Alabama Association of School Business Officials
February 2026 Certificate Program

Contract Administration for Public Works Projects

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Presented by: Alex Thrasher

Life Cycle of Public Works Contract Administration

Advertisement & Solicitation

Ala. Code § 39-2-2

Design, Budget, Specifications and Plan Development,

Bidding

Ala. Code §§ 39-2-4 through -5

Pre-bid process, bid openinig

Award

Ala. Code § 39-2-6

Determination of successful bidder, contract execution, associated documents

Execution

Ala. Code § 39-2-8 through -12

Managing the Work to Completion

Advertising and Soliciting for Public Works Projects

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Advertisement & Solicitation

- Public works must be competitively bid through sealed bids
  - If project cost expected to be more than $100,000
- Requirements of Title 39 do not apply if cost is less than $100,000 but the work cannot be split into parts to avoid the requirements

Preparing for Advertisement & Solicitation

- Identify need for project
- Identify and secure source of funding
- Work with designers of record to develop and finalize design and budgets (traditional design-bid-build process)
  - Plans and specifications
  - Contract documents
- Obtain appropriate approvals
- Prepare invitation to bid

Advertisement & Solicitation – Sole Sourcing

- General Prohibition on Sole Source Specifications Unless:
  - Awarding authority satisfies the educational institution's governing board that the sole source is:
    - "of an indispensable nature for the improvement."
    - There is no other "viable alternative"
    - Necessary to fulfill the function for which it is needed
  - Architect or engineer of record has recommended the sole source as an indispensable item for which there is no other viable alternative."
  - Information supporting the use of the sole source item is made available when the bid solicitation is advertised

Advertisement & Solicitation – Best Practices

- Establish project requirements, work with consultants to understand your specifications before advertising
  - Issues can arise when technical experts are not consulted
- Sole source specifications also subject to scrutiny
  - Be wary of performance specifications that arguably result in *de facto* sole source specifications subject to challenge
- Pre-bid meetings are not required, but are a useful tool
  - Provides bidders equal opportunity to investigate the project site
  - Can improve reliability of bids and help avoid changes during project
  - Can be a relevant factor if a dispute arises during construction
- Emergency declarations must be in writing, documented thoroughly
  - Subject to after the fact scrutiny and challenge

Bidding Public Works Projects

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Bidding Public Works – Bid Bond Requirements

- Bid Bonds Required
  - 5% of estimated cost or $10,000
- Bid bonds from unsuccessful bidders must be returned immediately after bids are tabulated and ordered
- The lowest bidders' bonds are held until contract bonds are issued and contract executed and approved
- If no award is made within 30 days of bid opening, all bids are rejected and all bonds returned, except for the potentially successful bidder who agrees in writing to an extension

Bidding Public Works - Prequalification

- Prequalification of bidders is permissible, not required
- Prequalified bidders are deemed to be "responsible" bidders, subject to some exceptions
  - "A responsible bidder is one who, among other qualities determined necessary for performance, is competent, experienced, and financially able to perform the contract." Ala. Code § 39-2-6(a)
- Must establish written procedures and criteria
- Publish them "sufficiently in advance of any affected contracts"
- The criteria must relate to:
  - The purpose of the contract
  - Contract requirements or the quality of the product or service
  - Responsibility, competency, experience, and financial ability of a bidder
- Determination must be "within the bounds of good faith"

Bidding – Best Practices

- Prequalification is a useful tool for assessment of bidders but it's no guarantee
  - "Bounds of good faith" standard is inherently subjective; proceed with caution
  - Maintain detailed records on prequalification decision
  - Applying prequalification criteria consistently across potential bidders is important
- Pre-bid meetings are not required, but are a useful tool
  - Provides bidders equal opportunity to investigate the project site
  - Can improve reliability of bids and help avoid changes during project
  - Can be a relevant factor if a dispute arises during construction

Bidding – Best Practices (Cont.)

- Electronic solicitation and submission of sealed bids is allowed
  - But develop and implement a process to ensure bids are timely received and remained sealed until bid opening
    - Security protocols, timestamp verification
    - E-procurement platforms?

- If you are going to evaluate life cycle costs in assessing bids you must state you will do so in the ITB and identify the relevant criteria
  - Define the calculation methodology to be utilized (energy costs, maintenance, replacement intervals, etc.)

Awarding Contracts for Public Works

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Awarding Public Works – Award and Execution Requirements

- Standard: Award to the lowest “responsible and responsive bidder”
  - Unless all bids are unreasonable or not in the interest of the awarding authority
  - “Responsive bidder” = “one who submits a bid that complies with the terms and conditions of the invitation for bids.”
    - Minor irregularities do not defeat responsiveness.

