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Articles

The Effect of Oral Statements on the Making of the City of Providence's Municipal Contracts

John J. Chung*

It is the rare exception that usually generates the most quizzical legal issues, and this Article addresses one such situation involving a municipal contract entered into by the City of Providence (the City). Providence is a city of roughly 180,000 people, and as would be expected of a city its size, the City must enter into thousands of contracts every year to operate and provide city services.¹ The City's Board of Contract and Supply (the Board) is responsible for awarding such municipal contracts over five thousand dollars.² The City, through the Board, has a well-established procedure for awarding municipal contracts,

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1. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/providencityrhodeisland> [<https://perma.cc/NP9H-NLYC>] (last visited Feb. 4, 2019); *see generally Current Bids*, CITY OF PROVIDENCE, <http://www.providenceri.gov/purchasing/openrfpsummary/> [<https://perma.cc/AX27-T7KV>] (last visited Feb. 4, 2019).

2. *Board of Contract and Supply*, CITY OF PROVIDENCE, <http://www.providenceri.gov/purchasing/board-contract-supply/> [<https://perma.cc/P2S4-EKYZ>] (last visited Feb. 4, 2019) [hereinafter *Board of Contract and Supply*].

which must—and does—operate efficiently given the amount of public money at issue and the sheer number of contracts.³ This Article focuses on the formation process of the contracts (as opposed to issues relating to performance), the way in which the contracts are formed, and the determination of the terms.

For the vast majority of contracts, these questions raise no practical issue because the procedures for awarding and forming municipal contracts ensure a smooth and transparent process. However, because the City manages thousands of contracts, it is to be expected that the occasional one-off situation will present an exception to the general process under which the thousands of contracts are formed without any disagreement or misunderstanding. This Article addresses one type of atypical situation in which an unusual issue arose in the contract formation process.

The City's contracts are, of course, in writing, and the written terms are designed to be controlling.⁴ In rare instances, though, an issue may arise as to whether an oral statement by a City official is incorporated into the terms of a contract. When that happens, is it permissible to consider the oral statement as part of the contract? Or do doctrines of contract law, such as the parol evidence rule, bar admissibility of such statements? Under ideal circumstances, municipal contracts should not require the need for oral testimony to explain their terms or meaning—these are public contracts, and any term that is not in writing runs counter to the need for complete transparency that is so important for government action.⁵ Given that public money is involved, any disinterested third party should be able to determine the terms of a municipal contract by looking at a writing or writings. There is the risk of a lack of transparency if some of the terms are in writing, but others are the result of oral statements. A third party should not wonder if there are unwritten terms that govern a contract involving public money. Even though the City's process

3. *How to Submit a Bid*, CITY OF PROVIDENCE, <http://www.providenceri.gov/purchasing/how-to-submit-a-bid/> [<https://perma.cc/4VCG-QEG4>] (last visited Feb. 4, 2019).

4. *Id.*

5. *See* BD. OF CONTRACT & SUPPLY, CERTIFICATE REGARDING PUBLIC RECORDS, <https://www.providenceri.gov/wp-content/uploads/2018/02/RFP-Template-Feb2018-Certificate-Regarding-Public-Records-Fillable.pdf> [<https://perma.cc/V9YC-CEGD>] (last visited Feb. 4, 2019).

for awarding contracts is designed to avoid such situations, it is not surprising that such situations would occasionally arise given the number of contracts that are made.

This Article will be based on a hypothetical factual scenario loosely based on the unusual way by which at least one contract was formed. Suppose the City advertises the need for window washers to clean the exterior of windows on city buildings. Five companies submit bids. In many bid situations, the City will award the contract to one bidder. In this situation, however, the City, at a public hearing, awards the window washing contract to two bidders: Company 1 and Company 2. However, the writings do not mention how the work will be divided between the two companies. In order to clarify this situation, a Board member raises the issue at the hearing, and another Board member states on the record that it is his or her understanding that the work will be divided equally. At any given public hearing, there are few members of the public in attendance, although anyone may attend.⁶ It is actually common for the bidders themselves not to attend the hearing because they will be notified in writing regardless of the outcome.⁷ Also, the hearings are conducted in a well-established, routine, pro forma manner so there is usually no risk of surprise to any party, which explains why the bidders would have no particular reason to attend.⁸ Therefore, it would not be unusual for the two successful hypothetical bidders of the window washing contract to be absent, and thus unaware of the oral statements about the equal division of work. After the hearing, the official written notifications of award are sent to the two successful bidders. However, there is nothing in the notifications mentioning the division of work and the awards are not memorialized in an individually drafted contract. Instead, the contract consists of the composite of documents issued and exchanged between the parties as part of the bidding process. (Which is an acceptable and legitimate way for the Board to form a contract.) However, this hypothetical set of facts may lead to disagreement.

Suppose Company 1 has been operating under the belief from the start of the bidding process that the work would be divided

6. *Board of Contract and Supply, supra* note 2.

7. *See generally How to Submit a Bid, supra* note 3.

8. *Id.*

equally. Company 2, though, has been operating under the belief that it would get all the work, and that the other successful bidder would get work only in the event that Company 2 did not have the capacity to handle all the work. (In other words, the other bidder is only in place to handle overflow work.) Once the contracts are in place, suppose the City operates under the contracts by assigning all the work to Company 2 with the view that Company 1 would get any overflow work. Company 1 then files a lawsuit against the City arguing that the City has breached the contract, that it should be getting half of the work, and that the oral statement at the public hearing is evidence that supports its interpretation of the contract. In this situation, what is the proper interpretation of the contracts? What are the controlling terms? Is the oral statement part of the contracts?

Although this hypothetical is loosely based on an actual situation, it is important to point out the ways in which the facts are highly unusual. First, it is rare for the City to award a contract to more than one bidder.⁹ It happens from time to time, but it is a highly exceptional occurrence. Second, it is rare for any official to make a public statement about the terms of a contract. Again, it happens from time to time, but it is another highly exceptional occurrence. Because such situations seldom occur, they fall far outside the usual practices and procedures established by the City for the award of municipal contracts, and raise legal issues that are rare and have been unaddressed (because there is usually no reason to address them).

Part I of this Article begins the analysis with a summary of the official structure of the City, and the relationship and respective roles of the City and the Board. This structure is the foundation of the process by which the City awards municipal contracts. Part I then discusses the general procedure by which municipal contracts are formed and drafted. Part II then discusses the law of municipal contracts in general, including a discussion of the substantive distinctions between municipal contracts and private contracts. Part III discusses the general doctrinal principles governing the formation and interpretation of municipal contracts, which are mostly similar to the principles

9. See, e.g., *BD. OF CONTRACT & SUPPLY, REQUEST FOR PROPOSALS* (2019), <http://www.providenceri.gov/wp-content/uploads/2019/01/PVD19-37-RESPIRATOR-MASK-FIT-TEST-SYSTEM.pdf> [<https://perma.cc/PLV2-TMPS>] [hereinafter *REQUEST FOR PROPOSALS*].

governing all contracts in general. In light of the issue addressed by this Article, Part IV discusses the parol evidence rule and its role in determining the admissibility of oral statements to interpret municipal contracts. To some extent, it is also a survey of applicable Rhode Island cases addressing the parol evidence rule. Part V then presents alternative but related issues relating to the issue of oral statements by public officials. It raises questions such as whether there are other substantive or evidentiary issues raised by the incorporation of oral statements into the contract formation process, and whether oral statements should have any role in the formation of municipal contracts. Part VI concludes this Article.

I. CONTRACT FORMATION AND PREPARATION BY THE CITY OF PROVIDENCE AND THE BOARD OF CONTRACT AND SUPPLY

The government of the City is based upon the Providence Home Rule Charter of 1980 (the Charter).¹⁰ All powers of the City must be exercised in the manner prescribed by the Charter or, if not so prescribed, then in such manner as provided by ordinance or resolution of the city council.¹¹ Pursuant to the Charter, the City established the Board.¹²

The Board “presides over all purchasing and procurement over \$5,000 (which must go out to bid) of materials, supplies, services, equipment, and all other necessary categories of procurement for the city of Providence.”¹³ More specifically, Article X, section 1007(c) of the Charter provides:

(c) It shall be the responsibility of the board of contract and supply: (1) To make all contracts for purchase of materials, supplies, services, equipment and property on behalf of the city, the price or consideration of which shall exceed five thousand dollars (\$5,000.00), on the basis of sealed bids solicited through public advertisement in a newspaper of general circulation in Providence, such bids to be submitted, opened and considered in accordance with rules and regulations approved by the board. The

10. PROVIDENCE, R.I., PROVIDENCE HOME RULE CHARTER OF 1980 art. I, § 101 (1980).

11. *Id.* art. I, § 104.

12. *Id.* art. X, § 1007.

13. *Board of Contract and Supply, supra* note 2.

city council may increase the figure of five thousand dollars (\$5,000.00) by a two-thirds vote following a public hearing, but no more often than once every five (5) years; (2) To insure before a contract is entered into that there exists sufficient appropriation to pay the cost thereof; (3) To reject any or all bids submitted to it for a specific purpose if it considers that the public interest will be best served thereby.¹⁴

The Board is comprised of twelve Board members, including the Mayor, who serves as the Chairperson of the Board.¹⁵ Broadly speaking, the Board oversees the procurement of goods and services by the City's departments.¹⁶ The goods and services cover the wide array of purchases one would expect as part of the need of running a city. They range from the repair of city machinery, the providing of learning services to the City's schools, to the purchase of everyday supplies and equipment.¹⁷ The bid

14. CHARTER art. X, § 1007(c). "The power of a municipal corporation to contract, like the exercise of all other corporate powers, depends largely upon its charter and the general laws applicable. This power must be granted either in express terms, or by necessary or fair implication, otherwise it is void and unenforceable." 10 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 29:6 (3d ed., rev. vol. 2009) [hereinafter 10 MCQUILLIN].

