

1 HB13
2 125481-2
3 By Representative Williams (J)
4 RFD: State Government
5 First Read: 01-MAR-11
6 PFD: 02/22/2011

1 ENGROSSED

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4 A BILL
5 TO BE ENTITLED
6 AN ACT
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8 Relating to competitive bidding for public works
9 projects under Title 39 and public contracts under Title 41 of
10 the Code of Alabama 1975; to amend Sections 39-2-1, 39-2-6,
11 41-16-51, and 41-16-57, Code of Alabama 1975, to define the
12 term "life cycle costs" and to clarify the definition of a
13 "public works project"; to allow local governments to purchase
14 goods and services through vendors with a current and valid
15 contract with the Government Services Administration or the
16 Western States Contracting Alliance without further
17 competitive bidding; to provide that life cycle costs may be
18 considered by the awarding authority in determining the lowest
19 responsible and responsive bidder; and to clarify that the
20 definition of personal property includes goods that are, or
21 are to become, fixtures.

22 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

23 Section 1. Sections 39-2-1, 39-2-6, 41-16-51, and
24 41-16-57, Code of Alabama 1975, are amended to read as
25 follows:

26 "§39-2-1.

1 "As used in this title, the following words shall
2 have the meanings ascribed to them as follows:

3 "(1) AWARDING AUTHORITY. Any governmental board,
4 commission, agency, body, authority, instrumentality,
5 department, or subdivision of the state, its counties and
6 municipalities. This term includes, but shall not be limited
7 to, the Department of Transportation, the State Building
8 Commission, the State Board of Education, and any other entity
9 contracting for public works. This term shall exclude the
10 State Docks Department and any entity exempted from the
11 competitive bid laws of the state by statute.

12 "(2) FORCE ACCOUNT WORK. Work paid for by
13 reimbursing for the actual costs for labor, materials, and
14 equipment usage incurred in the performance of the work, as
15 directed, including a percentage for overhead and profit,
16 where appropriate.

17 "(3) LIFE CYCLE COSTS. The total costs of ownership
18 over the expected life of a water or sewer public works
19 project, taking into consideration the costs of construction,
20 operation, and maintenance, less any value obtained from
21 salvage and quantifiable environmental benefits.

22 "~~(3)~~ (4) PERSON. Natural persons, partnerships,
23 limited liability companies, corporations, and other legal
24 entities.

25 "~~(4)~~ (5) PUBLIC PROPERTY. Real property which the
26 state, county, municipality, or awarding authority thereof

1 owns or has a contractual right to own or purchase, including
2 easements, rights-of-way, or otherwise.

3 "~~(5)~~(6) PUBLIC WORKS. The construction,
4 installation, repair, renovation, or maintenance of public
5 buildings, structures, sewers, waterworks, roads, curbs,
6 gutters, side walls, bridges, docks, underpasses, and viaducts
7 as well as any other improvement to be constructed, installed,
8 repaired, renovated, or maintained on public property and to
9 be paid, in whole or in part, with public funds or with
10 financing to be retired with public funds in the form of lease
11 payments or otherwise.

12 "§39-2-6.

13 "(a) The contract shall be awarded to the lowest
14 responsible and responsive bidder, unless the awarding
15 authority finds that all the bids are unreasonable or that it
16 is not to the interest of the awarding authority to accept any
17 of the bids. A responsible bidder is one who, among other
18 qualities determined necessary for performance, is competent,
19 experienced, and financially able to perform the contract. A
20 responsive bidder is one who submits a bid that complies with
21 the terms and conditions of the invitation for bids. Minor
22 irregularities in the bid shall not defeat responsiveness. The
23 bidder to whom the award is made shall be notified by
24 telegram, confirmed facsimile, or letter at the earliest
25 possible date. If the successful bidder fails or refuses to
26 sign the contract, to make bond as provided in this chapter or
27 to provide evidence of insurance as required by the bid

1 documents, the awarding authority may award the contract to
2 the second lowest responsible and responsive bidder. If the
3 second lowest bidder fails or refuses to sign the contract,
4 make bond as provided in this chapter or to provide evidence
5 of insurance as required by the bid documents, the awarding
6 authority may award the contract to the third lowest
7 responsible and responsive bidder.

