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# Public Works Bidding

Public works contracts, as defined in Section 39-2-1 of the Code of Alabama 1975, are not covered by the regular competitive bid law found in Title 41 of the Code and discussed in detail in the article entitled "The Competitive Bid Law" found on the League legal team's Selected Readings page, here: *https://almonline.org/SelectedReadingsfortheMunicipalOfficial.aspx*. This article reviews and summarizes the public works bid law found in Title 39 of the Code of Alabama 1975.

**What is a Public Work Contract?**

Section 39-2-1, Code of Alabama 1975, defines public works as:

> "The construction, repair, renovation, or maintenance of public buildings, structures, sewers, waterworks, roads, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, 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."

Two points need to be made about this definition. First, the activities specifically listed should be used as examples of the type of municipal projects that are subject to the public works bidding procedures. Second, direct municipal purchases are not the only kind controlled by Title 39. If the municipality plans to finance a project and pay off the loan, bond issue, etcetera, with public funds, the project must be bid as well.

All public works projects involving a public expenditure of $100,00 or more are controlled by the procedures in Title 39. Because public works projects are specifically exempt from the regular bid law in Title 41, public works projects involving expenditures of less than $100,000 do not have to be bid. Section 39-2-2(b)(1), Code of Alabama 1975.

The contracts for cutting grass in public cemeteries in the city should be bid pursuant to the Competitive Bid Law if the costs exceed now $30,000. Contracts for the construction, repair, and maintenance of markers, headstones, and walls are "public works" subject to bid under the Public Works Law if the costs are in excess of $100,000. AGO 2007-0030.

A contract by the Water and Sewer Authority to install a main sewer outfall line must be bid under Section 39-2-2 of the Code of Alabama 1975, where the project in question will be paid for with public funds by waiving the fees to which the Authority is entitled. AGO 2007-0007.

Painting contracts of $100,000 or less entered into by the Alabama Department of Postsecondary Education qualify as "public works" under Section 39-2-2(b)(1) of the Code of Alabama and may be let with or without advertising or sealed bids. AGO 2007-0089.

**Advertising/Notice Requirements**

For all public works contracts exceeding $100,000, the municipality must publish notice of the request for bids at least once in a newspaper of general circulation published in the municipality. Section 39-2-2(a)(2)(b)(1), Code of Alabama 1975. Although the term "published" is not defined, it probably has the same meaning as when used in Section 11-45-8 of the Code of Alabama 1975 and the Attorney General has ruled that a newspaper is published where it is entered into the post office and first put into circulation. AGO 1995-0127. If there is no newspaper published in the municipality, then the municipality must simply post the request for bids on a bulletin board maintained outside the purchasing office (which in many municipalities is the clerk's office or city hall). Section 39-2-2(a)(2)(b)(2), Code of Alabama 1975.

In addition to a bulletin board notice, the municipality must send the notice by U.S. mail or electronic mail to the Department of Finance for publication of the advertisement on the centralized website maintained by the Department of Finance. Section 39-2-2(a)(2)(b)(2), Code of Alabama 1975. In 2025, the Legislature provided a safe harbor for municipalities when a newspaper fails to publish a public works project notice for request for bids as requested by the municipality.

Now, a municipality may enter into a public works contract if the municipality submitted the advertisement for sealed bids for the contract in accordance with Section 39-2-2(a)(2) and the advertisement was published for at least seven (7) consecutive calendar days on a centralized website maintained by Department of Finance. Section 39-2-2(b)(2), Code of Alabama 1975.

Whether the notice is published in a newspaper or posted, the municipality must send also a notice by mail to all persons who have filed a request in writing to be notified of a solicitation for bids for the type public works project in the request. If the person listed fails to respond to three solicitations for bids, the listing may be canceled. Section 39-2-2(a)(2)(b), Code of Alabama 1975.

**Advertisements for bids must:**

1. Contain a brief description of the improvement;
2. State that plans and specifications are on file for examination in a designated office of the municipality;
3. State how to obtain plans and specifications;
4. State when and where bids will be received and opened; and
5. Identify whether prequalification is required and where all written prequalification information can be reviewed. Section 39-2-2(a)(3), Code of Alabama 1975.

All bids must be opened publicly at the time and place stipulated. Section 39-2-2(a)(4), Code of Alabama 1975. No public work project for over $100,000 can be split to avoid bidding requirements. Contracts that violate the bid law are void. Willful violations of the public works bidding procedures are Class C felonies, which carry a potential punishment of between one year and a day to 10 years, and/or a fine of up to $5,000 or double the pecuniary gain to the defendant or loss to the victim. Section 39-2-2(c), Code of Alabama 1975

If any pre-bid meetings are held, they must be held at least seven days prior to the bid opening, except when the project is declared an emergency. Section 39-2-2(i), Code of Alabama 1975. No modification of bid specifications can be made within 24 hours of the opening of a bid.

**Exceptions**

Contracts for architectural, engineering, construction management, program management or project management services in support of the public works, where the services rendered do not involve actual construction, repair, renovation or maintenance of the public work, either by their own forces or by subcontract, lease or otherwise, do not have to be bid.

The Department of Transportation may enter into contracts for road construction or road maintenance projects that do not involve more than two hundred fifty thousand dollars ($250,000) without advertising for sealed bids, provided the project is listed on the publicly accessible website of the department for at least seven calendar days before entering into the contract. The total cost of all projects not subject to advertising and sealed bids pursuant to this subsection may not exceed one million dollars ($1,000,000) in the aggregate per year. Section 39-2-2(k), Code of Alabama 1975.

