discussion that it is a professional service, a comparison of PennDOT’s own practice with the procurement of these services, by analogy, is instructive and leads to the conclusion that competitive procurement is both feasible and warranted.

3 See, e.g., First Class Township Code – 53 P.S. § 56802(d)(1), (e); Second Class Township Code – 53 P.S. § 68102(h)(1), (l).

4 For the Third Class City Code, compare the current section, 11 Pa. C.S. § 11901.7 (added by Act 67 of 2015), and 53 P.S. § 36901.7 (added by Act 22 of 2014), which the current section repealed and replaced, with 53 P.S. § 36901(k) (repealed by Act 22 of 2014), which referred only to the Steel Act. For the Borough Code, compare 8 Pa. C.S. § 1402(e) with 53 P.S. § 46402(e).
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Viewed as a professional service, traffic signal maintenance is a form of electrical work. PennDOT bids electrical work on facilities and structures within the right-of-way competitively, using prequalified contractors because of the specialized nature of the work. In fact, there is a specific category within the Prequalification Regulations (67 Pa. Code §457.5(a)), designated as P, Highway/Sign Lighting, Signal Control, which covers work performed on PennDOT-owned highway facilities. Although PennDOT’s prequalification requirements do not apply to municipal contracts and purchases funded by LFF (without the presence of either other state highway funding or federal-aid highway funds), the existence of a specific prequalification category for this type of work at the departmental level demonstrates that there are numerous electrical contractors available to perform maintenance of traffic signals and that municipalities can and should therefore procure the service through competitive bidding. In fact, PennDOT has required municipalities to procure competitively contracts for another category of highway electrical work, consisting of street light maintenance services, being paid for with LFF.

Moreover, traffic signal maintenance activities may overlap with traffic engineering services. If signal maintenance involves engineering services and PennDOT is providing a political subdivision with federal or state funding, or both, to obtain these services, the political subdivision must procure them competitively using a qualifications-based selection method. It cannot obtain them without bidding on the grounds that they are a professional service. This principle applies to the procurement of engineering services generally for local projects involving federal- and state-aid participation, even if LFF constitute the local share. The fact that political subdivisions are already procuring certain professional services competitively—whether through invitations for bids, requests for proposals or qualifications-based selection—because of the funding source should not make competitive bidding of traffic signal maintenance services an unduly burdensome process. Furthermore, competitive bidding is entirely consistent with their procurement procedures under other funding contexts.

Thank you for your attention to and compliance with this guidance going forward, if you are not already bidding traffic signal maintenance services competitively. If you have any questions, please contact Kristen Sims, Audit Manager, Center for Program Development and Management, at (717) 214-6161 or krsims@pa.gov.