8 "(b) If no bids or only one bid is received at the
9 time stated in the advertisement for bids, the awarding
10 authority may advertise for and seek other competitive bids,
11 or the awarding authority may direct that the work shall be
12 done by force account under its direction and control or, with
13 the exception of the Department of Transportation, the
14 awarding authority may negotiate for the work through the
15 receipt of informal bids not subject to the requirements of
16 this section. Where only one responsible and responsive bid
17 has been received, any negotiation for the work shall be for a
18 price lower than that bid.

19 "(c) If the awarding authority finds that all bids
20 received are unreasonable or that it is not to the interest of
21 the awarding authority to accept any of the bids, the awarding
22 authority may direct that the work shall be done by force
23 account under its direction and control.

24 "(d) On any construction project on which the
25 awarding authority has prepared plans and specifications,
26 received bids, and has determined to do by force account or by
27 negotiation, the awarding authority shall make available the

1 plans and specifications, an itemized estimate of cost and any
2 informal bids for review by the Department of Examiners of
3 Public Accounts and, upon completion of the project by an
4 awarding authority, the final total costs together with an
5 itemized list of cost of any and all changes made in the
6 original plans and specifications shall also be made available
7 for review by the Department of Examiners of Public Accounts.
8 Furthermore, the above described information shall be made
9 public by the awarding authority upon request. Upon the
10 approval of the awarding authority, its duly authorized
11 officer or officers may, when proceeding upon the basis of
12 force account, let any subdivision or unit of work by contract
13 on informal bids.

14 "(e) No provision of this section shall be
15 interpreted as precluding the use of convict labor by the
16 awarding authority. This section shall not apply to routine
17 maintenance and repair jobs done by maintenance personnel who
18 are regular employees of the awarding authority, nor shall it
19 apply to road or bridge construction work performed by an
20 awarding authority's regular employees and own equipment.

21 "(f) No contract awarded to the lowest responsible
22 and responsive bidder shall be assignable by the successful
23 bidder without written consent of the awarding authority, and
24 in no event shall a contract be assigned to an unsuccessful
25 bidder whose bid was rejected because he or she was not a
26 responsible or responsive bidder.

1 "(g) Any agreement or collusion among bidders or
2 prospective bidders in restraint of freedom of competition to
3 bid at a fixed price or to refrain from bidding or otherwise
4 shall render the bids void and shall cause the bidders or
5 prospective bidders to be disqualified from submitting further
6 bids to the awarding authority on future lettings. Any bidder
7 or prospective bidder who willfully participates in any
8 agreement or collusion in restraint of freedom of competition
9 shall be guilty of a felony and, on conviction thereof, shall
10 be fined not less than five thousand dollars (\$5,000) nor more
11 than fifty thousand dollars (\$50,000) or, at the discretion of
12 the jury, shall be imprisoned in the penitentiary for not less
13 than one nor more than three years.

14 "(h) Any disclosure in advance of the terms of a bid
15 submitted in response to an advertisement for bids shall
16 render the proceedings void and require advertisement and
17 award anew.

18 "(i) The lowest responsible and responsive bidder on
19 a water or sewer public works project may be determined to be
20 the bidder offering the lowest life cycle costs. The lowest
21 responsible and responsive bidder shall otherwise meet all of
22 the conditions and specifications contained in the invitation
23 to bid, except that a bidder may still be considered
24 responsive if he or she responds with a bid using different
25 construction materials than those specified in the invitation
26 to bid if the materials' use would result in lower lifecycle
27 costs for the water or sewer public works project. To utilize

1 this provision to determine the lowest responsible and
2 responsive bidder, the awarding authority must include a
3 notice in the invitation to bid that the lowest responsible
4 and responsive bidder may be determined by using life cycle
5 costs.