Another exception to the public works bid law applies to contracts for the purchase of any heating or air conditioning units or systems by any awarding authority subject to Chapter 13B of Title 16, or Article 3, commencing with Section 41–16–50, of Chapter 16, Title 41, or Article 5, commencing with Section 41-4-110, of Chapter 4 of Title 41, provided the contract is entered into with an Alabama vendor who has been granted approved vendor status for the sale and installation of heating or air conditioning units or systems as a part of the purchasing cooperative, and each of the following a purchasing cooperative, and each of the following occur:

a. The heating or air conditioning unit or system being purchased and installed is available as a result of a competitive bid process conducted by a local governing body which has been approved by the Department of Examiners of Public Accounts.

b. The purchase and installation of the heating or air conditioning unit or system is not available on the state purchasing program at the time or the purchase and installation under the purchasing cooperative is available at a price that is equal to or less than that available through the state purchasing program.

c. The entity entering into the contract for the purchase and installation 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 and installation complies with state competitive bid laws.

d. The exemption from the requirement to use sealed bids for the purchase of heating or air conditioning units or systems authorized by this amendatory act shall not serve to exempt any public works project from the remaining provisions of this article, including, but not limited to, design and review requirements, compliance with all applicable codes,

laws, specifications, and standards, and the compensation of engineers, architects, or others as mandated by state law or rule. Section 39-2-2(e)(2), Code of Alabama 1975.

Pursuant to Act 2023-497, a municipality may, by resolution, purchase materials or equipment pursuant Section 41-16-51(a)(14), (16), (17), (18), or (19) of the Competitive Bid Law, even when those materials or equipment are part of the contract for public works. The remaining portion of the public works project shall be subject to public works bidding. Section 39-2-2(m), Code of Alabama 1975. For more discussion on these subdivisions, see the article entitled "The Competitive Bid Law", found on the League legal team's Selected Readings page, here: *https://almonline.org/SelectedReadingsfortheMunicipalOfficial.aspx*.

Section 39-2-2, Code of Alabama 1975 specifies that contracts for the purchase, design, and installation of playground equipment fall under the competitive bid law and are explicitly excluded from the public works bid law. Playground equipment is defined as any structure or apparatus intended for children's recreational use and play in a public area, including a public park, public school, or other public property. The term includes slides, swings, climbing equipment, seesaws, and splash pads. The term also includes purchases ancillary to the use of a playground, including safety surfacing, fencing, signage, and shade structures.

**Emergencies**

The public works bid law provides a procedure for remedying emergencies without public advertisement and bidding. Act 2023-497 allows municipalities to circumvent the requirements of the public works bid law in emergency situations for which delay in remedying the emergency would cause harm to any person(s) or public property. However, such contracts can only be let to the extent necessary to mitigate the harm created by the emergency. All emergencies affecting public health, safety, or convenience must be declared in writing by the municipality, setting forth the nature of the danger to the public health, safety, or convenience which would result from delay. Contracts may be let to the extent necessary to meet the emergency without public advertising. Actions taken and the reasons for the action must be immediately made public by the municipality and published in writing. Section 39-2-2(f), Code of Alabama 1975.

**Sole Source Bidding**

Generally, sole source is any material, product, system or service that is indispensable to the unique needs of the purchaser. In other words, sole source is used when a municipality is in a position where there is no viable alternative, and the material, product, system or service is the only one that fulfills the function for which it is needed.

Sole source for public works contracts is addressed in Section 39-2-2(g), Code of Alabama 1975. Keep in mind, Section 39-2-2(g) applies to all public works contracts except contracts for public roads, bridges, and water and sewer facilities. With this exception in mind, sole source vendors may be used on any public works project if the following requirements are met:

1. The municipality must document to the Division of Real Property Management of the Department of Finance to the satisfaction of its governing board, that the sole source product or services is indispensable to the improvement, that there are not viable alternatives and that this product or service is the only one that fulfills the function for which it is needed;
2. The architect or engineer of record must have recommended the item or service;
3. All information substantiating the use of the sole source item – including the recommendation of the architect or engineer – must be documented and made available for examination in the office of the municipality at the time of the advertising for sealed bids. Section 39-2-2(g), Code of Alabama 1975.

**Bidding Documents**

Municipalities must maintain an adequate number of sets of bid documents that may be obtained by prime contractor bidders upon payment of a deposit for each set. The municipal governing body has the authority to determine what constitutes an adequate number of sets for each project and to determine the amount of the deposit. However, the deposit shall not exceed twice the cost of printing, reproduction, handling and distribution of each set.

The deposit must be refunded in full to each prime contractor bidder upon return of the documents in reusable condition within 10 days after the bid opening. Prime contractor bidders, subcontractors, vendors, or dealers may obtain additional sets by paying the same deposit. If the additional sets are returned in reusable condition within 10 days after the bid opening, the deposit must be refunded; however, the municipality may deduct the cost of printing, reproduction, handling, and distribution. All refunds are due from the municipality within 20 days after the bid opening.

**Submitting Sealed Bids**

While the common practice for submitting sealed bids is in physical, paper form, Act 2023-497 permits municipalities the option for sealed bids to be solicited and submitted through electronic means. Electronic means includes, but is not limited to, electrical, digital, magnetic, optical, electromagnetic, or any other similar technology provided that the municipality adopts rules and policies to ensure that all electronic submissions are transmitted securely and bids remained sealed until bid opening. Section 39-2-2(l), Code of Alabama 1975.