15. See *Board of Contract and Supply*, CITY OF PROVIDENCE OPEN MEETINGS PORTAL, <http://providenceri.iqm2.com/Citizens/Board/1024-Board-of-Contract-and-Supply> [https://perma.cc/N5Y7-V2BD] (last visited Feb. 4, 2019). The Charter requires that the members,

shall consist of the mayor, the president of the city council, the finance director, the city controller, the chairperson of the committee of the city council with jurisdiction over city property, the chairperson of the committee of the city council with jurisdiction over budgetary and financial matters, the director of public works, the commissioner of public safety, the city treasurer, the director of public property, the chairperson of the water supply board and the president of the school committee, all ex officio. In the absence of any of the above-named members, a deputy shall serve in the place of said member.

CHARTER art. X, § 1007.

16. *Board of Contract and Supply*, *supra* note 2.

17. See *BD. OF CONTRACT & SUPPLY ADVERTISEMENT, INVITATION TO BID 1-2* (2019), <http://www.providenceri.gov/wp-content/uploads/2018/12/ad01-22-19.pdf> [https://perma.cc/ZP8K-2CMA]. To be more specific, the following is a list of just some of the items for which the City's departments sought bids in January 2019:

DEPARTMENT OF PARKS

SITE IMPROVEMENTS TO COLUMBIA PARK. INSTALLATION OF STORMWATER BMP'S IN ROGER WILLIAMS PARK—

and procurement process for the wide range of goods and services goes through the Board.¹⁸

Without going into granular details, the process may be roughly described as follows. When a City department determines it has a need to purchase a good or service over five thousand dollars, it requests authorization from the Board for the public advertisement of the need.¹⁹ The Board then (absent unusual circumstances) approves a City department's request to advertise for the purchase of goods or services.²⁰ The requesting department requests authorization for the advertisement of a Request for Proposal (RFP) to be issued by the Board.²¹ The

PACKAGE 1. JOSLIN PARK PLAYGROUND IMPROVEMENTS.
NEUTACONKANUT PARK LIGHTING IMPROVEMENTS
PROJECT. PROPOSALS FOR PARTNERSHIP SERVICES.
ROGER WILLIAMS PARK ROADWAY IMPROVEMENTS—PHASE
II.

PROVIDENCE POLICE DEPARTMENT

WRITTEN POLICE PROMOTIONAL EXAMINATION FOR THE
RANK OF DETECTIVE.

WATER SUPPLY BOARD

RFP FOR REPAIR WORK TO WATER MAINS AND
APPURTENANCES WITHIN PROVIDENCE WATER'S
DISTRIBUTION SYSTEM (BLANKET CONTRACT 2019-2021) (PW
PROJECT NO. 24003 AND NO. 23500) REPLACEMENT AND
REHABILITATION OF WATER MAINS AND APPUTENANCES
WITHIN PROVIDENCE WATER'S DISTRIBUTION SYSTEM
(BLANKET CONTRACT 2019-2021). (PW PROJECT NO. 25006
AND NO. 20173).

Id.

18. CHARTER art. X, § 1007(c).

19. *See How to Submit a Bid*, *supra* note 3.

20. *Id.*

21. *See id.* When the bids are submitted,

[a]ll the terms and conditions of an advertisement become a part of a valid bid, so that competition among bidders may be equal and free, and so that the municipal corporation and the taxpayers may be assured of receiving that for which payment is contracted. Generally, bids must conform to the advertisement, and may be rejected for failure to comply with specifications as advertised.

10 McQUILLIN, *supra* note 14, § 29:71, at 593–94. The City solicits bids through an RFP, but McQuillin distinguishes Requests for Proposals from Requests for Bids. Specifically, McQuillin states:

In contrast to bids, a request for proposals (RFP) is used when the public authority is incapable of completely defining the scope of work

Board then issues an official, public “Invitation to Bid,” listing the various items for bid.²² Interested bidders are given a deadline by which bids must be submitted to the Board, and each bid is publicly opened and read into the public record at a regularly scheduled public meeting of the Board.²³ As a general matter, the Board meets every two weeks on a Monday at 2:00 p.m. at city hall.²⁴ The bids must be submitted in sealed envelopes or packages to the Board, which are then unsealed at the public meeting.²⁵ After announcing for the record the matter up for bid, the official in charge of running the meeting then reads into the public record the information relating to each bid including the name of the bidder and the bid amount. Minutes of Board meetings are publicly available on its website.²⁶

required, when the service may be provided in several different ways, when the qualifications and quality of service are considered the primary factors instead of price, or when responses contain varying levels of service which may require subsequent negotiation and specificity. A request for proposal (RFP) is a more flexible alternative to competitive bidding for a public contract, and while it is true that all who submit proposals must be treated fairly, there is no legal requirement that a final contract must conform to the original RFP.

Id. § 29:33, at 475–76. Additionally,

[a] public body’s consideration of a response to a request for a bid is controlled by the estimated costs, while the response for a request for a proposal (RFP) is controlled by estimated cost and technical excellence in the field; when a public body uses a RFP, awards of contracts are generally based not solely on price, but on the results of an extensive evaluation which includes criteria, qualifications, experience, methodology, management, approach, and responsiveness to the RFP. At the conclusion of a request for proposals (RFP) process concerning a public contract, the procurement officer will seek authorization from the governing body to begin negotiating the terms of the contract with the highest ranking bidder; the contract is, thus, not formed until after the negotiation process.

Id. § 29:33, at 476. Whether this distinction makes any substantive difference for the City is not addressed in this Article.

22. See *How to Submit a Bid*, *supra* note 3.

23. *Id.* An official sample of a bid form is available at <https://www.providenceri.gov/wp-content/uploads/2018/02/RFP-Template-Feb-2018-Bid-Form-1-Fillable.pdf> [<https://perma.cc/M8MH-A3ST>].

24. See generally *Meeting Calendar*, CITY OF PROVIDENCE, <http://providenceri.iqm2.com/Citizens/calendar.aspx> [<https://perma.cc/TT9D-GAMJ>] (last visited Feb. 11, 2019).

25. *How to Submit a Bid*, *supra* note 3.

26. See generally *Meeting Calendar*, *supra* note 24. An example of a

All bids received are opened at the Board's meeting.²⁷ "From there, the bids [are] distributed and referred back to the corresponding City departments that issued the RFP's for review and selection."²⁸ The department directors then review the bids, report their bid recommendation to the Board and ask for the Board's approval of the departmentally-approved bids.²⁹ As a general matter, some bidders may be informed of the bid decision as early as two weeks from the date that the bid packet was opened, while other decisions are announced within sixty days of the bid submission.³⁰ The awards are announced on the record at a regularly scheduled meeting.³¹

After the Board approves a department director's bid recommendation, and after the Board awards the successful bid, the process of preparing the contract between the successful bidder and the City commences. The preparation of the contract is conducted under the authority of the City Solicitor, who is in charge of the City's law department.³² The law department works with the successful bidder or its legal counsel on matters relating to the preparation of the contract.³³

In terms of the law of contract formation, the bid is the offer

meeting's minutes (from the Monday, October 29, 2018 meeting) is available at: <http://providenceri.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=8789&Inline=True> [<https://perma.cc/39C9-KDQT>]. As for the process of preparing the bid:

The preparation of the bid by those who desire to compete then follows and in order to receive consideration they must conform to the advertisement and specifications on file and be clear and definite so that the authorities can determine from the bid exactly the bidder's proposal and the project's cost.

10 MCQUILLIN, *supra* note 14, § 29:32, at 472–73.

In construing a bid, application is made of the settled rules relating to the interpretation of instruments generally. Thus a bid must be construed as a whole and its parts harmonized. It must be assumed that it was intended that every part of the bid should have some meaning, and that effect should be given to such meaning.

Id. § 29:72, at 604.

27. *How to Submit a Bid*, *supra* note 3.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.*

32. *See id.* The City's law department is the department of lawyers whose duties include the preparation of municipal contracts. *See id.*

33. *Id.*

and the Board's award is the acceptance.³⁴ The consideration is provided by the mutual exchange of promises for the sale and payment of the goods or services.³⁵ When the Board awards a bid, an issue that may arise is whether a contract is formed. An alternative interpretation of the contract formation process would be that the contract is formed only after preparation and/or approval of the bid and award by the City Solicitor, along with the preparation, formalization, and execution of a further and separate document that constitutes the contract. Although these possibilities may raise issues of legal theory, the answer regarding contract formation is determined by the actual practice of the Board and City Solicitor.

As a general matter, the City, acting through the City Solicitor, is involved in the drafting of an individualized, tailored contract for practically all awards of a city contract.³⁶ After the bid is awarded, however, the actual practice in which the contracts are drafted may vary, and the variance often depends on the City department involved. To address an initial matter, the parties to a City contract are the successful bidder and the department involved. (Such as the City's school district or the Department of Art, Culture and Tourism, to name just a couple of examples.) The written contract contains at least three signature blocks. Every contract contains a signature block for the City, one for the successful bidder, and one for the City Solicitor's office. Some contracts also include another signature block for the department involved. Using the school district as an example, because it enters into hundreds of municipal contracts, it uses its own standard form contracts, which are reviewed and approved by the City Solicitor's office.³⁷ On the other hand, a department like

34. 10 MCQUILLIN, *supra* note 14, § 29:3, at 314–15.

A proposition or offer made to the proper corporate authorities and an acceptance of the terms of it by an ordinance, resolution, or motion constitutes a contract. The ordinance or other official act accepting the terms of the proposition constitutes assent to the contract on the part of the corporation, as distinguished from a mere declaration of intention to enter into a contract.

