



# Alabama Department of Examiners of Public Accounts

## **Alabama Competitive Bid and Public Works Law Manual for State Government Entities**

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ALABAMA STATE HOUSE

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## PREFACE

This handbook is written to assist those state governmental entities who must consult the Competitive Bid and Public Works Laws of Alabama. The current revision was overseen by Jason Paulk, Chief Legal Counsel, Examiners of Public Accounts, and Laura Mest, Assistant Legal Counsel, Examiners of Public Accounts.

The handbook is organized in three Parts: Part I – Contracts, Part II – Public Works, and Part III – Appendices. Parts I and II are organized with (1) a chapter of general introduction to the subject; (2) a chapter summarizing the cases that have interpreted the statutes; and (3) a chapter containing brief summaries of the opinions issued by the Attorney General. Part III contains the applicable statutes for the Competitive Bid Laws and Public Works referenced throughout Parts I and II.

Because the Competitive Bid Law has been the subject of many interpretations, the opinions in Part I are divided into topics, such as exemptions from the Competitive Bid Law and procedures under the Competitive Bid Law, in order to make research easier. Some opinions may appear in more than one of these chapters if the opinion is relevant to more than one topic. It is always important in reading the opinions to consider the possibility that some parts of the underlying statutes (e.g., the threshold amount at which the Competitive Bid Law applies) may have changed since the opinion was issued.

It would be emphasized that this publication is not an authoritative statement of the law, nor is it a substitute for the Code or other legal materials explanatory thereof. This publication seeks only to serve as a guide to the specific mandates of Alabama law, regarding Competitive Bid and Public Works Law. Users of this publication who have a need for authoritative legal statements should seek the assistance of the appropriate legal sources. Users of this manual should also consult the Department of Finance's Administrative Rules (Chapter 355 of the Alabama Administrative Code) as well as the State's Fiscal Policies and Procedures Manual which was most recently updated in July 2024 and can be found [here](#).

This does not serve as legal advice to the reader but only to alert the reader as to matters that come within the Competitive Bid and Public Works Law. No conclusions concerning the policies of the State of Alabama are drawn from this publication.

The Department wishes to recognize Othni J. Lathram, the Director of the Legislative Services Agency, for his work on the first three editions of this handbook. In 2007, the Department of Examiners of Public Accounts requested the Alabama Law Institute to compile the Competitive Bid and Public Works Laws for Alabama. In recent years, this handbook has been revised on multiple occasions to reflect changes to the law. The Institute retained the services of Professor Jim Bryce from the University of Alabama School of Law to draft the 2007 and 2008 revisions. The 2014 revision was overseen by Michael Hill of the Law Institute with the help of Daniel Harris who served as a research assistant.

In 2021, the Legislature made significant changes to the Competitive Bid Law as applied to state agencies, specifically repealing Articles 2 and 3A of the Competitive Bid Law (Act 2021-

296). However, Act 2021-296 did not make significant changes to the Competitive Bid Law as applied to county and local governmental entities. As such, the Department has separated this handbook into two versions, one of which is intended to assist county and local governments and this version, which is intended to assist state governmental entities. Additionally, Act 2021-296 removed institutions of higher education from the purview of most provisions of the Competitive Bid Law but required these institutions to establish and maintain procurement offices and to adopt rules as necessary to comply with the law.

This version reflects updates to state laws through the 2024 regular session of the Alabama Legislature as well as newly issued Attorney General Opinions through March 1, 2025.

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## INTRODUCTION TO THE HANDBOOK

The Department of Examiners of Public Accounts is created and governed by the Code of Alabama (1975) Title 41, Chapter 5A (§§ 41-5A-1 through 41-5A-23). The cited statutes grant power to an appointed Chief Examiner of Public Accounts (“Chief Examiner”), who is allowed to delegate his or her powers to his or her appointed assistants, staff, deputies, and employees. The Chief Examiner shall be selected and appointed by the Legislative Committee on Public Accounts to serve for a term of five years and until a qualified successor is appointed. Ala. Code § 41-5A-2.