**Bid Bonds and Prequalification**

All public works bidders must file with their bids either a cashier's check drawn on an Alabama bank or a bid bond executed by a surety company duly authorized and qualified to make bonds in the state of Alabama. This bond or check must be made payable to the municipality. The governing body has the authority to set the amount, which is limited to a range of not less than five percent of either the municipality's estimated cost or of the contractor's bid, up to a maximum of $10,000. The bid guaranties constitute all of the qualifications or guaranties required of contractors as prerequisites to bidding for public works, except as required by the state licensing board for general contractors and any prequalification procedures required by the municipality.

Section 39-2-4(b) restricts the type of prequalification procedures that can be used on public works projects. First, these procedures must be written. Additionally, any prequalification criteria must:

1. Be published sufficiently in advance of any affected contract so that a bona fide bidder may seek and obtain prequalification prior to preparing a bid for that contract;
2. Be related to the purpose of the contract or contracts affected;
3. Be related to contract requirements or the quality of the product or service in question;
4. Be related to the responsibility, including the competency, experience and financial ability of a bidder; and
5. Permit reasonable competition at a level that serves the public interest.

The prequalification publication may run concurrently with the publication of the notice requesting bids, provided this produces the required advance notice.

Within the bounds of good faith, the municipality retains the right to determine whether a contractor satisfies these prequalification procedures and criteria. Any bidder who satisfies the prequalification criteria is deemed "responsible" for purposes of award unless the municipality revokes the prequalification under the following procedures:

1. No later than five working days or the next regular meeting after the opening of bids, the municipality issues written notice to the bidder of its intent to revoke prequalification and the grounds therefore;
2. The bidder is provided an opportunity to be heard before the municipality on the intended revocation;
3. The municipality makes a good faith showing of a material inaccuracy in the prequalification application of a bidder or of a material change in the responsibility of the bidder since submitting its prequalification application; and
4. The revocation of prequalification is determined no later than 10 days after written notice of intent to revoke, unless the bidder whose qualification is in question agrees in writing to an extension in time.

If the municipality does not establish prequalification procedures, the act specifically authorizes the rejection of bidders who are determined not responsible and the inclusion of criteria in the bid documents which limit contract awards to responsible bidders.

All bid guaranties (bonds or checks), except those of the three lowest bona fide bidders, shall be returned immediately after bids have been checked, tabulated and the relation of the bids established. The bid guaranties of the three lowest bidders shall be returned as soon as both the contract bonds and the contract of the successful bidder have been properly executed and approved. When the award is deferred for a period of time longer than 15 days after the opening of the bids, all bid guaranties, except those of the potentially successful bidders, shall be returned. If no award is made within 30 days after the opening of the bids or such other time as specified in the bid documents, all bids shall be rejected and all guaranties returned, except for any potentially successful bidder that agrees in writing to a stipulated extension. In this case, the municipality may permit the potentially successful bidder to substitute a satisfactory bidder's bond for the cashier's check submitted with its bid as a bid guaranty. The act does not define who qualifies as a "potentially successful bidder."

**Awarding the Contract**

The contract shall be awarded to the lowest responsible and responsive bidder, unless the municipality finds that all the bids are unreasonable or that it is not in the interest of the municipality to accept any of the bids. A responsible bidder is one who, among other qualities determined necessary for performance, is competent, experienced and financially able to perform the contract. A responsive bidder is one who submits a bid that complies with the terms and conditions of the invitation for bids. Minor irregularities in the bid do not defeat responsiveness.

The bidder to whom the award is made must be notified by electronic mail, confirmed fax or letter as soon as possible. If the successful bidder fails or refuses to sign the contract, to make bond as required by Title 39, or to provide evidence of insurance as required by the bid documents, the municipality may award the contract to the second lowest responsible and responsive bidder. If the second lowest bidder fails or refuses to sign the contract, make bond as provided in this chapter or to provide evidence of insurance as required by the bid documents, the municipality may award the contract to the third lowest responsible and responsive bidder. If the third lowest bidder fails to execute the contract, the act is unclear as to whether the municipality may then accept a bid from the fourth bidder.

If no bids or only one bid is received at the time stated in the advertisement for bids, the municipality may advertise for and seek other competitive bids or the municipality may direct that the work shall be done by force account under its direction and control or may negotiate for the work through the receipt of informal bids not subject to the requirements of Title 39. Any negotiation for the work must be for a price lower than that bid.

If the municipality finds that all bids received are unreasonable or that it is not to the interest of the municipality to accept any of the bids, the municipality may direct that the work shall be done by force account under its direction and control.

Force account work is defined by Section 39-2-1 as, "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." "The force account method ... merely means that the city will act as its own contractor using labor and material employed or bought by the city to perform various phases of construction." AGO 1988-0205.

On any construction project where the municipality has determined to let a contract through negotiation or force account work, it must make available the plans and specifications, an itemized estimate of cost and any informal bids for review by the Department of Examiners of Public Accounts. Upon completion of the project, the municipality must also send to the Department of Examiners of Public Accounts the final total costs together with an itemized list of cost of any and all changes made in the original plans and specifications. Section 39-2-6(d), Code of Alabama 1975. This information must also be made public by the municipality upon request. Upon the approval of the municipality, its duly authorized officer or officers may, when proceeding upon the basis of force account, let any subdivision or unit of work by contract on informal bids.

The public works bid law does not require advertising for sealed bids on projects that that will be done through "force account" work. AGO 1998-0039.

When work is performed by force account, there is no contract to be signed and the bid requirement in Section 39-2-2, Code of Alabama 1975, has no effect. All equipment, materials and supplies used in the project must be obtained pursuant to the general competitive bidding requirements in Title 41, Chapter 16 of the Code. When a municipality uses the force account method, it must obtain engineering drawings, plans, specifications, and estimates prepared by a professional engineer, and the construction must be executed under the direct supervision of a professional engineer. Additionally, if architectural work beyond work incidental to engineering is involved, a licensed professional architect is required. AGO 1999-0065.