Id.

35. *Id.* “So an ordinance granting a right, accepted and acted upon by the grantee, becomes an irrevocable contract.” *Id.*

36. See DEPT OF HUMAN RESOURCES, ASSISTANT CITY SOLICITOR I, <https://www.providenceri.com/CityJobs/position.php?id=1138> [<https://perma.cc/4H32-BBCW>].

37. *Agreement Between the Providence Teachers Union AFT Local 958*,

Art, Culture and Tourism is a party to a much smaller number of contracts, so it would call upon the City Solicitor's office to prepare the contract for a project. In some instances, the department involved may proceed by working from a draft contract prepared by the successful bidder, and the City Solicitor's office would be involved to ensure that the City and department's interests are adequately protected. One standard feature of the City's contracts is the inclusion of a merger or integration clause (the relevance of which will be explained below). As is apparent from this description of the process, the City Solicitor's office plays an active and important role in the making of municipal contracts.

However, given that thousands of contracts are prepared over the course of even a few years, it is not surprising that a rare exception may arise that does not follow the standard practice. Every first-year law student learns that a formal document signed by all parties is not necessary to form a contract in many situations.³⁸ So, in rare situations, the City enters into a contract that is not memorialized or evidenced by a formal written contract.

So, what is the process by which this rare instance occurs? For some city contracts awarded by the Board, the actual contract itself is evidenced and manifested by the series of forms and documents that constitute the routine process of the bidding process. The contract does not exist in the form of a single document.³⁹ In such situations, there is no single, formal document titled "Contract" with a list of recitals, with all terms and conditions contained within the document, and formally executed by the parties.⁴⁰ In actual practice, such contracts are evidenced by a composite of documents, including, but not limited to, the advertised specifications, the documents submitted by the successful bidder, and the notice of award by the Board.⁴¹ This is

AFL-CIO and the City of Providence, PROVIDENCE SCHS. (Sept. 1, 2014), <https://www.providenceschools.org/site/handlers/filedownload.ashx?moduleinstanceid=564&dataid=13934&FileName=PTU.pdf>.

38. CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW CASES AND MATERIALS 6 (Wolters Kluwer 8th ed. 2016).

39. See generally Edward N. McConnell, *The "One Contract" Rule—What It Is and How to Use It*, LOMBARDI L. (2013), <https://www.lombardilaw.com/library/OneContractRuleOutline-PCBANov2013CLE-Final.pdf> [<https://perma.cc/4LET-8H5L>].

40. See *id.*

41. See *id.*

perfectly acceptable and routine as a matter of fact and law regarding municipal contracts.⁴² According to the leading treatise on the subject, “a requirement that contracts be in writing does not require a single integrated document: a series of documents, the totality of which contains all material terms of the agreement, will suffice.”⁴³

One of the first documents issued in the process is the document titled “Request for Proposals,” which is issued on the Board’s letterhead.⁴⁴ As an example, it may seek bids for certain types of equipment for the Fire Department or for services required by the Department of Parks. This document contains a brief description of the goods or services required, the deadline for submission, and instructions for submitting a bid.⁴⁵ This document is accompanied by a separate sheet with more specific information about the project, which is tailored to the specific project.⁴⁶ As an example, it may include additional specifications for safety equipment for the Fire Department that is not included in the RFP. There is also a one-page document called “Bid Terms,” which sets forth additional terms and policies related to the work.⁴⁷ Additional terms may include the proposed term of the contract, requirements regarding conformity of the goods, and the City’s right (but not obligation) to buy up to a certain amount of equipment. There is also a “Notice to Vendors” on the Board’s letterhead, which is a general statement of terms and policies that is generally applicable to all contracts regardless of the type of work involved.⁴⁸ The Board also issues a document called “Bid Terms,” which contains instructions relating to financial assurances from the bidder.⁴⁹ In addition to these documents, which are generally provided to all bidders for any and all projects, there are additional, more specialized documents that are issued to bidders that are dependent on the type of work involved.⁵⁰ For example, some projects may require issuance of documents addressing the bidder’s handling of environmentally

42. *See id.*

43. 10 MCQUILLIN, *supra* note 14, § 29:26, at 453–54.

44. *See, e.g.*, REQUEST FOR PROPOSALS, *supra* note 9.

45. *See, e.g., id.*

46. *See, e.g., id.*

47. *See, e.g., id.*

48. *See, e.g., id.*

49. *See, e.g., id.*

50. *See, e.g., id.*

toxic waste because of the presence of such material in the project. Such documents would, of course, not be issued in other types of projects, such as bids sought for learning services to be provided to the schools.

Interested bidders then submit “Bid Form 1,” which includes information identifying the bidder and the bid price.⁵¹ Bidders also submit documentation to prove they are properly licensed and insured.⁵² Other documents are also submitted, such as a certificate acknowledging that each bidder understands that the bid becomes public record.⁵³

After bids are submitted to the City, the bids are sent to the individual department that requested authorization for the work.⁵⁴ The originating department is the entity that reviews the substance and merit of the bids and is the entity that recommends the award.⁵⁵ The originating department’s recommendation is formalized in a letter addressed to the Mayor, as Chairman of the Board.⁵⁶ The letter identifies the bids that were submitted and recommends the winning bid.⁵⁷ The letter is often a one-page document, and does not state the substantive bases for the decision. (Although the bid amounts are included with the identification of the bidders.)⁵⁸

The originating department’s recommendation of the winning bid is then placed on the agenda for a public meeting of the Board.⁵⁹ At the meeting, the Board votes to approve or deny the recommendation.⁶⁰ Except in rare situations, the recommendation is approved by the Board and noted in the record of the meeting.⁶¹ After the Board’s approval, the City’s Department of City Clerk issues a written memorandum to the purchasing director to inform him or her that the Board voted to

51. *See, e.g., id.*

52. *See, e.g., id.*

53. *See, e.g., id.*

54. *How to Submit a Bid, supra* note 3.

55. *Id.*

56. *See, e.g.,* BD. OF CONTRACT & SUPPLY, AGENDA PACKET 16 (Jan. 22, 2019), <http://providenceri.iqm2.com/Citizens/Board/1024-Board-of-Contract-and-Supply> [<https://perma.cc/N5Y7-V2BD>].

57. *See, e.g., id.*

58. *See, e.g., id.*

59. *See, e.g., id.*

60. *See, e.g., id.*

61. *See, e.g., id.*

approve the originating department's recommendation of the winning bid.⁶² In those rare situations when an individualized contract is not prepared, the totality of these documents comprise the contract between the City and the winning bidder.⁶³

The City receives hundreds of bids each year for a variety of projects, and the Board's process operates smoothly and efficiently.⁶⁴ The procedures described above are how the City forms contracts with its vendors. As mentioned, practically all successful bids are memorialized and formalized by the preparation and approval of individually tailored contracts. The process is designed to promote a standardized and efficient approach.⁶⁵

However, there are exceptions that arise in any general practice or procedure, and it is the exceptions that pose the occasional legal problem. In preparation for this Article, the author attended three public meetings of the Board in the fall of 2018. At those meetings, there were no discussions on or off the record about any of the bids. There were no discussions between or among Board members; there were no discussions between or among Board members and any of the public attendees. This seems to be the norm and ordinary course for the conduct of Board meetings.

At times, though, a Board meeting may present an out-of-the-ordinary-course situation, as in the window washing hypothetical. As described, it is unusual for the Board to award a bid to more than one bidder, but it happens on rare occasion.⁶⁶ Also, there is the rare occurrence of a public discussion between Board members discussing the way in which a contract will operate, which are recorded in the minutes of the meeting. In these rare instances, how should the law treat this oral discussion? The problem becomes compounded when the official writings, including the Department of City Clerk's notification of the award, do not mention anything about the oral statements.⁶⁷ In other words,

62. See, e.g., *id.*

63. See, e.g., *id.*

64. *Current Bids*, *supra* note 1.

65. See Matt Gasior, *What Is a Request For Proposal (RFP)? Getting the Most out of an RFP Process for Local Government*, POWER DMS (Aug. 21, 2018), <https://www.powerdms.com/blog/what-is-request-for-proposal-rfp/> [<https://perma.cc/A33H-LRT9>].

66. REQUEST FOR PROPOSALS, *supra* note 9.

67. See, e.g., *Elorza Administration Improperly Paid Powerful Lobbyist*

there is no official writing that reflects or refers to the public discussion on the record, other than the meeting minutes.

When disagreement arises regarding the division of work (as in the window washing hypothetical), should the oral statements be viewed as part of the contract terms or as evidence relating to the proper interpretation? The courts will be called on to determine how the work is to be divided. The issue is therefore whether the court should consider the oral discussion between the two Board members to decide the contractual rights of the two bidders disputing the meaning of their contractual rights with the City. Because this type of situation occurs so infrequently, there are a variety of novel issues that present themselves.

II. A GENERAL INTRODUCTION TO MUNICIPAL CONTRACTS

As a general matter, municipal contracts are like any other kind of contract and are governed by the general laws applicable to all contracts.⁶⁸ For the most part, there are few legal distinctions between municipal contracts and contracts wholly between private parties.⁶⁹ “Contracts with municipalities are measured by the same tests and are subject to the same rights and liabilities as are other contracts.”⁷⁰ “[R]ules relating to

\$33,000—*Total Payments Exceed \$100k*, GOLOCALPROV (Aug. 24, 2018), <https://www.golocalprov.com/news/elorza-administration-improperly-paid-powerful-lobbyist-33000-total-payment> [https://perma.cc/SV3Z-ZMME]; see also Kate Nagle, *Raimondo’s Point Judith Ties to Providence Contracts Come Under Scrutiny*, GOLOCALPROV (Oct. 31, 2014), <https://www.golocalprov.com/politics/raimondos-point-judith-ties-to-providence-contracts-come-under-scrutiny> [https://perma.cc/82T5-F568].

