

# **ALABAMA COMPETITIVE BID & PUBLIC WORKS LAWS: UPDATE**



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# **WARNING!!!**

☐ This presentation:

- CANNOT** cover every situation
- Is **NOT** all inclusive of every aspect of the law
- IS** a general overview

☐ If you have a question...

- Seek Advice from your Legal Counsel
- Seek Advice or Opinion from the Attorney General's Office or the Alabama Ethics Commission
  - [www.ago.alabama.gov](http://www.ago.alabama.gov)
  - [www.ethics.alabama.gov](http://www.ethics.alabama.gov)
- Contact the Department of Examiners' Legal Counsel

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-Report Fraud, Waste, and Abuse on Hotline: 1-844-56-FRAUD or  
link on Department's website

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# COMPETITIVE BID LAW



# LEGAL AUTHORITY & APPLICATION:

- ☐ § 16-13B-1, et seq. *Ala. Code* 1975
- ☐ Applies to County and City Boards of Education
- ☐ Applies to all expenditures of funds of whatever nature for labor, services, and work involving \$15,000 or more
- ☐ Applies to all expenditures of funds for the purchase or lease of materials, equipment, supplies, or other personal property involving \$15,000 or more

# SPLITTING OF CONTRACTS:

- ☐ No purchase or contract in excess of \$15,000 shall be divided into parts involving amounts of \$15,000 or less for the purpose of avoiding the requirements of the competitive bid law
- ☐ Any such contracts shall be void.

§ 16-13B-4(e), *Ala. Code* 1975.

# LEGAL REQUIREMENT:

- ❑ Requires a contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.

§ 16-13B-1(a), *Ala. Code* 1975.

# ADVERTISING REQUIREMENTS:

- ☐ Post notice on bulletin board maintained outside the purchasing office and in any other manner and for any length of time as may be determined.
- ☐ Can do more...BUT not required.

§ 16-13B-4(a), *Ala. Code* 1975.



# BID LISTS: NOTICE

- ❑ Sealed bids shall also be solicited by sending notice by mail or other electronic means to all person, firms, or corporations who have filed a request in writing that they be listed for solicitation on bids list for the particular items that are set forth in the request.
- ❑ If a person, firm, or corporation whose name is listed fails to respond to any solicitation after the receipt of three, they may be removed from the bid listing.

§ 16-13B-4(a), *Ala. Code* 1975.

# LOCAL PREFERENCE ZONE:

- ☐ Must establish the local preference zone PRIOR to advertising for bids.
- ☐ If awarding authority is silent on the local preference zone, it is deemed to be the legal boundaries or the jurisdiction of the awarding authority.
- ☐ Bid can be no more than 3% greater than the bid of the lowest responsible bidder.

§ 16-13B-1(b), *Ala. Code* 1975.

# BONDS:

- ❑ Bid Bond: The awarding authority may require bidders to furnish a bid bond for a particular bid solicitation if the bonding requirement applies to all bidders, is included in the written bid specifications, and if bonding is available for the services, equipment, or materials. § 16-13B-1(d), *Ala. Code* 1975.
- ❑ Performance Bond: A responsible sum for faithful performance of the contract, with adequate surety, may be required in an amount specified in the advertisement for bids. § 16-13B-8, *Ala. Code* 1975.

# **SEALED BIDS & DOCS.:**

- ☐ Bids must be sealed when received
- ☐ Opened in public at the hour stated in the notice
- ☐ All original bids and documents pertaining to the award of the contract shall be retained for a period of seven years from the date the bids are opened and shall be open to public inspection
- ☐ Retention period is est. by the Local Government Records Commission

§ 16-13B-4(b) and (d), *Ala. Code* 1975.

# ITEMS TO CONSIDER: LOWEST RESPONSIBLE BIDDER

- ☐ Qualities of the goods proposed to be supplied
- ☐ Conformity with specifications
- ☐ Purposes for which required
- ☐ Terms of delivery
- ☐ Transportation charges
- ☐ Dates of delivery

§ 16-13B-7(a), *Ala. Code* 1975.

# REJECTION OF A BID:

- ❑ Awarding authority may reject any bid if the price is deemed excessive or quality of product is inferior.

§ 16-13B-7(d), *Ala. Code* 1975.

# ONLY ONE BID RECEIVED:

- ☐ May accept bid or
- ☐ May reject the bid and negotiate the purchase or contract, provided the negotiated price is lower than the original bid price.