The Chief Examiner has the following authority and duties:

- (a) The chief examiner shall be the executive and administrative head of the department and shall have the power and duty to do all of the following subject to review and oversight by the Legislative Committee on Public Accounts:
  - (1) Exercise general supervision of and make regulations for the governance of the department.
  - (2) Prescribe uniform rules pertaining to investigations, examinations, audits, and departmental hearings.
  - (3) Supervise the fiscal affairs and responsibilities of the department.
  - (4) Appoint and remove the staff, officers, and employees of the department, subject to the Merit System Act and the rules issued pursuant thereto.
  - (5) Keep an accurate and complete record of all proceedings of the department; record and file all bonds, reports, and other documents; and assume responsibility for the custody and preservation of all papers and documents of the department.
  - (6) Make recommendations and an annual report to the Governor and to the Legislative Committee on Public Accounts concerning the condition, operation, functioning, and findings of the department.
  - (7) Invoke any legal, equitable, or special remedy for the enforcement of orders or this chapter.
  - (8) Notwithstanding any other law to the contrary, exercise any other power necessary to expedite the making of thorough and accurate audits of the accounts of all individuals or entities receiving or disbursing public funds.
  - (9) *Examine and audit the books, accounts, and records of all state and county offices, officers, bureaus, authorities, boards, commissions, corporations, departments, and agencies.*
- (10) a. Prepare, in consultation with the Association of County Commissions of

Alabama, except with respect to county boards of education, such bookkeeping, accounting, and reporting systems, procedures, records, and forms as may be necessary to install a uniform system of accounting and reporting in the various county offices. This paragraph does not authorize the Department of Examiners of Public Accounts to prescribe specific accounting software to be utilized in various county offices.

b. Prepare such bookkeeping, accounting, and reporting systems, procedures, records, and forms as may be necessary to install a uniform system of accounting and reporting in the various state offices.

(11) *Report to the Legislative Committee on Public Accounts, the Governor, and the Contract Review Permanent Legislative Oversight Committee every expenditure or contract found to have been made in violation of law.*

(12) Prepare, for use by the county boards of education, bookkeeping, accounting, and reporting systems, procedures, records, and forms necessary for the installation of a uniform system of accounting and reporting by the several county boards of education; install the bookkeeping, accounting, and reporting systems for the county boards of education; and exercise and maintain continuing supervision thereof.

(13) Prepare and furnish to the chairs of the county commissions of the several counties of the state a fiscal statement of each county, as of the end of each fiscal year, the statement showing receipts, disbursements, outstanding indebtedness, and securities owned of and by each of the several counties.

(b) All powers and duties vested in the chief examiner may be delegated to his or her appointed assistants, staff, deputies, and employees, but the chief examiner shall be responsible for their actions.

§ 41-5A-5 (emphasis added).

The two subdivisions italicized above are most relevant to the tasks of assuring that the Competitive Bid Law and the Public Works Law have been followed.

Purchases of goods and services are governed by two sets of laws: the Competitive Bid Law and the Public Works Law. Although these laws have the same general purpose of assuring that the State's and local government's purchases of goods, services, and construction services are conducted for the benefit of the governments and not for selfish purposes of office holders, they should be viewed as being mutually exclusive in operation.

Many of the conflicts between the Competitive Bid Law and the Public Works Law were clarified in 1997 legislation, Act 97-225. The statute, provided in relevant part, explains the purpose behind the act as follows:

To incorporate and make uniform all of the competitive bid laws for public works contracts for the state and its political subdivisions; to exempt public works contracts from certain

competitive bid provisions that govern all other public contracts for the state and its political subdivisions; to provide standards for awarding authorities to prequalify contractors; to provide for enforcement of the competitive bid laws for public works contracts; to provide for definitions; to increase the criminal fines; to exempt from certain competitive bid provisions lease-leaseback transactions entered into by institutions and systems of higher education with separately constituted boards of trustees provided that any such institution or system of higher education shall at all times remain the owner of any real property the subject of any such lease- leaseback transaction;

Among other things, this Act played a primary role in clarifying each respective set of laws, and it also helped draw the line between transactions governed by Public Works Laws and those governed by Competitive Bid Laws, while allowing for certain “gray areas” to be covered by both. Id.