- Execute contract form included in the proposal, plans and specifications

Awarding Public Works – Bond Requirements

- Awarded Contractor
  - Awarded contractor must furnish payment and performance bonds and provide evidence of insurance
- Awarding Authority
  - Awarding authority must approve bonds and insurance within 20 days unless contractor agrees to a longer period
- "Proceed order" (aka notice to proceed) must be issued within 15 days of contract execution
  - Failure to do so permits contractor to withdraw bid without forfeiting bid bond

Awarding Public Works – Mistake in Bid

- Mistake in Bid
  - Bidder may seek withdrawal of bid without forfeiting bond
  - Mistake must be due to “calculation or clerical error, an inadvertent omission, or a typographical error”
  - Resulting bid must be “substantially out of proportion to that of other bidders”
  - Bidder must provide notice of the mistake within 3 days of bid opening
  - Bidder’s request to withdraw must be supported with “**clear and convincing documentary evidence**”
    - Very high standard under the law
    - Documentation should be substantial and persuasive
  - “Mistake of law, judgment or opinion” are not grounds for withdrawal
  - Bidder cannot do any work on the contract in any capacity and cannot bid if the project is readvertised for letting

Awarding Public Works – No Bids or Only One Bid

- Only if no bids or only one bid is received:
  - Awarding authority may advertise for other bids, or
  - Direct the bidder to perform the work on force account under the direction and control of the awarding authority, or
  - Negotiate for a lower price than the bid received through "informal bids not subject to the requirements of" § 39-2-6.
  - "Force Account Work" = "Work paid for by reimbursing for 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."

Awarding Public Works – Issues Cont.

- If 2 or more bids are received and all bids exceed available funding:
  - Awarding authority may negotiate for a lower price with the lowest responsible and responsive bidder if it demonstrates:
    - Shortage of funding
    - That time is of the essence
    - That the negotiated changes are in the public interest and do not materially alter the scope and nature of the project.
      - Questions of material alteration are ripe for disputes
- If all bids determined to be unreasonable or not in the interest of the authority, the work may be directed under force account.
  - Specific requirements applicable to force account work
- Lowest responsible and responsive bidder may be determined on "lowest life cycle costs."
  - Bidder must meet all requirements in ITB, except it may propose different construction materials if using them would decrease lifecycle costs

Awarding Public Works Contracts – Best Practices

- Create a checklist or matrix for evaluating bid responsiveness
  - Schedule
  - Price
  - Technical Aspects
- If informal bid negotiations are employed, document well and adhere to good faith and fair dealing standard
- Consult with counsel before acting on or accepting apparent bid irregularities or negotiating informally
- Calendar and adhere to applicable deadlines after bid opening

Awarding Public Works Contracts – Best Practices (Cont.)

- When No Bids Are Received:
  - Analyze why no bids were received before proceeding:
    - Was advertisement adequate?
    - Were specifications too restrictive?
    - Was timeline too short?
    - Is project too small/large for market?
  - Consider extending bid period and re-advertising

Executing Contracts for Public Works

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Executing Public Works Contracts – Notice to Proceed and Project Schedule

- Owner may employ an owner's representative (A/E) or construction manager to assist in administration
- Notice to Proceed (NTP) identifies the date upon which the Work may commence and the date upon which the Work is to be completed.
- Schedule shows the order in which the contractor proposes to carry out the work
  - Establishes baseline for measuring progress throughout the project
  - Enables owner and design professional to:
    - Monitor contractor's progress against plan
    - Identify delays early
    - Coordinate owner-furnished items or separate contractors
    - Plan for inspections and milestone reviews
    - Provides documentation for delay claims and time extension requests

Executing Public Works Contracts – Schedule of Values

- Schedule of Values
  - Schedule of Values is a breakdown of the contract price
  - Serves as the basis for approving monthly progress payments
  - Review carefully before approving; this document governs payment throughout the project
  - Should not be concentrated in early line items without good cause
  - Each line item should reflect actual anticipated cost of that work element plus proportionate share of overhead/profit

Executing Public Works Contracts – Payments Generally

- Payments Generally
  - Due within 35 days “after acceptance by the awarding authority” that contract requirements were met
  - Verify work completed matches request for payment
  - Must respond to payment request within 10 days
  - Payment requests may include:
    - Material delivered to site
    - Materials suitably stored and insured off site
    - Preparatory work

Executing Public Works Contracts – Late Payment Penalties, Retainage, and Taxes for Nonresident Contractors

- If work is not in dispute, late payments are subject to interest
- Awarding authority may hold up to 5% of the value of work completed up to 50 percent overall completion; no retainage thereafter
  - Retainage held until final completion and acceptance of the work
- Non-resident contractors must satisfy the awarding authority that all taxes due and payable to the State have been paid prior to receiving final payment