6 "§41-16-51.

7 "(a) Competitive bids shall not be required for
8 utility services, the rates for which are fixed by law,
9 regulation, or ordinance, and the competitive bidding
10 requirements of this article shall not apply to:

11 "(1) The purchase of insurance.

12 "(2) The purchase of ballots and supplies for
13 conducting any primary, general, special, or municipal
14 election.

15 "(3) Contracts for securing services of attorneys,
16 physicians, architects, teachers, superintendents of
17 construction, artists, appraisers, engineers, consultants,
18 certified public accountants, public accountants, or other
19 individuals possessing a high degree of professional skill
20 where the personality of the individual plays a decisive part.

21 "(4) Contracts of employment in the regular civil
22 service.

23 "(5) Contracts for fiscal or financial advice or
24 services.

25 "(6) Purchases of products made or manufactured by
26 the blind or visually handicapped under the direction or

1 supervision of the Alabama Institute for Deaf and Blind in
2 accordance with Sections 21-2-1 to 21-2-4, inclusive.

3 "(7) Purchases of maps or photographs from any
4 federal agency.

5 "(8) Purchases of manuscripts, books, maps,
6 pamphlets, or periodicals.

7 "(9) The selection of paying agents and trustees for
8 any security issued by a public body.

9 "(10) Existing contracts up for renewal for
10 sanitation or solid waste collection, recycling, and disposal
11 between municipalities or counties, or both, and those
12 providing the service.

13 "(11) Purchases of computer and word processing
14 hardware when the hardware is the only type that is compatible
15 with hardware already owned by the entity taking bids and
16 custom software.

17 "(12) Professional services contracts for
18 codification and publication of the laws and ordinances of
19 municipalities and counties.

20 "(13) Contractual services and purchases of
21 commodities for which there is only one vendor or supplier and
22 contractual services and purchases of personal property which
23 by their very nature are impossible to award by competitive
24 bidding.

25 "(14) Purchases of dirt, sand, or gravel by a county
26 governing body from in-county property owners in order to
27 supply a county road or bridge project in which the materials

1 will be used. The material shall be delivered to the project
2 site by county employees and equipment used only on projects
3 conducted exclusively by county employees.

4 "(15) Contractual services and purchases of products
5 related to, or having an impact upon, security plans,
6 procedures, assessments, measures, or systems, or the security
7 or safety of persons, structures, facilities, or
8 infrastructures.

9 "(16) Subject to the limitations in this
10 subdivision, purchases of goods made as a part of the
11 purchasing cooperative sponsored by the National Association
12 of Counties, or its successor organization. This subdivision
13 shall not apply to goods for which a service or service
14 contract, whether subject to competitive bidding under this
15 article or not, is necessary to utilize the goods. Such
16 purchases may only be made if all of the following occur:

17 "a. The goods being purchased are available as a
18 result of a competitive bid process approved by the Alabama
19 Department of Examiners of Public Accounts for each bid.

20 "b. The goods are either not at the time available
21 to counties on the state purchasing program or are available
22 at a price equal to or less than that on the state purchasing
23 program.

24 "c. The purchase is made through a participating
25 Alabama vendor holding an Alabama business license if such a
26 vendor exists.

1 "(17) Purchase of goods or services, other than
2 wireless communication services, whether voice or data, from
3 vendors that have been awarded a current and valid Government
4 Services Administration contract or the Western States
5 Contracting Alliance contract. Any purchase made pursuant to
6 this subdivision shall be under the same terms and conditions
7 as provided in the Government Services Administration contract
8 or the Western States Contracting Alliance contract. Prices
9 paid for such goods and services, other than wireless
10 communication services, whether voice or data, may not exceed
11 the amount provided in the Government Services Administration
12 contract or the Western States Contracting Alliance contract.