It is clear that the public works bid law does not apply to projects where the municipality will perform the work with its own employees. For example, the Attorney General has ruled that the construction of a municipal golf course is subject to the public works bid law, not the competitive bid law. But, if the municipality constructs the course itself, it does not have to bid the project. AGO 1999-0056. As noted in AGO 1999-0065, cited above, though, the purchase of the material used in the project may be subject to the general competitive bid law. But, if the purchase of materials is part of a public works contract itself, rather than a separate agreement, the public works bid law controls the purchase. AGO 2000-0099. Where the municipality is not performing the work itself, it may require a successful bidder to:

1. Enter into a written contract on any form included in the proposal, plans and specifications;
2. Furnish a performance bond and payment bond executed by a surety company duly authorized and qualified to make such bonds in the state of Alabama in the amount required by Section 39-1-1(a); and
3. Provide evidence of insurance as required by the bid documents within a specified period. If no period is specified, evidence must be submitted within 15 days after the prescribed forms have been presented to him or her for signature.

Under extenuating circumstances, the municipality may grant an extension of up to five days for the return of the contract, required bonds and required evidence of insurance. The municipality must approve the contractor's bonds, if they meet the

requirements of Section 39-2-8 and the contractor's evidence of insurance, if it meets the requirements of the bid documents and must execute the contract within 20 days after their presentation by the contractor unless the successful contractor agrees in writing to a longer period.

The municipality must issue a "proceed order" within 15 days after final execution of the contract by the municipality, unless both parties agree in writing to a stipulated extension in time for the issuance of a proceed order.

Should the successful bidder or bidders fail to execute a contract and furnish acceptable contract securities and evidence of insurance as required by law within the period allowed, the municipality shall retain from the proposal guaranty, if it is a cashier's check or recover from the principal or the sureties, if the guaranty is a bid bond, the difference between the amount of the contract as awarded and the amount of the proposal of the next lowest bidder. If no other bids are received, the full amount of the proposal guaranty shall be so retained or recovered as liquidated damages. Any sums so retained or recovered shall be the property of the municipality.

Failure by the municipality to execute a contract and to issue a proceed order as required shall be just cause, unless both parties agree in writing to a stipulated extension in time for issuance of a proceed order, for the withdrawal of the contractor's bid and contract without forfeiture of the certified check or bond.

**Assignment of the Contract by the Successful Bidder**

No contract awarded to the lowest responsible and responsive bidder shall be assignable by the successful bidder without written consent of the municipality 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 or responsive bidder.

**Violations and Penalties**

Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition to bid at a fixed price or to refrain from bidding or otherwise shall render the bids void and shall cause the bidders or prospective bidders to be disqualified from submitting further bids to the municipality. Any bidder or prospective bidder who willfully participates in any agreement or collusion in restraint of freedom of competition shall be guilty of a felony and, on conviction thereof, shall be fined not less than $5,000 nor more than $50,000 or, at the discretion of the jury, shall be imprisoned in the penitentiary for not less than one nor more than three years.

Any advance disclosure of the terms of a bid shall render the proceedings void and require re-bidding. Section 39-2-2(d), Code of Alabama 1975, provides that anyone who willfully violates the public works bid law is guilty of a Class C felony.

No civil action shall be brought or maintained by a contractor in any court in this state to require any municipality to pay out public funds for work and labor done, for materials supplied or on any account connected with performance of a contract for public works, if the contract was let or executed in violation of or contrary to any provision of law.

An action shall be brought by the Attorney General or may be brought by any interested citizen, in the name and for the benefit of the awarding authority to recover paid public funds from the municipality, contractor, its surety or any person receiving funds under any public works contract let in violation of or contrary to this title or any other provision of law, if there is clear and convincing evidence that the contractor, its surety or such person knew of the violation before execution of the contract. The action must be commenced within three years of final settlement of the contract.

The Attorney General, a bona fide unsuccessful or disqualified bidder, or any interested citizen may maintain an action to enjoin the letting or execution of any public works contract in violation of or contrary to the provisions of this title or any other statute and may enjoin payment of any public funds under any such contract. In the case of a successful action brought by a bidder, reasonable bid preparation costs shall be recoverable by that bidder. The action shall be commenced within 45 days of the contract award.

The act specifically requires strict competitive bidding on public works contracts and prohibits the use of quantum meruit, estoppel or any other legal or equitable principle which would allow recovery for work and labor done or materials furnished under any contract let in violation of competitive bidding requirements as prescribed by law.

Tender of ownership of waterlines by developer to a city water utility pursuant to a contract between developer and utility was rendered invalid by judicial finding that the contract was entered into in violation of statute mandating that all public-works contracts in excess of $50,000 be advertised for sealed bids. Therefore, developer held ownership of waterlines, where contract was sole basis for transfer of ownership of waterlines and judicial finding rendered contract invalid. The city water utility was not entitled to recover any money it paid to the developer under the agreement. *Lake Cyrus Development Co., Inc. v. Attorney Gen. of State of Ala. ex rel. Bessemer Water Service,* 143 So.3d 771 (Ala.2014).

**Requirement of Licensing**

Section 34-8-8, Code of Alabama 1975, requires municipalities preparing plans and specifications to include enough of Chapter 8, Title 34, to inform prospective bidders for which a contractor's license is required that they must show evidence of their license before their bid is considered. Failure to do this is a Class B misdemeanor.