68. *City of Warwick v. Boeng Corp.*, 472 A.2d 1214, 1217 (R.I. 1984).

69. *What Are the Differences Between Government and Commercial Contracts?*, VILL. UNIV. (Feb. 6, 2019), <https://www.villanovau.com/resources/contract-management/differences-between-government-and-contract-management/> [https://perma.cc/Q33B-UWUF].

70. *Boeng*, 472 A.2d at 1217. There are additional factors involved in analyzing the formation of a municipal contract.

Apart from the general principles of contract law in determining the validity of a municipal contract, four matters are to be considered:

.....

First, whether the municipal corporation had express, implied, or inherent power to enter into the particular contracts, or is it beyond the scope of its powers or actually prohibited by charter or statute. If the contract is one which the municipality has no power to make, in other words, a contract beyond the scope of its powers and not merely one containing invalid provisions, it is *ultra vires* and

contracts generally apply to agreements to which a municipal corporation is a party. Thus, there must be an offer and acceptance, mutuality, delivery, where that is an essential element of the particular transaction, and in general a conformance with all requirements of the law of contracts.”⁷¹

As with any contract, the court’s role is to apply the plain language of the contract, and to uphold the objective intent of the parties.⁷² However, municipal contracts embody particular features and concerns due to the fact that they involve the public funds.⁷³ Courts need to be mindful of the fact that due regard to the interests of the taxpaying public must be taken into account when dealing with municipal contracts.⁷⁴ The need to protect the public is seen in the measures taken by public entities in forming municipal contracts.⁷⁵ This is the reason why competitive bidding

unenforceable, and no further inquiry is necessary.

....

Second, assuming that the contract is within the corporate powers, the question arises as to whether it was entered into by the proper department, board, committee, officer or agent. Here it must be borne in mind that all who contract with a municipal corporation are charged with notice of the extent of its powers and of the powers of municipal officers and agents with whom they contract. It therefore follows that if the particular department, board, officer, or agent had in fact no power to bind the municipality, there is no liability on the express contract unless it has been properly ratified by the municipality or its conduct has been such as to estop it to deny the validity of the contract.

....

Third, the contract must have been entered into in the mode provided for by statute or the charter. Assuming that the first two considerations were met, a contract may be invalid because certain conditions precedent were not observed, or because there was not an ordinance authorizing it, or because there is no record of special authority being conferred on the contraction agency, or because there was no advertisement for bids, or because there was some essential omission exacted by the controlling law.

10 MCQUILLIN, *supra* note 14, § 29:2, at 308–10.

71. *Id.* § 29:2, at 303–05.

72. *See* High Steel Structures, Inc. v. Cardi Corp., 152 A.3d 429, 435 (R.I. 2017) (interpreting provision of contract between state of Rhode Island and contractor for highway construction work).

73. Nelson Rosenbaum, Comment, *Criteria for Awarding Public Contracts to the Lowest Responsible Bidder*, 28 CORNELL L. REV. 37 (1942).

74. 10 MCQUILLIN, *supra* note 14, § 29:90.6, at 709–13.

75. *Id.* § 29:34, at 477.

is an essential feature in the contract formation process.⁷⁶ The entire purpose of competitive bidding is to protect the public interest.⁷⁷

76. *See id.* § 29:34, at 471–73. To determine whether competitive bidding is necessary, McQuillin states:

The first matter to be considered is the necessity for competitive bidding and this requires a look at the statutes, charter, and ordinances to see if competitive bidding is required and whether the provisions cover the contract in hand. The determination of how bids on a particular contract will be accepted may be controlled by local rather than state legislation. Then, if competitive bidding is required, it is necessary to determine whether all the conditions precedent to submitting requests for bids have been complied with and this again requires the examination of all state or municipal provisions in regard to it. The next step is the request for bids, and all statutory and municipal regulations must be at least substantially followed, including the contents of the advertisement, the publication of it, the posting of the notice when necessary, the proof of publication, etc. So it may be necessary for the municipality to file plans and specifications which the bidders may consult for the details of the work. The preparation of the bid by those who desire to compete then follows and in order to receive consideration they must conform to the advertisement and specifications on file and be clear and definite so that the authorities can determine from the bid exactly the bidder's proposals and the project's cost.

Id.

77. *See id.* § 29:80, at 630–39. McQuillin states that, although there are provisions to follow, municipal authorities are cloaked with some discretion.

Statutory or charter provisions that certain contracts of municipal corporations be awarded to the lowest and best, or lowest responsible, bidder are made for the protection of public interests and must be complied with by the municipal authorities for the benefit of the public. However, these authorities generally have a broad discretion in determining what bid is the one most nearly answering such requirements. However, the discretion in awarding the contract must be exercised fairly and reasonably within the spirit of the law.

.....

The award must be in accordance with the terms of the advertisement and the contract given to the lowest responsible bidder who complies with the advertised proposals. These provisions should not be so strictly construed as to reduce the authorities to mere ministerial agents, since this would often defeat the purpose for which they are designed, by allowing unscrupulous contractors to defraud the city. On the other hand, if the authorities are vested with too broad discretionary powers, the way for fraudulent practices is again left open. Therefore, such provisions are made to be applied according to their spirit in a manner best adapted to conserve the public interests. The municipal officers having authority to let

The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.⁷⁸

The need for protection of the public makes it particularly important for municipal contracts to be completely transparent, and for the terms to be easily discernible by any disinterested, third party. Even though there is nothing necessarily improper about publicly-recorded oral statements, the problem is that such statements make it more difficult for a third party to determine the terms of the contract. It is one thing to locate all the writings that comprise the contract, and interpret the writings; it is another and a more difficult task to locate all the writings and then determine whether there are oral terms that affect the writings. How does one know if all the oral terms have been identified? A primary purpose of reducing contracts to writing is to avoid the need to determine whether there are unknown, unwritten terms to consider.⁷⁹

contracts subject to provisions of this kind are not purely ministerial officers, but rather judicial, since their duties require the exercise of discretion.

Id.

78. *Id.* § 29:34, at 477–78. There are other differences between municipal and private contracts, as well.

The difference between the contracts of a private person and those of an officer of a corporation, municipal, or otherwise is this: An individual has the right to make, alter, or ratify a contract at his or her own will with the consent of the other contracting party. If the individual stands by and permits others to work for him or her and accepts the work, the law implies a promise to pay its value. On the other hand, an officer of a corporation has no power to make or alter a contract unless it be duly authorized, made, or altered in the manner prescribed by the charter or statute from which the power is derived.

Id. § 29:25, at 446–47.

79. Nico Apfelbaum, *The True Importance of Written Contracts in*

III. RULES OF INTERPRETATION FOR MUNICIPAL CONTRACTS

The rules of interpretation for municipal contracts are generally the same as any other type of contract, with a few differences that take into account the involvement of the public's interest.⁸⁰ "Contracts with municipalities are measured by the same tests and are subject to the same rights and liabilities as are other contracts."⁸¹ "If the language of a municipal contract is unambiguous, its construction is a matter of law for the court [(as with any type of contract)]."⁸² If the court finds no ambiguity, its role is to apply the meaning of the plain language of the contract.⁸³ The general rule also applies in that contracts must be construed as a whole, and not merely in detached parts, and, if the agreement is contained in several instruments, all should be construed together.⁸⁴

There are a few principles of interpretation, though, that are unique to municipal contracts due to the involvement of the public's interest. "Subject to the rule that, in case of doubt or ambiguity, an agreement should be construed most strongly against the one by whom it was prepared, public contracts will be liberally construed in favor of the public. Sometimes the statutes expressly require the application of such a rule."⁸⁵

In the hypothetical that is the subject of this Article, the writings are not complete and there is ambiguity given the conflicting interpretations of the parties.⁸⁶ "Whether a contract's terms are ambiguous is a question of law."⁸⁷ A contract is ambiguous only if "it is reasonably and clearly susceptible of more than one interpretation."⁸⁸ On the other hand, if "the language

Businesses & Transactions, HG LEGAL RESOURCES (last visited Feb. 11, 2019), <https://www.hg.org/legal-articles/the-true-importance-of-written-contracts-in-businesses-and-transactions-39639> [<https://perma.cc/6864-ALG7>].

80. 10 MCQUILLIN, *supra* note 14, § 29:2 at 303–05.

81. *City of Warwick v. Boeng Corp.*, 472 A.2d 1214, 1217 (R.I. 1984).

82. 10A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 29:121, 191 (3d ed., rev. vol. 2009) [hereinafter 10A MCQUILLIN].

83. *High Steel Structures, Inc. v. Cardi Corp.*, 152 A.3d 429, 435 (R.I. 2017).

84. 10A MCQUILLIN, *supra* note 82, § 29:122, at 195–96.

85. *Id.* § 29:122 at 199–201.

86. *See supra* discussion in Introduction.

87. *Nat'l Refrigeration, Inc. v. Standen Contracting Co.*, 942 A.2d 968, 971 (R.I. 2008).