The Public Works Law defines Public Works as being, “[t]he construction, installation, repair, renovation, or maintenance of public buildings, structures, sewers, waterworks, roads, curbs, gutters, sidewalks, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, installed, repaired, renovated, or maintained on public property and to be paid, in whole or in part, with public funds or with financing to be retired with public funds in the form of lease payments or otherwise.” § 39-2-1(6). If a contract is deemed to fall into one of these categories, then it falls under the provisions of the Public Works Law. The Public Works Law begins with a requirement that bonds be submitted by winning bidders to secure contracts that are \$100,000.00 or more in value. The purpose of the Public Works bond requirement is to ensure that materialmen receive full payment for labor or materials that they supply to a public works project. See SGB Const. Services, Inc. v. Ray Sumlin Const. Co., Inc., 644 So. 2d 892, 895 (Ala. 1994).

Chapter 2 of the Public Works Law, (§ 39-2-1 to 14), requires that public works contracts, much like competitive bid contracts, must be let by advertisement and competitive bid. The purpose of these statutes requiring contracts to be let by public bids were designed to protect the public from collusion and prevent contracts awarded solely on the basis of favoritism. See Glencoe Paving Co. v. Graves, 94 So. 2d 872 (Ala. 1957). § 39-5-1 provides that contracts that are made in violation of the Public Works Laws are unenforceable. The remainder of Article 5 of the Public Works Laws provides specific remedies and penalties for non-compliance.

If a transaction involving a government agency is not exclusively governed by the Public Works Law, then it may very likely fall under the Competitive Bid Law (§§ 41-4-110 to 41-4-178, 41-16-1 to 41-16-5, 41-16-50 to 41-16-63, 41-16-80 to 41-16-144, and 16-13B-1, et. seq.). Most services and commodities needed by government-funded agencies must be obtained through the competitive bid process. The purpose of and responsibilities under the bid law was explained in the well-known case, White v. McDonald Ford Tractor Co., Inc., 248 So. 2d 121 (Ala. 1971). In this case, the Alabama Supreme Court explained, “It is fair to say that the legislative intent in passing the Competitive Bid Law was to get the best quality equipment at the lowest possible price, and the executive authorities should carry out this intent of the legislature. These officials must have discretion, not an unbridled discretion, but one exercised within the bounds we have tried to delineate in this opinion. The single most important requirement of the Competitive Bid Law is

the good faith of the officials charged in executing the requirements of the law.” *Id.* at 129. Although the statutes governing bid laws have been amended from time to time, the main purpose of the laws is, and always has been, to ensure the quality and price for goods purchased by government agencies.

This handbook will detail both the Public Works Law and the Competitive Bid Law of the State of Alabama. The amendments and interpretations contained herein are complete and accurate through October 2024. These laws are subject to amendment or repeal any time the Legislature is in session. These laws are also subject to interpretation by the courts and the Attorney General at any time. For the most current information regarding these statutes, please visit the Alabama Legislative Information System Online at <https://alison.legislature.state.al.us/>.

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## **PART I**

### **PUBLIC CONTRACTS**

#### **CHAPTER 1**

##### **INTRODUCTION TO THE COMPETITIVE BID LAW**

*See Appendix A for the Code of Alabama (1975) statutes referenced throughout this Chapter.*

With the passage of Act 2021-296, which became effective October 1, 2022, the Alabama Legislature made significant changes to the Competitive Bid Law as applied to state governmental entities. This Act created the Division of Procurement within the Department of Finance, headed by the Chief Procurement Officer (“CPO”) and gave the CPO broad authority to make or supervise the purchase of supplies or services by the state. Further, Act 2021-296 repealed Articles 2 and 3A of the previous Competitive Bid Law entirely and created a new Article 5 of Chapter 4 of Title 41, commencing with Section 41-4-110. The goal of the “new” Competitive Bid Law was to simplify, clarify, and modernize the law governing procurement by the state and to provide consistency in procurement among the various state entities.