§ 16-13B-1(b), *Ala. Code* 1975

# **PROVISION FOR MISTAKES BY VENDOR:**

- ☐ There are no provisions in the law for mathematical mistakes by vendors.



# LENGTH OF CONTRACT TERMS:

- ☐ Personal property or service contracts are limited to 5 years.
- ☐ Lease-purchase contracts for capital improvements and repairs to real property and other lease-purchase contracts are limited to 10 years.

§ 16-13B-7(f), *Ala. Code* 1975

# DOCUMENTATION OF RESULTS:

- ☐ To whom bid was awarded
- ☐ Reasons for not awarding to the lowest bidder (if applicable)
- ☐ Bid file shall be open for public inspection

§ 16-13B-7(e), *Ala. Code* 1975

# DEFAULTING BIDDER:

- ❑ “If at any time after the award has been made the lowest responsible bidder notifies the awarding authority in writing that the bidder will no longer comply with the terms of the award to provide the goods or services to the awarding authority under the terms and conditions of the original award, or the awarding authority documents that the lowest responsible bidder defaults under the terms of the original award, the awarding authority may terminate the award to the defaulting bidder and make an award to the second lowest responsible bidder for the remainder of the award period without rebidding, provided the award to the second lowest responsible bidder is in all respects made under the terms and conditions contained in the original bid specifications and is for the same or a lower price than the bid originally submitted to the awarding authority by the second lowest responsible bidder.”

§ 16-13B-7(a), *Ala. Code* 1975

# ASSIGNMENT OF CONTRACT:

- ❑ No contract awarded to the lowest responsible bidder shall be assignable by the successful bidder without written consent of the awarding authority, and in no event shall a contract be assigned to an unsuccessful bidder whose bid was rejected because he or she was not a responsible bidder.

§ 16-13B-9, *Ala. Code* 1975

# BID EXEMPTIONS:

- ☐ § 16-13B-2, *Ala. Code* 1975.
  - ☐ Utility Services (rates fixed by law, regulation, or ordinance)
  - ☐ Purchase of Insurance
  - ☐ Professional Services
    - ☐ Attorneys
    - ☐ Physicians
    - ☐ Architects
    - ☐ Teachers
    - ☐ Superintendents of Construction
    - ☐ Artists
    - ☐ Appraisers
    - ☐ Engineers
    - ☐ Consultants

# BID EXEMPTIONS CONT:

- ☐ Certified Public Accountants
- ☐ Public Accountants
- ☐ Others possessing a high degree of professional skill where the personality of the individual plays a decisive part.
- ☐ Regular Civil Service employment contracts
- ☐ Fiscal or Financial Advice or Services
- ☐ Products made by Alabama Inst. For Deaf and Blind
- ☐ Maps/Photographs from any federal agency
- ☐ Manuscripts, Books, Maps, Pamphlets, or Periodicals \* (Act 2022-80)
- ☐ Paying Agents/Trustees for any security issued by a public body
- ☐ Existing contracts for renewal of sanitation or solid waste
- ☐ Computer hardware which is only type compatible with hardware already owned/Custom software

# **BID EXEMPTIONS CONT.:**

- ☐ Service or commodity for which there is only one vendor or supplier
- ☐ Services or purchases of personal property which by their very nature are impossible to award by competitive bidding
- ☐ Security Related Services/Products related to, or having an impact upon, security plans, procedures, assessments, measures, or systems, or the security of persons, structures, facilities or infrastructures
- ☐ Product whose price is regulated and established by state law
- ☐ Purchases made by individual schools of county or city schools systems from moneys other than those raised by taxation or received through appropriations.
- ☐ Purchases of good or services, other than wireless communication services, from vendors awarded a current and valid Government Services Administration (GSA) contract.
- ☐ Purchases of unprocessed agricultural products with a cost of \$100,000 or less.



# **BID EXEMPTIONS MAY APPLY:**

- ☐ Purchase, lease, or lease/purchase of goods or services, other than voice or data wireless communication services, made as part of the purchasing cooperative sponsored by the National Association of Counties or any other national or regional governmental purchasing program. Such purchase, lease, or lease/purchase may only be made if all of the following occur:
  - ☐ Competitive bid process of the cooperative must be approved by the Examiners of Public Accounts has been approved.
  - ☐ Goods or services are either not available on State contract or are available at a price equal to or less than the price on the State contract
  - ☐ Purchase, lease, or lease/purchase must be made through a participating Alabama vendor holding a Alabama business license if such vendor exists.