88. *Id.* at 972 (quoting *Rotelli v. Catanzaro*, 686 A.2d 91, 94 (R.I. 1996)).

of a contractual agreement is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids.”⁸⁹

If there is ambiguity, additional principles need to be considered. Although the following principles do not directly address the problem raised by the hypothetical, they are presented in order to give a general summary of the law when ambiguity exists in a municipal contract. For example, “[a]n ambiguous contract should be read in light of surrounding circumstances, and . . . trade usages or customs [may be] read into the agreement by operation of law and become a part of it.”⁹⁰ Another general principle is that an ambiguity should be construed against the drafter, except in the face of a patent ambiguity.⁹¹ If the patent ambiguity should have been readily apparent to the bidder, or the bidder had actual knowledge of it, the ambiguity will be construed against the bidder.⁹² This exception is consistent with a construction in favor of the public.⁹³

The dispute involving the window washing company and the City presents a situation of an ambiguous municipal contract. The writings do not address the argument raised against the City. It is not possible to simply apply the plain language of the writings because there is no language addressing the issue. Because of the silence of the writings, the conflicting interpretations of the contract are equally plausible. This raises the important issue regarding the applicability of the parol evidence rule.⁹⁴

89. *Id.*

90. 10A MCQUILLIN, *supra* note 82, § 29:122, at 196–97.

91. *Id.* § 29:122, at 201.

92. *Id.*

93. *Id.* However, the principle of construing a document against the drafter is merely a guiding principle to take into consideration; it is not a binding rule in any sense.

94. One possible line of analysis in the hypothetical would be to argue that no enforceable contract was formed because of the absence of a material term. A party could argue that the term addressing the division of work between the two successful bidders is a material term, and without it, no contract can be formed. The argument could go on to assert that if the court were to rule on the proper division of work, the court would be impermissibly writing the contract for the parties by supplying a term that no party ever addressed. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 417–38 (3d ed. 2004). However, this argument would be weakened once the parties begin performance. If one of the bidders is actually washing windows and the City is paying for the service, there is obviously a contract in existence, but

IV. THE PAROL EVIDENCE RULE UNDER RHODE ISLAND LAW

The parol evidence rule in Rhode Island tracks the general common law approach in place throughout the country.⁹⁵ Rhode Island case law has echoed the prevailing description of the parol evidence rule seen in cases across the country: “Few subjects connected with the interpretation of contracts present so simple and uniform a statement of principle, bedeviled by such a perplexing and harassing number of difficulties in its application, as the parol evidence rule.”⁹⁶ The purpose of the parol evidence rule is to make inadmissible prior understandings or agreements for the purpose of contradicting, altering, adding to, or varying the terms of a written contract.⁹⁷ Absent fraud or mistake, parol evidence of prior or contemporaneous agreements is generally inadmissible for those purposes.⁹⁸ The parol evidence rule protects the sanctity of the writing.

When the parties to a contract have mutually agreed to incorporate (or “integrate”) a final version of their entire agreement in a writing, neither party will be permitted to contradict or supplement that written agreement with “extrinsic” evidence (written or oral) of prior agreements or negotiations between them. When the writing is intended to be final only with respect to a part of their agreement, the writing may not be contradicted, but it

with an ambiguous term regarding division of work.

95. *Parol Evidence Rule*, BLACK’S LAW DICTIONARY (10th ed. 2014).

96. *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1191–1192 (R.I. 1994). Despite the name, the parol evidence rule is a rule of substantive law, not a rule of evidence. *See Fram Corp. v. Davis*, 401 A.2d 1269, 1272 (R.I. 1979). “The parol evidence rule does not exclude evidence because it is untrustworthy or an undesirable means of establishing a fact. The rule declares that certain kinds of facts are not to be considered as a matter of substantive law.” *Id.*

97. *Paoletta v. Radiologic Leasing Assocs.*, 769 A.2d 596, 599 (R.I. 2001).

The parol-evidence rule provides that “parol or extrinsic evidence is not admissible to vary, alter or contradict a written agreement.” We have stated, however, that “[i]n interpreting unambiguous contracts, we ‘consider the situation of the parties and the accompanying circumstances at the time the contract was entered into, not for the purpose of modifying or enlarging or curtailing its terms, but to aid in the interpretive process and to assist in determining its meaning.’”

Id. (internal citations omitted) (alterations in original).

98. *Fram Corp.*, 401 A.2d at 1273.

may be supplemented by such extrinsic evidence.⁹⁹

Most types of contracts do not need to be written in order to be enforceable, but if the parties go to the trouble and effort of putting the terms in writing, the parol evidence rule is designed to protect the written terms.¹⁰⁰ The parol evidence rule applies to any agreement put into writing.¹⁰¹ However, the full application and effectiveness depends on whether a written contract is integrated or not.¹⁰²

The parol evidence rule is best understood in light of its purpose: to give legal effect to whatever intention the parties may have had to make their writing at least a final and perhaps also a complete expression of their

99. KNAPP ET AL., *supra* note 38, at 413. The interpretation of the parol evidence rule has been divided into what has come to be known as the Williston versus Corbin approach.

The point in dispute is whether the fact that the writing appears on its face to be a complete and exclusive statement of the terms of the agreement establishes conclusively that the agreement is completely integrated.

....

In Williston's view, it does. "It is generally held that the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms." Many courts, particularly in cases decided in the first half of the twentieth century, agreed that the issue is to be resolved by first inspecting the writing alone. If, on its face, the agreement appears to be completely integrated, the court should simply accept that this is so. Some courts have recognized the futility of trying to tell whether the writing is completely integrated without looking beyond the four corners of the writing and so have softened the test. These courts read the writing in the light of surrounding circumstances—excluding, however, the most vital circumstances of all, the evidence of the prior negotiations themselves.

....

The opposing camp, inspired by Corbin, rejects even this exclusion. According to Corbin, account should always be taken of all circumstances, including evidence of prior negotiations, since the completeness and exclusivity of the writing cannot be determined except in the light of those circumstances The trend clearly favors Corbin.

2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 230–31 (3d ed. 2004) [hereinafter 2 FARNSWORTH].

100. KNAPP ET AL., *supra* note 38, at 413.

101. See *Parol Evidence Rule*, *supra* note 95.

102. See *id.*

agreement. If the parties had such an intention, the agreement is said to be “integrated,” and the parol evidence bars evidence of prior negotiations for at least some purposes. If the parties had no such intention, the agreement is said to be “unintegrated,” and the parol evidence rule does not apply.¹⁰³

The concept of “integration” is crucial because the parol evidence rule “bars the use of any previous or contemporaneous oral statements that attempt to modify an integrated written agreement.”¹⁰⁴ If a writing is deemed to be unintegrated, the parol evidence rule does not apply.¹⁰⁵

Therefore, it is necessary to determine whether a contract is integrated, partially integrated or unintegrated.¹⁰⁶

If an agreement is integrated, it is considered “partially integrated” or “completely integrated” according to the degree to which the parties intended the writing to express their agreement. If they intended the writing to be a final expression of the terms it contains, but not a complete expression of all the terms agreed upon—some terms remaining unwritten—the agreement is partially integrated. If the parties intended the writing to be a complete expression of all the terms agreed upon, as well as a final expression of the terms it contains, the agreement is completely integrated.¹⁰⁷

An integrated contract is one where the writing or writings are a final and complete expression of the agreement.¹⁰⁸

[W]hen parties to a contract have adopted a written agreement as the final expression of their intention in regard to a portion of or the entire subject matter of the transaction, all other expressions of intention that have occurred prior to or contemporaneous with the making of the agreement are immaterial in ascertaining the terms

103. 2 FARNSWORTH, *supra* note 99, § 7.3, at 418.

104. *Nat'l Refrigeration, Inc. v. Standen Contracting Co.*, 942 A.2d 968, 972 (R.I. 2008). The parol evidence rule applies only to fully integrated agreements. *See Fram Corp. v. Davis*, 401 A.2d 1269, 1272 (R.I. 1979).

105. *See Fram Corp.*, 401 A.2d at 1272.

106. *See id.*

107. 2 FARNSWORTH, *supra* note 99, § 7.3, at 418–19.

108. *Fram Corp.*, 401 A.2d at 1272.

of the transaction.¹⁰⁹

In broad, general terms, if a document is determined to be fully integrated, then parol evidence is not allowed to be introduced.¹¹⁰ If the document is not fully integrated, parol evidence is allowed.¹¹¹ “The difficulty lies in discerning if the document is fully integrated.”¹¹² If the agreement is integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible to contradict the writing.¹¹³ If the agreement is partially integrated, such evidence is admissible to supplement the writing but not contradict it.¹¹⁴ “If the agreement is completely integrated, not even evidence of a ‘consistent additional term’ is admissible to supplement the writing.”¹¹⁵

So how does one go about determining whether a written contract is wholly or partially integrated, or unintegrated? The answer starts with an examination of the writing itself. Does it appear to be a complete and final expression of the agreement, or are there terms that are obviously missing?

The character of the writing itself is often persuasive as to the intention of the parties. Indeed, it has been held that if a writing appears in view of its thoroughness and specificity to embody a final agreement on the terms that it contains, the agreement is conclusively to be taken as an integrated one with respect to those terms Thus the intention of the parties is determined from all the circumstances, including their language and other conduct, just as intention is determined for any purpose.¹¹⁶

109. *Id.* at 587–88.

110. *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1192 (R.I. 1994).

111. *Id.*

112. *Id.*

113. 2 FARNSWORTH, *supra* note 99, § 7.3, at 419.

114. *Id.*

115. *Id.*

116. *Id.* § 7.3, at 420.