Section 41-4-132(a) provides the general rule that purchases by state agencies are subject to the Competitive Bid Law: “Except as otherwise provided in this division, contracts shall be awarded by competitive sealed bidding.” Other methods of procurement for state contracts include competitive sealed proposals, pursuant to Section 41-4-133, small purchase procedures pursuant to Section 41-4-134, sole source procurement pursuant to Section 41-4-135, emergency procurement pursuant to Section 41-4-136, or special procurement pursuant to Section 41-4-137.” Additionally, Ala. Code § 41-4-127 requires the CPO, with approval of the Director of Finance and the Governor, to adopt rules to implement the state’s procurement law. Those rules can be found [here](#). While the general effect of the Competitive Bid Law is that most goods and non-professional services needed by a state governmental entity must be obtained through the competitive bid process, there are important exceptions to this general rule which are detailed in the Exemptions section of this handbook.

One of the most basic requirements for the application of the Competitive Bid Law is that the value of the transaction must equal or exceed \$25,000. This amount was increased from \$15,000, pursuant to Act 2021-296 which required the CPO to adopt rules to implement and administer the Competitive Bid Law. The CPO has set the competitive bid threshold amount at \$25,000, below which small purchase procedures may be used. *See Ala. Admin. R. 355-4-3-.05 and Chapter 4-5 A and B of the Fiscal Policies and Procedures Manual.*

If a transaction falls under the Competitive Bid Law, each party must strictly comply with the relevant provisions. The defense of non-compliance with the Competitive Bid Law can

possibly bar a claim for relief. In Ex Parte Seth Ballew, 771 So. 2d 1040 (Ala. 2000), the plaintiff filed an action to recover damages for breach of contract. The plaintiff owned a sanitation company that serviced the town of Priceville. In 1987, the plaintiff and the defendant town entered into a contract for the plaintiff to provide the town exclusive garbage collection services for a period of three years. The contract contained no renewal terms. When the original term of the contract expired in 1990, the parties did not renew the terms of the contract. Instead, they continued to abide by the terms of the original contract. The plaintiff continued to provide exclusive garbage collection to the town, and the town continued to pay the plaintiff for his services, with an incremental increase in compensation. A conflict arose in 1998 between the plaintiff and the defendant, and the defendant decided that it would no longer use plaintiff's exclusive services. When the plaintiff sued, the defendant moved for and was granted summary judgment, on the grounds that the contract was not enforceable because it was not in compliance with the Competitive Bid Laws. The plaintiff moved to have the defendant barred from using the defense of non-compliance due to the doctrine of equitable estoppel. The Alabama Supreme Court, however, affirmed the decisions of the lower courts that the doctrine of estoppel could not preclude town's defense of noncompliance with the Competitive Bid Law.

The Ballew case is significant, mainly because it overruled the once widely-cited case, Layman's Sec. Co. v. Water Works and Sewer Bd. of City of Prichard, 547 So. 2d 533 (Ala. 1989). In Layman's, the court noted that the doctrine of equitable estoppel could preclude the defense of non-compliance if the plaintiff could prove that it detrimentally relied on the terms of the contract. The court in Ballew, however, virtually abolished the relevance of detrimental reliance, holding that a showing of noncompliance would prohibit any claims of relief under the doctrine of estoppel. Moreover, because the competitive bid laws are considered to be public policy, the doctrine of estoppel cannot be used to validate a transaction that is illegal or in violation of public policy. See Maintenance, Inc. v. Houston County, Alabama, 438 So. 2d 741 (Ala. 1983).

Similarly, the Court has declared contracts null and void when it determines that they do not comply with the Competitive Bid Law. In Brown's Ferry Waste Disposal v. Trent, 611 So. 2d 226 (Ala. 1992), the court determined that a landfill contract between the Limestone County Commission and landfill operator was subject to the Competitive Bid Law. The court determined that the contract to develop and operate the landfill did not fall within any of the special categories such as renewal of the existing contract, contract for professional services, or contract that by its nature is impossible of competitive bidding. Because the contract was not competitively bid due to the Commission's failure to comply with the notice and hearing requirements, the court declared that it was null and void, and that the parties were not bound by its terms.