Additionally, municipalities receiving bids from contractors must require prospective bidders to include a current license number on the bid. All bids that do not contain the license number must be rejected. A violation of this provision is a Class C misdemeanor.

**Mistakes in Bidding**

If the low bidder discovers a mistake in its bid rendering a price substantially out of proportion to that of other bidders, the low bidder may withdraw its bid without forfeiture upon written notice to the awarding authority within three working days after the opening of bids whether or not award has been made. 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 municipality shall permit withdrawal without forfeiture. The decision of the municipality must be made within 10 days after receipt of the low bidder's evidence or by the next regular meeting of the municipality. In no event shall a mistake of law, judgment or opinion constitute a valid ground for the withdrawal of a bid without forfeiture. 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.

**Bonding Requirements**

Any person entering into a public works contract with a municipality shall, before commencing work, execute a performance bond, with penalty equal to 100 percent of the amount of the contract price. In addition, another bond, payable to the municipality letting the contract, shall be executed in an amount not less than 50 percent 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.

Any person that has furnished labor, materials or supplies for or in the prosecution of a public work where payment has not been made may institute a civil action upon the payment bond. However, a civil action shall not be instituted on the bond until 45 days after written notice to the surety of the amount claimed to be due and the nature of the claim. The civil action shall be commenced not later than one year from the date of final settlement of the contract. The giving of notice by registered or certified mail, postage prepaid, addressed to the surety at any of its places of business or offices shall be deemed sufficient under this section. In the event the surety or contractor fails to pay the claim in full within 45 days from the mailing of the notice, then the person or persons may recover from the contractor and surety, in addition to the amount of the claim, a reasonable attorney's fee based on the result, together with interest on the claim from the date of the notice.

Every person having a right of action on the bond shall, upon written application to the municipality under the direction of whom the work has been prosecuted, indicating that labor, material, foodstuffs or supplies for the work have been supplied and that payment has not been made, be promptly furnished a certified copy of the additional bond and contract. The claimant may bring a civil action in the claimant's name on the bond against the contractor and the surety, or either of them, in the county in which the work is to be or has been performed or in any other county where venue is otherwise allowed by law.

In the event a civil action is instituted on the payment bond, at any time more than 15 days before trial begins, any party may serve upon the adverse party an offer to accept judgment in favor of the offeror or to allow judgment to be entered in favor of the offeree for the money or as otherwise specified in the offer. If within 10 days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service and the clerk of the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence of the offer shall not be admissible. If the judgment finally obtained by the offeree is less favorable than the offer, the offeree shall pay the reasonable attorney's fees and costs incurred by the offeror after making the offer. An offer that is made but not accepted does not preclude a subsequent offer. When the liability of one party to another party has been determined by verdict, order or judgment but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of judgment, which shall have the same effect as an offer made before trial if the offer is made no

less than 10 days prior to the commencement of hearings to determine the amount or extent of liability. Nothing requires taking a bond to secure contracts in an amount less than $100,000.

**Retainage**

Retainage is defined as: "That money belonging to the contractor which has been retained by the awarding authority conditioned on final completion and acceptance of all work in connection with a project or projects by the contractor." Retainage helps ensure that a project is completed to the satisfaction of the municipality.

Unless otherwise provided in the specifications, the municipality must make partial payments as the work progresses at the end of each calendar month but in no case later than 35 days after acceptance by the awarding authority that the estimates and terms of partial payments have been fulfilled. The contract must designate a person to review the progress of completed work and to review the documents submitted by the contractor. The designated person must within 10 days review the submission and request for payment and accept or request payment in writing. In preparing estimates, the material delivered on the site, materials suitably stored and insured off-site, and preparatory work done may be taken into consideration.

The awarding authority may not offer a contract for bidding unless confirmation of any applicable grant has been received and any required matching funds have been secured by or are available to the awarding authority. Section 39-2-2(j), Code of Alabama 1975. Should the source of funds for the payment be a grant, award, or direct reimbursement from the state, federal government, or other source which will not become available until after the execution of the contract, this shall be disclosed in the bid document and contract and the provisions regarding prompt payment shall not apply until the awarding authority is in receipt of the funds as provided in the contract. Upon such receipt, the contracting agency shall process payment within 10 days. Section 39-2-12(l), Code of Alabama 1975.

In making these partial payments, the municipality may retain not more than five percent of the estimated amount of work done and the value of materials stored on the site or suitably stored and insured off-site. After the project is 50 percent completed, the municipality may not withhold any more retainage. The retainage shall be held until final completion and acceptance of all work covered by the contract unless an escrow or deposit arrangement is used.

The Attorney General has ruled that a municipality may not, in bid specifications, provide for withholding more than five percent retainage on the first 50 percent of a public works project, nor may it provide that retainage shall continue to be withheld after the project is 50 percent complete. AGO 1997-0256.

On completion and acceptance of each separate building, public work or other divisions of a contract on which a price is stated separately in the contract or can be separately ascertained, payment may be made in full, including the retained percentage thereof, less authorized deductions. However, nothing requires a municipality to make full payment on an item of work when such item of work is an integral part of a complete improvement.

In addition to other requirements, a nonresident contractor must satisfy the municipality that he or she has paid all taxes due and payable to the state of Alabama or any political subdivision thereof prior to receiving final payment for contract work.

In lieu of the retainage, the municipality may provide in the specifications or contracts for the maintenance of an escrow account, or the depositing of security. The act lists in detail the requirements for an escrow account and the acceptable types of security.

All material and work covered by partial payments made shall become the sole property of the municipality. However, this does not relieve the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made, and for the restoration of any damaged work.

**Change Orders**

Change orders, that is, modifications to existing contracts, must be handled with care. Alabama statutory law provides little guidance regarding when change orders are permitted.