13 "(b) This article shall not apply to:

14 "(1) Any purchases of products where the price of
15 the products is already regulated and established by state
16 law.

17 "(2) Purchases made by individual schools of the
18 county or municipal public school systems from moneys other
19 than those raised by taxation or received through
20 appropriations from state or county sources.

21 "(3) The purchase, lease, sale, construction,
22 installation, acquisition, improvement, enlargement, or
23 expansion of any building or structure or other facility
24 designed or intended for lease or sale by a medical clinic
25 board organized under Sections 11-58-1 to 11-58-14, inclusive.

26 "(4) The purchase, lease, or other acquisition of
27 machinery, equipment, supplies, and other personal property or

1 services by a medical clinic board organized under Sections
2 11-58-1 to 11-58-14, inclusive.

3 "(5) Purchases for public hospitals and nursing
4 homes operated by the governing boards of instrumentalities of
5 the state, counties, and municipalities.

6 "(6) Contracts for the purchase, lease, sale,
7 construction, installation, acquisition, improvement,
8 enlargement, or extension of any plant, building, structure,
9 or other facility or any machinery, equipment, furniture, or
10 furnishings therefor designed or intended for lease or sale
11 for industrial development, other than public utilities, under
12 Sections 11-54-80 to 11-54-99, inclusive, or Sections 11-54-20
13 to 11-54-28, inclusive, or any other statute or amendment to
14 the Constitution of Alabama authorizing the construction of
15 plants or other facilities for industrial development or for
16 the construction and equipment of buildings for public
17 building authorities under Sections 11-56-1 to 11-56-22,
18 inclusive.

19 "(7) The purchase of equipment, supplies, or
20 materials needed, used, and consumed in the normal and routine
21 operation of any waterworks system, sanitary sewer system, gas
22 system, or electric system, or any two or more thereof, that
23 are owned by municipalities, counties, or public corporations,
24 boards, or authorities that are agencies, departments, or
25 instrumentalities of municipalities or counties and no part of
26 the operating expenses of which system or systems have, during
27 the then current fiscal year, been paid from revenues derived

1 from taxes or from appropriations of the state, a county, or a
2 municipality.

3 "(8) Purchases made by local housing authorities,
4 organized and existing under Chapter 1 of Title 24, from
5 moneys other than those raised by state, county, or city
6 taxation or received through appropriations from state,
7 county, or city sources.

8 "(c) The state trade schools, state junior colleges,
9 state colleges, and universities under the supervision and
10 control of the State Board of Education, the district boards
11 of education of independent school districts, the county
12 commissions, and the governing bodies of the municipalities of
13 the state shall establish and maintain such purchasing
14 facilities and procedures as may be necessary to carry out the
15 intent and purpose of this article by complying with the
16 requirements for competitive bidding in the operation and
17 management of each state trade school, state junior college,
18 state college, or university under the supervision and control
19 of the State Board of Education, the district boards of
20 education of independent school districts, the county
21 commissions, and the governing bodies of the municipalities of
22 the state and the governing boards of instrumentalities of
23 counties and municipalities, including waterworks boards,
24 sewer boards, gas boards, and other like utility boards and
25 commissions.

1 "(d) Contracts entered into in violation of this
2 article shall be void and anyone who violates the provisions
3 of this article shall be guilty of a Class C felony.

4 "§41-16-57.

5 "(a) When purchases are required to be made through
6 competitive bidding, awards shall be made to the lowest
7 responsible bidder taking into consideration the qualities of
8 the commodities proposed to be supplied, their conformity with
9 specifications, the purposes for which required, the terms of
10 delivery, transportation charges, and the dates of delivery.
11 If at any time after the award has been made the lowest
12 responsible bidder notifies the awarding authority in writing
13 that the bidder will no longer comply with the terms of the
14 award to provide the goods or services to the awarding
15 authority under the terms and conditions of the original
16 award, or the awarding authority documents that the lowest
17 responsible bidder defaults under the terms of the original
18 award, the awarding authority may terminate the award to the
19 defaulting bidder and make an award to the second lowest
20 responsible bidder for the remainder of the award period
21 without rebidding, provided the award to the second lowest
22 responsible bidder is in all respects made under the terms and
23 conditions contained in the original bid specifications and is
24 for the same or a lower price than the bid originally
25 submitted to the awarding authority by the second lowest
26 responsible bidder.