§ 16-13B-2(a)(13), *Ala. Code* 1975.



# **APPROVED PURCHASING COOPERATIVES:**

- ☐ Omnia Partners Public Sector
- ☐ Sourcewell
- ☐ NCPA Cooperative
- ☐ H-GAC
- ☐ E & I Cooperative Services (Bd. Of Edu. Only)
- ☐ TIPS Cooperative
- ☐ NPP
- ☐ Buyboard
- ☐ NASPO

**Current approval is through December 31, 2022**

# EMERGENCIES:

- ☐ Must affect public health, safety, or convenience, be declared in writing by the awarding authority, and such action and reasons should be immediately made public by the awarding authority.
- ☐ No advertising required.
- ☐ Must still follow other bid law requirements - per ruling by the Ala. Supreme Court. *General Electric Co. vs. City of Mobile*, 585 So.2d 1311 (Ala. 1991)

§ 16-13B-3(e), *Ala. Code* 1975.

# 2022 LEGISLATION:

## ☐ Act 2022-80-Senator Melson

- ☐ “Purchases of manuscripts, books, instructional materials, maps, pamphlets, or periodicals, or the electronic version thereof. The exemption for the purchase of instructional materials shall only include those purchases from a current vetted and approved list published by the State Department of Education.” § 16-13B-2(a)(7), *Ala. Code* 1975.

## ☐ Act 2022-264-Senator Williams

- ☐ Adds new provision to the bid law: § 16-13B-2.1, *Ala. Code* 1975. To authorize local BOE and other public educational entities to purchase goods or services related to Child Nutrition Program without advertising or bidding under certain circumstances.

# QUESTIONS???



# PUBLIC WORKS



# LEGAL AUTHORITY & APPLICATION:

- ❑ § 39-1-1, et seq., *Ala. Code* 1975.
- ❑ Applies to all public works contracts on the state, county, and municipal levels of government within the State of Alabama. § 39-1-1, *Ala. Code* 1975

# WHAT ARE PUBLIC WORKS?:

❑ § 39-2-1(6), *Ala. Code* 1975.

❑ “Public works” are defined as “[t]he construction, installation, repair, renovation, or maintenance of public buildings, structures, sewers, waterworks, roads, curbs, gutters, side walls, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, installed, repaired, renovated, or maintained on public property and to be paid, in whole or in part, with public funds or with financing to be retired with public funds in the form of lease payments or otherwise.”



# EXPENDITURE THRESHOLD:

- ❑ § 39-2-2(a), *Ala. Code* 1975.

- ❑ “Before entering into any contract for a public works involving an amount in excess of fifty thousand dollars (\$50,000), the awarding authority shall advertise for sealed bids...”

- ❑ § 39-2-2(b), *Ala. Code* 1975

- ❑ “An awarding authority may let contracts for public works involving fifty thousand dollars (\$50,000) or less with or without advertising or sealed bids.”



# ADVERTISING REQUIREMENTS:

## ☐ § 39-2-2(a), *Ala. Code* 1975

☐ Public works involving an amount in excess of fifty thousand dollars (\$50,000) shall advertise:

☐ Once a week for three consecutive weeks-newspaper of general cir. in the county or counties of the improvement is to be made.

☐ Additional requirement for contracts over \$500,000-once in three newspapers of general cir. throughout the state.

## ☐ § 39-2-2(b)(1), *Ala. Code* 1975

☐ An awarding authority may let contracts for public works involving fifty thousand dollars (\$50,000) or less with or without advertising or sealed bids.

# BID LISTS:

- ❑ § 39-2-2(a), *Ala. Code* 1975
  - ❑ Sealed bids shall also be solicited by sending notice by mail to all persons who have filed a request in writing with the official designated by the awarding authority that they be listed for solicitation on bids for the public works contracts indicated in the request.
  - ❑ If any person whose name is listed fails to respond to any solicitation for bids after the receipt of three such solicitations, the listing may be canceled.

# BID BONDS/CASHIER'S CHECK:

- ☐ § 39-2-4, *Ala. Code* 1975
  - ☐ All bidders must file either a bid bond or cashier's check in an amount not less than 5% of bid, not to exceed \$10k
  - ☐ Any cashier's checks must be drawn on an Alabama bank

# PERFORMANCE BOND:

- ❑ § § 39-1-1(a) and 39-2-8, *Ala. Code* 1975
  - ❑ A bond (from an Alabama Surety Co.) equal to 100% of the Contract must be furnished within the period specified or, if no period is specified, within 15 days after the prescribed forms have been presented to him or her for signature.