The Attorney General, though, has provided guidelines setting forth the circumstances in which a change order would be appropriate. Those circumstances are:

- Minor changes for a total monetary value less than required for competitive bidding.
- Changes for matters relatively minor and incidental to the original contract necessitated by unforeseen circumstances arising during the course of the work.
- Emergencies arising during the course of the work on the contract.
- Changes or alternatives provided for in the original bidding where there is no difference in price of the change order from the original best bid on the alternate.

- Changes of relatively minor items not contemplated when the plans and specifications were prepared and the project was bid which are in the public interest and which should not exceed 10 percent of the contract price. In subsequent opinions the attorney general has ruled that the 10 percent rule may not apply in extraordinary circumstances and emergency situations. See AGOs 1993-0105, 1992-0388, 1992-0363, 1992-0049, 1991-0279 and 1987-0197.

According to the attorney general, these are the criteria under which a change order will be allowed. Further, the attorney general requires that the change order be supported by a signed statement from the architect (engineer) and/or owner containing the following:

- A statement of what the change order covers and who instituted the change and why.
- Statement regarding the reasons for using the change order method rather than competitive bid.
- Statement that all prices have been reviewed and found reasonable, fair and equitable and recommending approval of the same.
- The owner either endorses the statements and recommendations or submits a separate statement covering the item.

Finally, the attorney general has emphasized that the foregoing are guidelines, that the final determination of the legality rests with the legal advisor to the various awarding authorities, and that the most important ingredient in the approval of negotiated change orders is the good faith of the officials executing the same. Citing *White v. McDonald Tractor Company,* 248 So. 2d 121 (1971).

**Completion of the Public Work**

Section 39-1-1(f) provides that the contractor shall, immediately after the completion of the contract, give notice of the completion by publishing the notice for a minimum of three weeks. Section 39-1-1(f) provides a few methods for publishing notice of completion. The contractor may publish notice of the completion of a public works project by using one or more of the following methods: (1) In a newspaper of general circulation in the county or counties in which the work, or some portion thereof, has been done; (2) On a website maintained by a newspaper of general circulation in the county or counties in which the work has been done; or (3) On a website utilized by the municipality for publishing notices. If no newspaper is published in the county in which the work was done, and if the municipality does not utilize a website for the purposes of publishing notices, the notice may be given by posting at the courthouse for 30 days, and proof of the posting of the notice shall be given by the municipality and the contractor. Section 39-1-1(f), Code of Alabama 1975. For contracts for road resurfacing materials that are awarded on an annual basis, where the bid specifications include options such as a unit price for materials. a unit price for the delivery of materials, or a unit price for materials to be laid in place by the bidder, notice of completion pursuant to this subsection may be given on an annual basis upon completion of the project as a whole, rather than at the completion of each proceed order. Section 39-1-1(f), Code of Alabama 1975.

A final settlement shall not be made upon the contract until the expiration of 30 days after the completion of the notice. Proof of publication of the notice shall be made by the contractor to the authority by whom the contract was made by affidavit of the publisher and a printed copy of the notice published. If no newspaper is published in the county in which the work is done, the notice may be given by posting at the courthouse for 30 days, and proof of same shall be made by the judge of probate, sheriff and the contractor. This subsection shall not apply to contractors performing contracts of less than $20,000 in amount. The governing body of the contracting agency, to expedite final payment, shall cause notice of final completion of the contract to be published one time in a newspaper of general circulation, published in the county of the contracting agency and shall post notice of final completion on the agency's bulletin board for one week, and shall require the contractor to certify under oath that all bills have been paid in full. Final settlement with the contractor may be made at any time after the notice has been posted for one entire week.

The purpose of this section is to provide security for those who furnish labor and material in performance of government contracts as a substitute for unavailable lien rights, and is liberally construed to accomplish this purpose. *Headley v. Housing Authority*, 347 So. 2d 532 (Ala. Civ. App. 1977). A public contractor is charged with knowledge of this section requiring bond of public contractors. *Universal Electric Construction Co. v. Robbins*, 239 Ala. 105, 194 So. 194 (Ala. 1940).

Upon the contractor's completion and the awarding authority's acceptance of all work required, the awarding authority shall pay the amount due the contractor upon the contractor's presentation of the following items:

a. A properly executed and duly certified voucher for payment.

b. A release, if required, of all claims and claims of lien against the awarding authority arising under and by virtue of the contract, other than such claims of the contractor, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

c. Proof of advertisement as provided by law. See, Section 39-1-1(f) for advertising requirements.

Payments are due and owing 40 days after all the above requirements are fulfilled. If the awarding authority fails to make payment, as required, interest on the amount will accrue and be due and owing to the contractor. The interest rate shall be the legal amount currently charged by the Alabama Department of Revenue. Interest shall accrue on the day following the later date described above and shall be paid from the same fund or source from which the contract principal is paid.

**Additional Regulations**

A municipality may prepare and promulgate rules and regulations governing public works bids as it deems proper. However, these regulations may not conflict with state law.

**Use of Domestic Iron or Steel**

The act requires contract provisions requiring the use of domestic iron or steel. If this provision is breached, the contract price must be adjusted downward in an amount equal to the savings realized by the contractor. Section 39-3-4, Code of Alabama 1975.

**Certification of Contract**

A municipality must, prior to the execution of final contracts and bonds, certify that the contract to be awarded is let in compliance with Title 39 and all other applicable provisions of law. For purposes of a civil action, the issuance of the certificate by the municipality constitutes a presumption that the contract was let in accordance with law. The presumption may be rebutted only by a showing with clear and convincing evidence that the certification is false or fraudulent and that the contractor knew that the certification was false or fraudulent before execution of the contract.