An integrated document is one “where the parties thereto adopt a writing or writings as the final and complete expression of the agreement.” How to determine whether the executed document was adopted by the parties as a final and complete expression of their agreement is the difficult problem. That question cannot be answered by an examination of the instrument alone for the writing does not in or of itself prove completeness. Instead in each instance

With regard to the window washer hypothetical, the issue is whether the contract is wholly or partially integrated. It seems reasonable to rule out the possibility that the contract is unintegrated.¹¹⁷ The key test to determine if a contract is integrated is whether it is intended to be a final expression of the matter addressed.¹¹⁸ On this issue, it seems indisputable that the writings comprising the window washing contract are intended to be the final expression. The bids are approved by a vote at a public hearing by the official entity (the Board) empowered by the City's Charter.¹¹⁹ The Board acts on behalf of the City, and has the exclusive authority to oversee the award of municipal contracts.¹²⁰ Once the Board approves a bid, and the bid is

wide latitude must be allowed for inquiry as to whether the parties intended that the writing constitute an integration of all of their prior agreements and negotiations. Such intent may be found in the prior or contemporaneous conduct and language of the parties for it is abundantly clear that the ultimate question of what negotiations and prior agreements were intended to be covered or adopted by the writing cannot be answered without first ascertaining what those negotiations and agreements were and in what circumstances they were undertaken and made. Extrinsic or parol evidence on these subject matters should be admitted preliminarily by the trial justice, and out of hearing of the jury if there be one. If satisfied on the evidence so admitted that there is an issue of fact as to the existence of a prior or contemporaneous oral agreement, the trial justice must then determine whether the collateral terms are consistent with the written and are such as would normally be excluded from the written contract by the parties. If he so finds, then and only then may that evidence be considered by the trier of the facts for his determination of the ultimate question of whether in fact the agreement consisted of what was written as well as what was oral. If on the other hand, what is collateral is inconsistent with the writing or is such that the parties would naturally and normally have included one in the other, then the extrinsic evidence originally admitted preliminarily must be excluded and may not be considered by the trier of facts.

Golden Gate Corp. v. Barrington Coll., 199 A.2d 586, 590 (R.I. 1964).

117. An unintegrated writing is one where the parties did not intend it to be a final expression of the agreement. See *Associated Catalog Merchs., Inc. v. Chagnon*, 557 A.2d 525, 528–29 (Conn. 1989). Clearly, the Board and the bidders intended to have a final expression of the agreement upon the award to the successful bidders and legal approval by the City Solicitor.

118. See *Fram Corp. v. Davis*, 401 A.2d 1269, 1272 (R.I. 1979) (“[A]n integrated document is one where the parties adopt a writing or writings as a final and complete expression of the agreement.”).

119. ALFRED G. CHAFFEE, *ORDINANCES OF THE CITY OF PROVIDENCE* 14 (1914).

120. *Id.* at 12.

approved by the City Solicitor, the City is not necessarily required to take further action in terms of writing the contract.¹²¹ As explained above, the window washing contract consists of the composite of the writings produced at the various stages of the bid process. Thus, these writings may be deemed as the final expression of the terms addressed.¹²²

The issue then becomes whether the contract is wholly or partially integrated.¹²³ This is a more difficult issue to determine.

Assuming that the agreement is integrated, is it completely, as distinguished from only partially, integrated? The answer depends on whether the parties intended the writing as a complete and exclusive expression of all terms on which agreement was reached, as distinguished from merely a final expression of the terms that it contains. The sharpest disagreement in connection with the parol evidence rule has been over the application of this test. It is one thing to accept that what is written cannot be contradicted. It is quite another to accept that what is written cannot be supplemented even by consistent terms. It is generally agreed that the mere fact that the agreement is integrated does not give rise to a presumption that it is completely integrated.¹²⁴

With regard to the window washing contracts, it may be possible to view the contract as either wholly integrated or partially integrated. The argument that it is wholly integrated would be that it was the parties' intent that the totality of the writings were intended to address every aspect of the contract, and that the parties never contemplated that any additional writing would be required to provide a material term.¹²⁵ The writings were intended to be the complete and final expression of the contract because the process was complete, and it seems to be

121. See *How to Submit a Bid*, *supra* note 3.

122. See *Fram Corp.*, 401 A.2d at 1272.

123. *Id.*

124. 2 FARNSWORTH, *supra* note 99, § 7.3, at 421–22. “The general rule that contracts must be construed as a whole, and not merely in detached parts, is applicable, and, if the agreement is contained in several instruments, all should be construed together.” 10A MCQUILLIN, *supra* note 82, § 29:122, at 195–96. This point is particularly relevant when the City's contracts consist of numerous documents intended to be read together.

125. See 2 FARNSWORTH, *supra* note 99, § 7.3, at 418–21.

out of the ordinary course for oral terms to become part of the City's contracts.¹²⁶

Even if, however, the contract was intended to be fully integrated, it is apparent that a material term was not addressed (the division of work). One of the difficulties in contract drafting is that even if the parties intend to cover all material terms in a completely integrated document, there is always the possibility that a material term may not be included for a variety of reasons, such as unforeseeable circumstance or inadvertence.¹²⁷ So it is possible that the window washing contract was intended to be completely integrated, but a material term was omitted for whatever reason.

The other possibility is that the contract was only intended to be a partial integration, with the material addressing division of work to be left unwritten.¹²⁸ This possibility may seem less likely and runs counter to be the public policy need for municipal contracts to be fully transparent and easily discernible by a third party.¹²⁹ One factor to note, however, is that when the City forms a contract by the composite of numerous writings, there is no writing in the bid and award process that contains an integration or merger clause. It is correct that an integration or merger clause is not necessary for a contract to be viewed as wholly integrated.¹³⁰ However, it is also true that the use of such clauses is widespread among lawyers who want to ensure that a contract is viewed as a complete integration.¹³¹ Thus, the absence of such a clause could give rise to the inference that if a merger or integration clause is omitted, it is omitted deliberately to signal that the document is not a complete integration.¹³² So perhaps the window washing contract could be interpreted as a set of

126. *See id.* § 7.3, at 419.

127. Markus Esly, *A Sure Way to Lose Your Case? Challenging Contract Terms for Uncertainty*, LEXOLOGY (Oct. 4, 2013), <https://www.lexology.com/library/detail.aspx?g=2a81495f-8ade-4a49-a98d-5d8d472993ae> [<https://perma.cc/XDG2-SVRB>].

128. *See* 2 FARNSWORTH, *supra* note 99, § 7.3, at 418–19.

129. *See generally* Rosenbaum, *supra* note 73.

130. *See* Braten v. Bankers Tr. Co., 456 N.E.2d 802, 805 (N.Y. 1983).

131. “When the agreement has been reduced to a complete and final integrated writing, courts will presume that that writing is the best evidence of what the parties intended.” George Bundy Smith & Thomas J. Hall, *Merger Clauses and Parol Evidence Rule; Commercial Division Update*, N.Y. L. J. (Feb. 20, 2015).

132. *See id.*

writings designed as an integration of the matters addressed, but also designed to address the division of work somewhere other than the writings. Admittedly, this interpretation seems less persuasive given the strong policy reasons and the nature of the Board's procedures to minimize uncertainty in the bidding process.

The issue of whether the contract is wholly or partially integrated may, however, be somewhat of a moot point because the basic problem remains open: How does the law resolve the issue of the missing written term regarding the division of work? Regardless of whether the contract is wholly or partially integrated, the law seems to come down on the side that the parol evidence rule allows for the admissibility of the oral statement at the public hearing.

The parol evidence rule is governed by numerous general statements in its application, but it is also subject to a variety of exceptions.¹³³ The most important exception for this Article is the principle that parol evidence may be admitted to supplement an agreement that is incomplete or ambiguous on its face.¹³⁴

Without attempting a complete enumeration or examination of our decisions in which the rule has been held inapplicable, reference to some instances where parol evidence has been admitted even where that evidence added to, varied, altered or contradicted the terms of a later unambiguous writing amply demonstrates that the rule is neither all-inclusive nor self-executing. For example, we have held that parol or extrinsic evidence is admissible to . . . complete a writing that is incomplete and which it is apparent from an inspection of the writing does not include the entire agreement of the parties.¹³⁵

133. 2 FARNSWORTH, *supra* note 99, § 7.3, at 420.

134. *Wells v. Uvez Optical, Inc.*, 635 A.2d 1188, 1192 (R.I. 1994) (quoting *Lisi v. Marra*, 424 A.2d 1052, 1055 (R.I. 1981)); *see also Raiche v. Scott*, 101 A.3d 1244, 1250 (R.I. 2014) (under Rhode Island law, court can consider parol evidence for purpose of supplementing agreement that is incomplete).

135. *Golden Gate Corp. v. Barrington Coll.*, 199 A.2d 586, 589–90 (1964).

We recognized in *Golden Gate Corp.*, that even where the prior or contemporaneous writings or oral negotiations added to, varied, altered, or contradicted the terms of a subsequent unambiguous writing, the parol evidence rule had been held to be “inapplicable” in

If the contract is partially integrated, parol evidence is permitted to supplement the agreement but not contradict it, and there is no requirement that the writing be ambiguous in order for the parol evidence to be admissible.¹³⁶ It is also well-settled that the use of extrinsic evidence to vary the terms of the agreement is inadmissible, but parol evidence is admissible to explain ambiguities (even for a fully integrated document).¹³⁷

This leads to the question of what constitutes an ambiguous agreement.

In reviewing the instant appeal, we are guided by well-settled rules on the interpretation of contracts. In particular, a court must find that a contract is ambiguous before it can exercise judicial construction of the document. If the court finds that the terms of an agreement are clear and unambiguous, the task of judicial construction is at an end and the agreement must be applied as written. In determining whether an agreement is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary, and usual meaning. Applying this standard, we have consistently found that an agreement is ambiguous only when it is reasonably and clearly susceptible to more than one interpretation. If a document is susceptible to more than one interpretation, extrinsic evidence is admissible to aid in its

certain instances

Fram Corp. v. Davis, 401 A.2d 1269, 1272 (1979) (internal citations omitted).

136. 2 FARNSWORTH, *supra* note 99, § 7.3, at 420.

137. “Whatever the degree of integration, however—partial, complete, or not at all—a written agreement may . . . always be explained by extrinsic evidence for purposes of interpretation.” *KNAPP ET AL.*, *supra* note 38, at 418.