# PAYMENT BOND:

❑ § 39-1-1(a), *Ala. Code* 1975

❑ A bond equal to 50% of the contract price, with the obligation that the contractor or contractors shall promptly make payments to all persons supplying labor, materials, or supplies for or in the prosecution of the work provided in the contract and for the payment of reasonable attorneys' fees incurred by successful claimants or plaintiffs in civil actions on the bond.

# AWARD OF CONTRACT

- ❑ § 39-2-6, *Ala. Code* 1975
  - ❑ The contract is awarded to the lowest responsible and responsive bidder meeting bid specifications unless the awarding authority finds that all bids are unreasonable or that it is not in their interest to accept any of the bids.
  - ❑ “Responsible Bidder” is defined as, “one who, among other qualities determined necessary for performance, is competent, experienced, and financially able to perform the contract.”
  - ❑ “Responsive Bidder” is defined as, “one who submits a bid that complies with the terms and conditions of the invitation for bids.”

# ASSIGNMENT OF CONTRACT AWARD:

- ❑ § 39-2-6(f), *Ala. Code* 1975
  - ❑ No contract awarded to the lowest responsible and responsive bidder is assignable without written consent of the awarding authority, and in no event shall it be assigned to an unsuccessful bidder whose bid was rejected because he or she was not responsible or responsive.

# FAILURE TO COMPLETE CONTRACT:

❑ § 39-2-6(a), *Ala. Code* 1975

❑ If the successful bidder fails or refuses to sign the contract, make bond, or provide required evidence of insurance, the contract may be awarded to the second lowest responsible and responsive bidder, and if he or she fails or refuses to comply with these requirements, the contract may be awarded to the third lowest responsible and responsive bidder.



# REJECTION OF BIDS:

- ❑ § 39-2-6(b), *Ala. Code* 1975
  - ❑ If no bids are received or if only one bid is received, the awarding authority has the following options:
    - ❑ Advertise for and seek other competitive bids
    - ❑ Direct that work be done by force account or
    - ❑ Negotiate through informal bids not subject to bid requirements
  - ❑ Where only one responsible and responsive bid is received, any negotiation must be for a price lower than that bid.

# MISTAKES BY VENDORS:

❑ § 39-2-11(d), *Ala. Code* 1975

- ❑ If the low bidder offers clear and convincing documentary evidence as soon as possible, but no later than three working days after the opening of bids, that it made such a mistake due to calculation or clerical error, an inadvertent omission, or a typographical error, the awarding authority shall permit withdrawal without forfeiture.
- ❑ The decision of the awarding authority shall be made within 10 days after receipt of the low bidder's evidence or by the next regular meeting of the awarding authority.
- ❑ Upon withdrawal of bid without forfeiture, the low bidder shall be prohibited from (1) doing any work on the contract, either as a subcontractor or in any other capacity, and (2) bidding on the same project if it is readvertised for letting.

# PROCEDURES FOR AWARDING CONTRACT:

❑ § 39-2-5, *Ala. Code* 1975

❑ Award Time Frame: If no award is made within 30 days of the bid opening, all bids shall be rejected and all guaranties shall be returned except for any potentially successful bidder who agrees in writing to a stipulated extension in time for consideration of the bid.

❑ § 39-2-6(a), *Ala. Code* 1975

❑ Notice to Successful Bidder: The awarding authority shall notify the successful bidder by telegram, confirmed fax, or letter at the earliest possible date.

# PROJECT COMPLETION:

- ☐ § 39-1-1(f), *Ala. Code* 1975
  - ☐ For contracts \$50,000 or more, the contractor must give notice of completion of a project by advertising in a newspaper of general circulation published within the county where the work is done for 4 consecutive weeks.
  - ☐ If there is no newspaper published in the county, notice may be given by posting at the courthouse for 30 days.
  - ☐ Final settlement on the contract shall not be made until 30 days after completion of the notice.
  - ☐ The contractor must provide proof of publication to the awarding authority.
  - ☐ The prescribed terms of payment cannot be amended once advertised.

# PROJECT COMPLETION CONT:

- ❑ § 39-1-1(g), *Ala. Code* 1975
  - ❑ For contracts less than \$50,000, the governing body of the contracting agency (rather than the contractor) is required to give notice of completion by:
    - ❑ Publishing once in newspaper of general circulation in the county and
    - ❑ Posting notice on the agency's bulletin board for one week.