Executing Public Works Contracts – Source of Funds

- Contract must identify the source of funds to be paid to contractor
  - Funds held by awarding authority at contract execution, or
  - Funds will become available at a date following contract execution
    - If funds are from a grant, award, or direct reimbursement from the state, federal government, or other source, that must be disclosed in the bid documents and the contract.
    - Prompt payment provisions do not apply until awarding authority has the money from funding source; payment within 10 days thereafter.
- Federal Funding Considerations
  - Additional compliance requirements may apply (Davis-Bacon, DBE, etc.)
  - Document compliance with all federal requirements
  - Ensure contractor is aware of and prepared to comply with additional compliance requirements
  - Require contractor to “flow-down” compliance requirements to subcontractors where applicable

Executing Public Works Contracts – Change Order Administration

- Change Order Administration
  - Know what your rights are under your contract relating to changes in the work
  - Do note allow changed work without prior written authorization
  - Request documentation from contractor consistent with contract terms
    - Scope of change, cost, and time impact
  - Maintain change order log
  - Excessive changes may indicate design/specification problems
  - Beware of informal notice of change order requests
  - Understand your rights if there is a dispute over whether work is a change.
  - Contract may require contractor to continue working despite disputes
  - Owner may be able to direct work despite disagreement over it

Executing Public Works Contracts – Project Closeout

- Project Closeout
  - Understand “Substantial Completion” under the contract
  - Define criteria for achieving it and acknowledging it
  - Define process for creating and completing punch list
  - Define closeout documentation required from contractor prior to final payment
    - O&M Manuals, warranties, training, as-builts, etc.
    - Contract time reconciled (extensions or liquidated damages addressed)
  - Obtain consent to final payment from surety for projects with payment and performance bonds when required
  - Obtain contractor’s affidavit of release of waiver or liens before final payment, if required
  - Obtain releases and waivers as required
  - Do not release retainage until all closeout requirements are complete

Executing Public Works Contracts – Lien and Claim Waivers

- Why Lien and Claim Waivers Matter
  - Protect awarding authority from "paying twice" for the same work
  - Ensure subcontractors and suppliers have been paid before releasing funds
  - Provide documented confirmation that payment obligations are satisfied
  - Reduce risk of payment bond claims
    - Mechanics' liens generally do not attach to public property
    - However, claims may be made against payment bond (Ala. Code § 39-1-1)
  - Create clear record for project closeout and audit purposes

Executing Public Works Contracts – Lien Waivers

- Types of Lien Waivers and Releases
  - Conditional Waiver on Progress Payment: Effective only when payment is actually received; use with each pay application
  - Unconditional Waiver on Progress Payment: Immediately effective upon signing; use only after confirming payment cleared
  - Conditional Waiver on Final Payment: Effective only when final payment is received; use at project closeout
  - Unconditional Waiver on Final Payment: Immediately effective; releases all lien rights; obtain only after final payment clears
  - DCM Form C-19

Executing Public Works Contracts – Claim Waivers

- Claim Waivers
  - Separate from lien waivers—releases claims for additional compensation, delay damages, etc.
  - Typically obtained with final payment
  - Should be comprehensive: "all claims, demands, and causes of action"
  - Consider carve-outs for warranty obligations and latent defects

Executing Public Works Contracts – Lien Waivers and Claim Waivers – Common Pitfalls & Best Practices

- Common Pitfalls to Avoid
  - Accepting unconditional waivers before payment clears (exposes authority if payment fails)
  - Failing to collect waivers from lower-tier subcontractors
  - Releasing retainage before obtaining final waivers
  - Using incorrect waiver form (conditional vs. unconditional vs. DCM Form)
  - Waiver amounts that don't match actual payments
- Best Practices
  - Maintain complete waiver file for each project
  - Organize by payee and payment period
  - Include waivers in final project closeout file
  - Ensure waivers are properly executed
  - When in doubt consult with counsel

Executing Public Works Contracts – Best Practices

- Hold pre-construction meeting with contractor before issuing NTP
- Bona fide disputes on payment requests need to be addressed promptly
- Above all else, know what your contract says
- Timeliness matters
  - Establish a process and good oversight for administration of payment requests, requests for information, change order requests, other submittals
  - Respond within times required by statutes and contract
  - Provide notice as required
- Document, document, document
  - Documents create the project record
    - Draft and circulate meeting minutes to all participants
  - E-mail confirmation of oral conversations
  - Be truthful, be complete, stick to facts, no opinions
  - Photograph work progress frequently and with intention

Questions?

Alex Thrasher
athrasher@bradley.com
205.521.8891

Bradley