1 "(b) The awarding authority in the purchase of or
2 contract for personal property or contractual services shall
3 give preference, provided there is no sacrifice or loss in
4 price or quality, to commodities produced in Alabama or sold
5 by Alabama persons, firms, or corporations. Notwithstanding
6 the foregoing, no county official, county commission, school
7 board, city council or city councilmen, or other public
8 official, state board, or state agency charged with the
9 letting of contracts or purchase of materials for the
10 construction, modification, alteration, or repair of any
11 publicly owned facility may specify the use of materials or
12 systems by a sole source, unless:

13 "(1) The governmental body can document to the
14 satisfaction of the State of Alabama Building Commission that
15 the sole source product or service is of an indispensable
16 nature, all other viable alternatives have been explored, and
17 it has been determined that only this product or service will
18 fulfill the function for which the product is needed.
19 Frivolous features will not be considered.

20 "(2) The sole source specification has been
21 recommended by the architect or engineer of record and who
22 also documents that there is no other product available and
23 that the use of the requirement is of an indispensable nature
24 and why.

25 "(3) All information substantiating the use of a
26 sole source specification is documented in writing and is
27 filed into the project file.

1 "(c) (1) Beginning January 1, 2009, for purchases of
2 personal property, including on or after the effective date of
3 this amendatory act, goods which are, or are to become,
4 fixtures, in instances where the awarding authority determines
5 that the total cost of ownership over the expected life of the
6 item or items, including acquisition costs plus sustaining
7 costs or life cycle costs, can be reasonably ascertained from
8 industry recognized and accepted sources, the lowest
9 responsible bid may be determined to be the bid offering the
10 lowest life cycle costs and otherwise meeting all of the
11 conditions and specifications contained in the invitation to
12 bid. To utilize this subdivision to determine the lowest
13 responsible bidder, the awarding authority shall include a
14 notice in the invitation to bid that the lowest responsible
15 bid may be determined by using life cycle costs and identify
16 the industry recognized and accepted sources that will be
17 applicable to such an evaluation.

18 "(2) No later than November 30, 2008, the Department
19 of Examiners of Public Accounts shall establish procedures for
20 the use of life cycle costs, which shall be distributed to all
21 contracting agencies and shall be used in conducting any
22 audits of the purchasing agency.

23 "(d) The awarding authority or requisitioning agency
24 may reject any bid if the price is deemed excessive or quality
25 of product inferior.

26 "(e) Each record, with the successful bid indicated
27 thereon, and with the reasons for the award if not awarded to

1 the lowest bidder, shall, after award of the order or
2 contract, be open to public inspection.

3 "(f) Contracts for the purchase of personal property
4 or contractual services shall be let for periods not greater
5 than three years. Contracts for the leasing of motor vehicles
6 by local governing bodies shall be let for periods not greater
7 than five years. Lease-purchase contracts for capital
8 improvements and repairs to real property shall be let for
9 periods not greater than 10 years and all other lease-purchase
10 contracts shall be let for periods not greater than 10 years."

11 Section 2. This act shall become effective
12 immediately following its passage and approval by the
13 Governor, or its otherwise becoming law.

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House of Representatives

Read for the first time and re-
ferred to the House of Representa-
tives committee on State Government
..... 01-MAR-11

Read for the second time and placed
on the calendar 1 amendment 09-MAR-11

Read for the third time and passed
as amended..... 31-MAR-11

Yeas 98, Nays 0, Abstains 0

Greg Pappas
Clerk