Classical courts generally admitted parol evidence for explanatory purposes only if the writing appeared on its face to be ambiguous, while modern courts are more likely to admit parol evidence to show that the language used in the agreement has a special meaning, even if that language does not appear unclear merely from an inspection of the writing.

Id. at 419. “As is the case with contracts generally, extrinsic evidence to vary the terms of the agreement is inadmissible, but parol evidence is admissible to explain ambiguities.” 10A *MCQUILLIN*, *supra* note 82, § 29:122, at 191–92. “An ambiguous contract should be read in light of surrounding circumstances, and, in a proper case, trade usages or customs are read into the agreement by operation of law and become a part of it.” *Id.* at 196–97.

interpretation. Where no ambiguity is found, it is basic that the intention of the parties must govern *if* that intention can be clearly inferred from the writing and if it can be fairly carried out in a manner consistent with settled rules of law. In interpreting unambiguous contracts, we “consider the situation of the parties and the accompanying circumstances at the time the contract was entered into, not for the purpose of modifying or enlarging or curtailing its terms, but to aid in the interpretive process and to assist in determining its meaning.”¹³⁸

138. *W.P. Assocs. v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994) (emphasis in original) (citations omitted). Several Rhode Island Supreme Court cases have addressed the issue of the nature of ambiguity in a contract and the appropriate use of extrinsic evidence:

“In determining whether a contract is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning.” “[A] contract is ambiguous only when it is reasonably and clearly susceptible of more than one interpretation.” When a contract is clear and unambiguous, “the parol-evidence rule . . . bars evidence of a previous or contemporaneous oral promise extrinsic to an integrated contract that would purport to contradict or modify the express terms of the written contract.”

Samos v. 43 East Realty Corp., 811 A.2d 642, 643 (R.I. 2002) (alteration in original) (citations omitted).

As is the case in contract interpretation, whether a lease is ambiguous or not is a question of law that this Court reviews on a *de novo* basis. In determining whether a lease is ambiguous, “we give words their plain, ordinary, and usual meaning. . . . The subjective intent of the parties may not properly be considered by the Court; rather, we consider the intent expressed by the language of the [lease].” Thus, if a lease “is clear and unambiguous by its terms, ‘what is claimed to have been the subjective intent of the parties is of no moment.’” “In situations in which the language of a [lease] is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids.”

Inland Am. Retail Mgmt. LLC v. Cinemaworld of Fla., Inc., 68 A.3d 457, 461–62 (R.I. 2013) (alterations in original) (citations omitted).

When the terms are clear and unambiguous, then the court should apply them as written. In making this determination, the court should view the agreements in their entirety and give the contractual language its “plain, ordinary and usual meaning.” On appeal, this Court will deem agreements to be ambiguous when they are reasonably and clearly susceptible to more than one rational interpretation. But if the contractual language is unambiguous, the intention of the parties must govern “if that intention can be clearly

Taking these principles into account, a few conclusions may be drawn regarding the oral statement in the window washing hypothetical. First, the contract is clearly integrated. It was intended to be a final, written expression of the agreement.¹³⁹ However, there may be some uncertainty whether it was wholly or partially integrated.¹⁴⁰ It is highly likely that terms were not meant to be added or supplemented through an oral discussion at the public hearing, even though that is what occurred. It is more likely that the discussion occurred in order to clarify or explain the intention of the parties. Therefore, even if the contract was intended to be wholly integrated, it is possible that the contract may have inadvertently been left open to an interpretation that it was only partially integrated.¹⁴¹

As a practical matter, however, an open issue needed to be

inferred from the writing and . . . can be fairly carried out in a manner consistent with settled rules of law.”

A.F. Lusi Const., Inc. v. Peerless Ins. Co., 847 A.2d 254, 258 (R.I. 2004) (alterations in original) (citations omitted).

[W]hether a contract is clear and unambiguous is a question of law In determining whether or not a particular contract is ambiguous, the court should read the contract “in its entirety, giving words their plain, ordinary, and usual meaning.” Contract ambiguity arises “only when [a contract] is reasonably and clearly susceptible of more than one interpretation.” “Where an ambiguity exists in a provision of a contractual document, the construction of that provision is a question of fact.”

Haviland v. Simmons, 45 A.3d 1246, 1258–59 (R.I. 2012) (first and third alterations in original) (citations omitted).

Similarly, we recognize that “[a]n ambiguity in a contract cannot be resolved on summary judgment.” Furthermore, whether a contract’s terms are ambiguous is a question of law. “However, ‘a contract is ambiguous only when it is reasonably and clearly susceptible of more than one interpretation.’” We have previously held “[i]n situations in which the language of a contractual agreement is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids.” In addition, the parol evidence rule bars the admission of any previous or contemporaneous oral statements that attempt to modify an integrated written agreement. We also adhere to the rule of interpretation that when considering “whether a contract is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning.”

Garden City Treatment Ctr., Inc. v. Coordinated Health Partners, Inc., 852 A.2d 535, 542–43 (R.I. 2004) (alterations in original).

139. See 2 FARNSWORTH, *supra* note 99, § 7.3, at 225–27.

140. See *id.*

141. *Id.*

addressed: the division of work between the two bidders. The contract was silent on this issue; in practical terms, this omitted term needed to be supplied in some way. Under such circumstances, extrinsic evidence is admissible to “complete or clarify an instrument which appears on its face to be incomplete or ambiguous”¹⁴² The alternative would be to view the contract as unenforceable. In light of this situation, it seems reasonable to conclude that a court would have no choice but to consider the oral statement.¹⁴³ Moreover, the admissibility of the oral statement would not conflict with the principles of the parol evidence rule.¹⁴⁴

The relationship between the two successful bidders was ambiguous and required explanation. Parol evidence is admissible to provide this information regardless of the type of integration involved.¹⁴⁵ Moreover, any oral statement concerning the division of work between the parties would not contradict any term of the writings because nothing in the writings addressed the issue.¹⁴⁶ Similarly, any such statement would not vary the terms because, again, the absence of any language on the issue meant there were no terms to vary.¹⁴⁷ The need to consider the oral statement is consistent with well-settled principles of Rhode Island contract law.

[O]ne of the cardinal rules of construction of agreements is that the meaning should be gathered from the entire context and the language should be interpreted so as to subserve, and not subvert, the general intention of the

142. *Supreme Woodworking Co. v. Zuckerberg*, 107 A.2d 287, 290 (R.I. 1954); *see also Simpson v. Dailey*, 496 A.2d 126, 129 (R.I. 1985) (plaintiff did not attempt to establish, challenge, or modify the terms of the contract; parol-evidence rule not applicable).

143. *Nat’l Refrigeration, Inc. v. Standen Contracting Co.*, 942 A.2d 968, 972 (R.I. 2008).

144. *See* 2 FARNSWORTH, *supra* note 99, § 7.3, at 225.

145. In addition, if the terms of a contract are ambiguous, the court will look to the construction placed upon such terms by the parties themselves as an aid in determining their intended meaning, and the circumstances surrounding the execution of the contract are also relevant to the determination of that intent. (For example, course of performance, course of dealing, and usage in custom or industry may be used in determining the intent of contracting parties.) *See Inland Am. Retail Mgmt. LLC v. Cinemaworld of Fla., Inc.*, 68 A.3d 457, 465 (R.I. 2013) (quoting *DTP, Inc. v. Red Bridge Prop., Inc.*, 576 A.2d 1377, 1382 (R.I. 1990)).

146. *See Samos v. 43 E. Realty Corp.*, 811 A.2d 642, 643 (R.I. 2002).

147. *Id.*

parties, and where a contract as a whole discloses a given intention and certain words or clauses would, if taken literally, defeat the intention, they should be interpreted, if possible, so as to be consistent with the general intent.¹⁴⁸

In sum, the court's role should be to give effect to the general intention of the parties and to promote the enforceability of the contract, as opposed to operating with a presumptive goal to deny the validity of a contract.¹⁴⁹

As for the evidentiary aspects of a public official's statements at a public hearing, a somewhat similar case was presented in a California.¹⁵⁰ In *Carruth v. City of Madera*, the plaintiff was permitted to prove the existence of a contract between his predecessor-in-interest and the city by introducing testimony from a city council meeting by council members regarding the contract.¹⁵¹ This case can be broadly construed to affirm the evidentiary value of statements by public officials at a public hearing.¹⁵² The council members' testimony was permitted to establish the terms of the contract.¹⁵³ However, there are significant distinctions between this case and the way in which the City conducts business. Unlike the City, the City of Madera was not subject to any legal requirements that city contracts needed to be recorded in the council's minutes.¹⁵⁴ Its rules of governance permitted a much more relaxed approach to the formation of city contracts in comparison to the requirements governing the City.¹⁵⁵ Nonetheless, this case can be viewed as recognizing the competency of public officials to testify about the contract formation process.¹⁵⁶

Given the hypothetical facts in the window washing contract, it seems that it would be an extremely difficult challenge to persuade a court to disregard a Board member's oral statement on

148. *Massasoit Hous. Corp. v. N. Kingstown*, 65 A.2d 38, 40–41 (R.I. 1949).

149. See 2 FARNSWORTH, *supra* note 99, § 7.3, at 225–27.

150. *Carruth v. City of Madera*, 233 Cal. App. 2d 688 (1965).

151. *Id.* at 693.

152. See generally *supra* section I.

153. *Carruth*, 233 Cal. App. 2d at 693.