Any municipality or its agents issuing a willfully false or fraudulent certificate is guilty of a felony and, on conviction thereof, shall be fined not less than $5,000 nor more than $50,000 or, at the discretion of the jury, shall be imprisoned in the penitentiary for not less than one nor more than three years.

**Fair and Open Competition**

Act 2014-107, codified as Chapter 8 of Title 39 of the Code of Alabama 1975, created the Fair and Open Competition in Governmental Construction Act. The Act applies to a "public agency," which is defined as the "State of Alabama, and any county, city, town, school district, or other political subdivision of the state, any public trust, any public entity specifically created by the statutes of the State of Alabama or as a result of statutory authorization therefor, and any department, agency, board, bureau, commission, committee, or authority of any of the foregoing public entities."

Section 4 of the Act (see Section 39-8-4, Code of Alabama 1975) contains the following specific prohibition:

A public agency awarding any contract for the construction, repair, remodeling, or demolition of a public improvement, or obligating funds pursuant to such a contract, shall ensure that neither the awarding public agency nor any construction manager acting on behalf of the public agency, in its bid specifications, project agreements, or other controlling documents shall include any of the following:

- A term that requires, prohibits, encourages, or discourages bidders, contractors, or subcontractors from entering into or adhering to agreements with a collective bargaining organization relating to the construction project or other related construction projects.
- A term that discriminates against bidders, contractors, or subcontractors based on the status as a party or nonparty to, or the willingness or refusal to enter into, an agreement with a collective bargaining organization relating to the construction project or other related construction projects.

Furthermore, a public agency shall not award a grant, tax abatement, or tax credit that is conditioned upon a requirement that the awardee include a term as described in Section 4 above in a contract document for any construction, improvement, maintenance, or renovation to real property or fixtures that are the subject of the grant, tax abatement, or tax credit. See Section 39-8-5, Code of Alabama 1975.

A public agency or a construction manager or other contracting entity acting on behalf of a public agency shall not place any of the terms described in Section 4 in bid specifications, project agreements, or other controlling documents relating to the construction, repair, remodeling, or demolition of a public improvement. Any such included term shall be void and of no effect. See Section 39-8-6, Code of Alabama 1975.

A public agency may exempt a particular project, contract, subcontract, grant, tax abatement, or tax credit from the requirements of Section 4 if the public agency finds, after public notice and hearing, that special circumstances require

an exemption to avert an imminent threat to public health or safety. A finding of special circumstances under this act shall not be based on the possibility or presence of a labor dispute concerning the use of contractors or subcontractors who are nonsignatories to, or otherwise do not adhere to, agreements with one or more collective bargaining organizations, or concerning employees on the project who are not members of or affiliated with a collective bargaining organization. See Section 39-8-7, Code of Alabama 1975.

**Selected Cases and Attorney General's Opinions on Public Works Bidding**

- Engineering services to plan the construction of a public works contract are not subject to the bonding requirements in Section 39-1-1, Code of Alabama 1975. AGO 1995-0183.
- The public works bid law, Section 39-1-1, et seq., Code of Alabama 1975, applies to renovation projects of municipal housing authorities. AGO 1998-0031.
- Incorporated industrial development boards are exempt from the public works bid law. Grant funds, however, may require that a project using those funds be bid. AGO 1998-0051.
- The public works bid law, Title 39, Chapter 2, Code of Alabama 1975, does not require bidding in-kind services performed by municipal employees that will serve as a match for ADECA grant funds. AGO 1998-0052.
- Section 39-1-4 of the Code prohibits agencies that are subject to the public works bid law from providing insurance other than builder's risk insurance and owner's protective insurance on projects it lets for bid. AGO 1999-0142.
- Public building authorities organized pursuant to Sections 11-56-1 through 11-56-22 of the Code are not subject to the Public Works Bid Law. AGO 1999-0218.
- The purchase of lights by a municipality for a ballpark is considered a purchase of equipment and subject to the Competitive Bid Law if the cost is $7500 or more. If the purchase of lights is included in a contract for the construction or renovation of the ballpark, it is subject to the Public Works Bid Law. AGO 2000-0099.
- Construction contracts, absent statutory authority, cannot be renewed without compliance with the competitive bid law or, where applicable, the public works bid law. AGO 2000-0078.
- If a city determines that a change order in excess of 10 percent is necessary for the proper completion of a project, where a grant can be retained by this method, the city can find that the circumstances are extraordinary and justify a change order in excess of 30 percent without violating the Competitive Bid Law or the Public Works Law. AGO 2000-0098.
- Under Section 39-2-1 of the Code of Alabama 1975, waterworks boards are subject to the Public Works Law when building construction costs exceed $50,000 (currently $100,000) Section 41-16-51(b)(7), Code of Alabama 1975, exempts waterworks boards from the competitive bid law when purchasing supplies, equipment or materials needed, used and consumed in the normal operation of the water board. If the purchase of the equipment, supplies or materials exceeds $50,000 (currently $100,000) and is included in the construction contract, it is subject to the Public Works Law. AGO 2002-0152.
- A city has met the "substantial compliance" standard set forth by Alabama's appellate courts if it inadvertently advertises for a public works contract in one newspaper that is not of statewide general circulation and has let the contract before determining that the advertisement ran in error. AGO 2004-0018. **Note: This opinion involves a very specific set of facts and should be examined carefully before being relied upon.**
- Works to be performed on public property or property that will become public property, that are paid for entirely with private funds are not public works and contracts to perform such works are not subject to the competitive bidding requirements of the Public Works Bid Law. AGO 2004-0026. **Note: It is the League's opinion that if private funds are disbursed by the city or through the city, they would become public funds and thus subject to any applicable bidding procedures.**
- The use of asphalt obtained through the award of a public works contract is restricted for use on public works projects. Further, no public works project, the total of which would exceed $50,000 (currently $100,000), may be split into parts involving sums of less than $50,000 (currently $100,000) in order to avoid bidding. However, in those situations involving the use of public employees, the portion of the project attributable to those public employees would not be subject to the public works bid law. AGO 2004-0083.