It is important to note that the authority of the courts is limited to declaring contracts invalid if they were not awarded in compliance with the Competitive Bid Law. The courts cannot order the awarding authority to award the contract to some other bidder. Vinson Guard Service, Inc. v. Retirement Systems of Alabama, 836 So. 2d 807, 810 (Ala. 2002).

The scope of the Competitive Bid Law has changed over time with respect to the services of attorneys and other professionals. Section 41-4-114(a)(21) defines professional services as,

“[t]he services of physicians, architects, engineers, landscape architects, land surveyors, geoscientists, attorneys, teachers, artists, appraisers, and other individuals or business entities offering the services of those individuals, who possess a high degree of scientific or specialized skill and knowledge where the experience and professional qualifications of the service provider are particularly relevant to the provision of the required service. The term also includes the management or administration of any occupational licensing board, as defined under Section 41-9A-1, by a person other than a state employee.” Further, Section 41-4-133(a)(1) states, in part, that unless determined otherwise by the CPO, professional services are to be procured by competitive sealed proposals. *See Ala. Admin. R. 355-4-3-.03* and Chapter 5 of the Fiscal Policies and Procedures Manual.

The 2022 update to the state’s procurement law, specifically Section 41-4-125, provides certain requirements and restrictions for the services of attorneys. Attorneys retained to represent the state in litigation are appointed by the Attorney General in consultation with the Governor from a listing of attorneys maintained by the Attorney General. Other state agencies hire attorneys for nonlitigation services from a listing of attorneys maintained by the Legal Advisor to the Governor. Section 41-4-125(a)(1) states, in part, “selection of an attorney or law firm shall be based on the level of skill, experience, and expertise required in the litigation and the fees charged by the attorney or law firm shall be taken into consideration so that the state receives the best representation for the funds paid. Fees shall be negotiated and approved by the Governor in consultation with the Attorney General.” While this paragraph provides the general rule for legal services, Section 41-4-125(b) states that this article does not apply to the appointment of attorneys or experts by a court or the retention of experts by the state for the purposes of litigation or avoidance of litigation.

Section 41-4-125.01 provides that physicians retained to provide medical services to the state shall be selected by the purchasing state entity from a list of qualified physicians maintained by the Alabama Medical Licensure Commission. Exemptions to this general rule are also provided in the Exemptions section of this handbook.

The above processes and the oversight of the CPO do not apply to certain governmental entities, as set out in Section 41-4-124. Those entities are as follows: (1) all educational and eleemosynary institutions governed by a board of trustees or other similar governing body; (2) the Retirement System of Alabama; (3) the Department of Mental Health; the Department of Transportation; (4) District Attorneys or Sheriffs, which are statutorily subject to Section 41-16-50, *et seq.*; (5) legislative agencies; (6) judicial agencies; and (7) the Alabama State Port Authority. Section 41-4-124(b) provides that these entities “shall establish and maintain procurement offices and personnel and adopt rules as may be necessary to comply with this article.”

## CHAPTER 2

### CASES INTERPRETING COMPETITIVE BID LAW

*See Appendix A for the Code of Alabama (1975) statutes referenced throughout this Chapter*

#### ARTICLE I: Introduction

Although numerous cases involving the Competitive Bid Law have been decided in Alabama, two main cases frame the general ideas of the competitive bidding process.

In White v. McDonald Ford Tractor Co., Inc., 248 So. 2d 121 (1971), the Alabama Supreme Court stated that the legislative intent in passing the competitive bid laws was to allow the government to obtain the best quality equipment at the lowest possible price. In its original request for bids, the State had written the specifications around a particular Massey-Ferguson turf tractor after it had been professionally determined that this particular type of tractor would be the best-suited for the type of work needing to be performed. The bid invitation was careful to note that the brand name and model information were included merely to indicate a desired standard of quality, and it encouraged those who believed a different brand of tractor would be better-suited for the job to write an explanation of their reasoning. In response to the request for bids, McDonald Ford Tractor Company submitted the lowest bid. The awarding authority did not deem it the “lowest responsible bidder.” McDonald Ford Tractor Company challenged the use of a specific brand and model of tractors as part of the specifications. The main problem addressed was whether, under Alabama’s Competitive Bid Law, specifications could be drawn to fit a particular article or piece of equipment that had been determined to be suitable for the purposes required. The Alabama Supreme Court held that the State should have sole discretion in determining who will be considered the “lowest responsible bidder.” The Court also warned, “This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously, or unless it is based on a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence . . . The single most important requirement of the Competitive Bid Law is the good faith of the officials charged in executing the requirements of the law. A bad motive, fraud, or a gross abuse of discretion will vitiate an award whether made with specifications which are quite general or very precise. *Id.* at 129.