# RETAINAGE:

- ❑ § 39-2-12(a)(3), *Ala. Code* 1975
  - ❑ “Retainage” is defined as “[t]hat money belonging to the contractor which has been retained by the awarding authority pending final completion and acceptance of all work in connection with a project or projects by the contractor.”
  - ❑ The procedures for retainage are found in § 39-2-6(b) and(c):
    - ❑ Payments are made at the end of each month as work progresses.
    - ❑ No more than 5% percent of estimated work done and value of materials is retained.
    - ❑ No further retainage shall be held after 50% of the work is completed

# PROFESSIONAL SERVICES:

❑ § 39-2-2(d)(1), *Ala. Code* 1975

❑ Contracts for architectural, engineering, construction management, program management, or project management services are EXEMPT from Title 39.



# HVAC UNITS & SYSTEMS:

## ☐ § 39-2-2(d)(2), *Ala. Code* 1975

☐ Contracts for the purchase of any heating or air conditioning units or systems by an awarding authority subject to Title 16 (county bds of education)...are **EXCLUDED** from the bidding requirements of Title 39...provided the contract is entered into with an Alabama vendor who has been granted approved vendor status for the sale of heating or air conditioning units or systems as a part of a purchasing cooperative, and each of the following occur:

- ☐ The heating or air conditioning unit or system being purchased is available as a result of a competitive bid process conducted by a governmental entity which has been approved by the Department of Examiners of Public Accounts.
- ☐ The purchase of the heating or air conditioning unit or system is not available on the state purchasing program at the time or the purchase under the purchasing cooperative is available at a price that is equal to or less than that available through the state purchasing program.
- ☐ The entity entering into the contract for the purchase of the heating or air conditioning unit or system has been notified by the Department of Examiners of Public Accounts that the competitive bid process utilized by the cooperative program offering the goods complies with this subdivision.
- ☐ Upon request, the vendor has provided the purchasing entity with a report of sales made under this subdivision during the previous 12-month period, to include a general description of the heating or air conditioning units and systems sold, the number of units sold per entity, and the purchase price of the units.



# EMERGENCIES:

❑ § 39-2-2(e), *Ala. Code* 1975

❑ In an emergency “affecting public health, safety, or convenience”, contracts may be let to the extent necessary to meet the emergency without advertisement. This is identical to the emergency provision in the competitive bid law, meaning that it is an exemption from advertising and not from competitively bidding the project.

❑ The emergency must be declared in writing by awarding authority, and must set forth the nature of the danger involved in delay and

❑ The action and reason shall immediately be made public by the awarding authority

# SOLE SOURCE:

☐ § 39-2-2(f), *Ala. Code* 1975

☐ No awarding authority may specify the use of materials, products, systems, or services by a sole source unless all of the following requirements are met:

☐ The awarding authority can document to the satisfaction of the State Building Commission all of the following:

☐ The product, material, system, or service is indispensable and

☐ There are no other viable alternatives and

☐ Only this product fulfills the function for which needed

☐ The sole source specification has been recommended by the architect or engineer as an “indispensable item” for which there is no viable alternative.

☐ All information substantiating use of a sole source specification is documented and made available for examination at the time of advertisement.

# FORCE ACCOUNT:

- ❑ § 39-2-6(c), *Ala. Code* 1975
  - ❑ § 39-2-1(2), “force account” is, “work paid for by reimbursing the actual costs for labor, materials, and equipment usage incurred in the performance of the work, as directed, including a percentage for overhead and profit, where appropriate.”
  - ❑ If the county rejects all bids as unreasonable or not in its interest, it may direct that work be done by force account under its direction and control.
  - ❑ “Force account” and “in-kind services” have the same meaning. See, AG’s Opinion # 98-039.
  - ❑ If a project is carried out by force account, the plans, specs, changes, estimated and actual costs of the project, and any informal bids shall be made available for review by the Examiners of Public Accounts and shall be made public upon request.
  - ❑ Additionally, the awarding authority may let any subdivision or unit of work being performed by force account by “informal bids”.
  - ❑ Since no contract is signed where a project is carried out by force account, public works law has no effect, but the competitive bid law still applies for the purchase of materials, supplies, and equipment. AG’s Opinions ## 99-065; 98-039 and 98-052.

# QUESTIONS???