154. *Id.*

155. See *id.*

156. For a counter analysis, please see *infra* section V.

the record concerning the terms of the contract. The parol evidence rule does not seem to provide a basis to bar such testimony. It seems that the court would need to consider the evidence in order to fulfill the legal presumption that contracts that present no insurmountable barriers to enforcement should be given effect.¹⁵⁷

V. ALTERNATIVE APPROACHES TO THE TREATMENT OF ORAL STATEMENTS AT BOARD MEETINGS

If the goal is to prohibit the admissibility of the kind of oral statements at issue here, there may be alternative approaches to accomplishing that goal. A merger or integration clause would have been helpful in the hypothetical.¹⁵⁸ However, given the way in which the contract was formed, it is difficult to identify where it should have been included. It is also important to note that merger clauses are not dispositive, and courts are free to disregard them under the proper circumstances.¹⁵⁹ Nonetheless, such a clause would provide an additional factor to weigh in deciding on the admissibility of an oral statement. Another matter to consider would be that in the event a merger clause was effective in barring the oral statement, the likely result would be a ruling that the contract in the hypothetical is unenforceable because it is missing a material term, and the entire bid process would need to start over.¹⁶⁰ Would this be a beneficial result for the City? It would certainly result in delay. Moreover, such a situation would likely give rise to litigation, regardless of whether the oral statement is considered or not.

Another possible approach would be to adopt a practice utilized by the Town of Johnston, Rhode Island, in 2003.¹⁶¹ That case involved a dispute over the town's refuse collection contract.¹⁶² During the relevant time period, the town had a written provision in the bid application documents, "that the town would not be bound by oral interpretations of the meaning of any specifications given by town officers, employees or agents."¹⁶³ If

157. See *Carruth*, 233 Cal. App. 2d at 699.

158. *Smith & Hall*, *supra* note 131.

159. See 2 FARNSWORTH, *supra* note 99, § 7.3 at 233-35.

160. See *id.* §§ 3.27, 3.28, at 417-26.

161. *Coastal Recycling, Inc. v. Connors*, 854 A.2d 711 (R.I. 2004).

162. See *generally id.*

163. *Id.* at 712. This practice seems to have been adopted in order to

the City were to adopt a similar practice, it might have the effect of barring the use of oral statements to lend meaning to municipal contracts.¹⁶⁴ Whether the City would want to adopt such a provision is, of course, a policy decision that is beyond the scope of this Article.

It is also important to note that the decision to accept a bid is made by the department that originated the request, and that department is the actual party to the contract. Thus, there may be a genuine issue as to the authority of a Board member to add to, or supplement, a contract in which the Board is not identified as a party. Additionally, even if the Board were deemed to have some authority regarding the contract, it is a completely separate matter as to whether an individual Board member has the authority to add to, or supplement, a contract. Thus, there may be a genuine question concerning the exact delineation of roles between the department that is the contracting party and the Board (and its members), which administers the process. In the window washing hypothetical, it seems reasonable to query whether the more appropriate interpretation of the parties' intention should originate from the department instead of a Board member.

To elaborate, does a Board member have the authority to set the terms of a contract with an oral statement at a Board meeting? Is he or she an authorized agent of the contracting party with the authority to set the terms of the contract? If the answer is yes, and if the contract is only partially integrated, then the oral statement should be admitted. In such a situation, the statement would not be a statement to explain the contract—the statement would be part of the contract. If this is a possibility, it would be beneficial for the City to identify the applicable law authorizing such action, and inform the public that the members of the Board have the authority to state or add to the terms of the contract through an oral statement.¹⁶⁵ In the alternative, the City could

make express the principle that “an officer of a corporation has no power to make or alter a contract unless it be duly authorized, made, or altered in the manner prescribed by the charter or statute from which the power is derived.” 10 MCQUILLIN, *supra* note 14, § 29:25, at 447.

164. *See generally* Coastal Recycling, Inc., 854 A.2d at 712.

165. At least one other state has addressed the issue of the legal significance of oral statements by municipal officials relating to municipal contracts. *See Lange v. City of Batesville*, 972 So. 2d 11 (Miss. Ct. App.

consider implementing a rule or policy similar to the one mentioned in *Coastal Recycling*, which was utilized by the Town of Johnston to avoid the possibility of a statement by an individual official having binding effect on the Town's contracts.¹⁶⁶

2008). In quoting precedent, the *Lange* court stated:

"We also think it was error for the court to permit individual members of the board of supervisors to testify *what the board did, and what the board understood, and what the board had authorized to be done in the premises*. A board of supervisors can act only as a body, and its act must be evidenced by an entry on its minutes. *The minutes of the board of supervisors are the sole and exclusive evidence of what the board did*. The individuals composing the board cannot act for the county, nor officially in reference to the county's business, except as authorized by law, and the minutes of the board of supervisors must be the repository and the evidence of their official acts."

Id. at 18 (emphasis in original) (quoting *Thompson v. Jones Cty. Cmty. Hosp.*, 352 So. 2d 795, 796 (Miss. 1977)). The court then stated the policy reason for this principle.

"When official authority is conferred upon a board or commission consisting of three or more members, the authority so conferred must be exercised by a legal quorum, and, as a general rule, the decisions to be executed or the contracts to be awarded by the board must be determined or decided upon only in or at a lawfully convened session, and the proceedings must be entered upon the minutes, of the board or commission. The reasons for the requirements aforesaid are: (1) That when authority is conferred upon a board, the public is entitled to the judgment of the board after an examination of a proposal and a discussion of it among the members to the end that the result reached will represent the wisdom of the majority rather than the opinion or preference of some individual member; and (2) that the decision or order when made *shall not be subject to the uncertainties of the recollection of individual witnesses of what transpired, but that the action taken will be evidenced by a written memorial entered upon the minutes at the time, and to which all the public may have access to see what was actually done.*"

Id. at 18–19 (emphasis in original) (quoting *Thompson*, 352 So.2d at 769). This Mississippi case does not appear to conflict with the practice of the City or with the facts in the hypothetical because the oral statements of the Board members are from a public hearing and were made on the record.

166. Even if such a rule or policy were in effect, it still may not be dispositive of the issue in the window washing hypothetical for the following reason. Even if the individual Board member's oral statement is not viewed as binding, it is part of the public hearing and recorded in the minutes. At the conclusion of the discussion, the Board then votes to approve the contract. Because the vote is taken after the oral statement, it could be argued that the Board has adopted or ratified the statement by the individual member. Viewed in this manner, the oral statement would no longer be the statement by a mere member of the Board, but a statement of the entire Board itself.

However, even if it were determined that a Board member did not have such authority, the oral statement could be admissible to explain an ambiguity or address an obviously missing term.¹⁶⁷ For example, the Board member could possibly be called to testify as an expert regarding the interpretation of the contract, if that testimony would show that there is a prevailing or widespread custom or practice in dividing the work. The Board member could also testify as an expert to the practices and procedures of the City in past situations involving oral statements.¹⁶⁸ Board members are involved in the awards of hundreds of contracts; they would be deemed to have expert knowledge regarding the award and formation of municipal contracts.¹⁶⁹ Even if they have no authority to add to, or supplement, the contract, they could certainly speak to the practices and procedures, which may shed light on the proper interpretation in situations like the hypothetical.

The open question is whether there should be a written policy to provide guidance in similar, future situations. Should there be a way to provide more predictability or formality when oral statements become part of the record as opposed to what may be an ad hoc approach to dealing with such situations? Or should the process be left alone given the rarity of such occurrences? It is understandable that it may not be possible or even advisable to establish a uniform approach to address a situation that rarely occurs. The problem with any new rule or policy, in general, is that it may unnecessarily restrict the discretionary powers of the

Therefore, it is not certain that adopting the rule utilized by the Town of Johnston would be dispositive of the issue presented in the hypothetical for the City of Providence. If further consideration of such a rule would be merited, it would be advisable to directly address the issue of such issues as adoption or ratification of statements on the record.

However, this still leaves open the issue regarding the precise relationship between the Department, which is an actual signatory to the contract, and the Board, which is not. Even though the Board is not a signatory, it would nonetheless seem curious to treat it as a complete stranger to the contract given its role. To treat the Board as a stranger to the contract with no substantive input would seem to reduce it to a mere clerical role, and it does not appear that is the intent under the Charter.

167. *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1192 (R.I. 1994).

168. *See, e.g., Levcowich v. Town of Westerly*, 492 A.2d 141, 143 (R.I. 1985) (admissibility of expert testimony to explain or supplement ambiguous documents is within the trial justice's discretion if trial justice concludes that ambiguity requiring explanation exists).

169. *See Current Bids, supra* note 1.

Board. Plus, any such attempts may raise larger issues that extend beyond purely legal considerations to political question-type issues.

CONCLUSION

As with any system or process designed to handle hundreds, if not thousands, of similar situations, there will undoubtedly be the exceptional situation that does not fit neatly within the established system. This will be true regardless of how smoothly or efficiently the system handles the vast majority of situations. It appears that situations involving oral statements by Board members regarding the terms of a contract fall into the exceptional category. It seems less than ideal for some terms of a municipal contract to be found in oral statements. In the interest of transparency, it would be preferable for all terms to be contained in an official writing or writings. The situation is complicated by the fact that successful bidders often do not attend the public hearing at which their bid is approved, so there would be no reason for them to know that part of their contract is based upon oral statements at a meeting they did not attend. This lack of awareness would predictably give rise to misunderstanding or disagreement, and probably a lawsuit.

The question then becomes should the City and the Board change their processes to avoid this type of situation? The problem can be restated to ask whether a system that seamlessly handles roughly ninety percent of matters should be modified to address a rare occurrence that presents a highly unusual situation. The practical answer may be to leave the system alone because modifying it may produce unintended consequences that create different sorts of problems. One relatively simple solution may be to send written notice to successful bidders of any statements on the record, so they are informed from the start of the contract of the existence of additional terms that are not set forth in the set of documents that together comprise the contract. This may have the result of preserving the system already in place with a minor modification that minimizes any change to the process.