- Under federal law and regulations, a city may not require a general contractor, submitting a bid on a public works project funded, in part, by federal transportation monies received by the state, to provide the contractor's license number on bid documents before submission of the bid or before the bid is considered for an award of a contract. However, a city may require proof of a license upon or subsequent to the award of a contract. AGO 2004-0099.
- If the project on city property will be paid for entirely with private funds, it will not be subject to the requirements of competitive bidding under the Public Works Bid Law. AGO 2004-0223.
- If a town obtained a good-faith estimate that the project was less than $500,000, it was not required to advertise in three newspapers of general circulation throughout the state. If the town substantially complied with the Public Works Bid Law the town may proceed with the executed contract. AGO 2008-0106.
- A contract that exceeds $50,000 (currently $100,000) for the construction of a water line to a public school is subject to the bidding requirements of the Public Works Law. AGO 2009-0022
- Contracts for the repair, improvement, and maintenance of a water storage tank are subject to the bidding requirements of the Public Works Bid Law. A tank contract that exceeds $50,000 (currently $100,000) must be bid. AGO 2009-0100.
- The preference to resident contractors over out-of-state contractors, found in section 39-3-5(a) of the Code of Alabama, applies if (1) the contract is under the Public Works Law, (2) the contract utilizes any state, county, or municipal funds, except if funded in whole or in part with federal funds, and (3) the law of the state of the out-of-state contractor gives preference to its resident contractors. A County Commission may not give preference to Alabama contractors over Florida contractors because Florida law does not provide a preference to resident contractors in public works contracts. AGO 2010-0040.
- The purchase and placement of sod by a contractor for the construction of a softball complex is a public works project. AGO 2010-0048.
- A project for maintenance of multiple water tanks that exceeds $50,000 (currently $100,000) is subject to the Public Works Law. The project may not be divided into parts. The tank maintenance contract cannot be renewed without competitive bidding. AGO 2015-0008.
- A newspaper meeting the requirements of Section 6-8-60 of the Code of Alabama is a newspaper of general circulation in the county for purposes of the Public Works Law. AGO 2015-0046.
- Because the city will possess a contractual right to purchase the property upon which the City Hall Complex will be built, the construction thereof is a public works project subject to bidding pursuant to Sections 39-2-1 through 39-2-14 of the Code of Alabama 1975. AGO 2015-0019.
- A county board may purchase real property upon which the successful bidder will construct or remodel a building by bidding in compliance with the Public Works Law. Upon completion of the transaction, the county board should comply with the Section 9-15-100, Code of Alabama 1975, disclosure requirements concerning the purchase of real property by the state, county, municipality, or any other governmental entity or quasi-governmental entity after the purchase. AGO 2015-0064.
- If the Alabama Department of Transportation determines that the failure to obtain approval to bid as a joint venture and omission of a contractor identification number assigned to the joint venture in the bid, as required in the department's administrative rules, are minor irregularities not defeating the responsiveness of the lowest bidder, it may award the contract to that bidder. AGO 2016-0006.
- The Jefferson County E-911 Board ("Board") may enter into a contract to allow a private company to erect a cell tower on a fire station so long as the tower is used for dispatch services. the contract between the Board and the company must be competitively bid under the Public Works Law. AGO 2020-0015.
- The renovation of a municipal court's administrative offices is subject to the **Public Works** Law and must be competitively **bid** if the project cost exceeds $50,000 (currently $100,000). AGO 2019-0042.
- The purchase of radio equipment, which includes transmitters, receivers, antennas and related items that are to be installed on completed radio towers, as well as the construction of radio towers and small buildings to complete the infrastructure for the dispatch system, are subject to the Public Works Law. AGO 2018-0004

- A contract for a Supervisory Control and Data Acquisition System is a public work under section 39-2-1(6) of the Code of Alabama. The contract is not exempt from the Public Works Law. There is no term limitation on a public works contract. AGO 2017-0026. The Water Works Board of the City of Vincent may not divide the installation of new water meters into multiple contracts for payments of less than $50,000 (currently $100,000) to evade the Public Works Law. If the Board can demonstrate, based on several specified factors, that it is not evading the Public Works Law by spreading out its meter purchases over several years as funds become available, then it will not violate section 39-2-2(a) of the Code of Alabama. AGO 2017-0010.
- Under the facts presented, the city complied with the requirements of the Public Works Law and may proceed with the contract. AGO 2022-0011.
- The Autauga County Board of Education may enter into an agreement with the Autauga County Commission to assist the Board with paving school parking lots without bidding the work pursuant to section 39-1-1, et seq., of the Code of Alabama when the Commission will provide materials, labor, and equipment at cost for all work to be performed. AGO 2022-0043.
- Construction of waterworks paid for by public funds and on public property (or on private property with easements to gain necessary access) is subject to the Public Works Law and, unless an exception applies, the project must be competitively bid under its terms. Loachapoka Water Authority may pay for extra pipe mistakenly delivered and installed as a change order if the amount of the invoice for said pipe is less than 10% of the total contract. AGO 2023-0031.