The Supreme Court’s decision in the McDonald Tractor case led to what is probably the most well-known case involving the competitive bidding process, Mobile Dodge, Inc. v. Mobile County, 442 So. 2d 56 (1983). In this case, the Mobile County Commission gave notice that it would receive bids for vehicles for the Mobile County Sheriff’s Department. The invitation-to-bid contained specifications calling for, among other things, heavy-duty full-length frames and front and rear coil-spring suspension systems. Both Mobile Dodge and Treadwell Ford submitted bids. Mobile Dodge submitted a bid of \$289,199.89, and Treadwell Ford submitted a bid of \$340,989.63. Although Mobile Dodge submitted the lowest bid of those responding, the contract was not awarded to the company because it had submitted its bid on police units having frames

with unibody construction and torsion bar suspension systems, and those units were determined by county officials not to be suitable for the needs and purposes for which the units were required. The contract was ultimately awarded to Treadwell Ford.

Mobile Dodge sought to enjoin Mobile County from purchasing the cars from Treadwell. Mobile Dodge alleged that it was the lowest bidder, and the only reason that it was not awarded the contract is that the bid specifications were drawn to deliberately exclude Mobile Dodge as a competitor. Moreover, Mobile Dodge also alleged that Mobile County acted arbitrarily, capriciously, and in bad faith in awarding the contract to Treadwell Ford.

At trial, Mobile County put on sufficient evidence to establish that the requirements specified in the bid invitations were necessary, especially since the Sheriff's department would be driving on dangerous unpaved roads in Mobile County. The Alabama Supreme Court held that awards should be made to the lowest responsible bidder after the qualities of the commodities proposed to be supplied, their conformity with specifications, their purpose, their delivery terms and transportation charges have been taken into consideration. The Supreme Court also explained that state authorities have sole discretion in determining who qualifies as the lowest responsible bidder, and that no court should interfere with the determination unless it was based on a misconception or ignorance of relevant information or is the result of improper influence or motive. If a court finds that the specifications were improperly drawn, the award of the contract cannot be allowed to proceed. *Id.*

Ultimately, the court in Mobile Dodge concluded that although the bid specifications might have precluded Mobile Dodge from successfully bidding on the project, it could not be said that the bid invitations were written in such a way to intentionally make Ford the preferred automobile. The court said that although the specifications may have unfortunately excluded certain types of vehicles, this fact does not make the process illegal.

Although McDonald Tractor and Mobile Dodge are probably the most recognizable cases involving the competitive bid laws, there has been extensive litigation concerning the interpretation of the competitive laws, as in effect from time to time. The following list of cases, arranged in reverse-chronological order, reflects the current precedents in competitive bid matters.

## ARTICLE II: Case Summaries

In reading the following case summaries, it is important to note that the statutory threshold for compliance has changed over the years. Once again, the threshold amounts were: October 1, 2022 – present: \$25,000; 2012—September 30, 2022: \$15,000; 1994 – 2012: \$7,500.00; 1989 – 1994: \$5000; 1977 – 1989: \$2000; and pre-1977: \$500.

### 1. Ex parte Carter, 275 So. 3d 115 (Ala. 2018), reh'g denied (Oct. 19, 2018)

State Auditor brought action in his individual capacity as a taxpayer, seeking declaratory judgment

that amendments to a contract between a software company and the State were void on the basis that the amendments violated the Competitive Bid Law. The Alabama Supreme Court held the issue was moot because injunctive relief was no longer available where performance pursuant to the amendments was complete. Any declaration that the contract violated the Competitive Bid Law served no purpose.

2. Alabama Mun. & Envtl. Engineers, Inc. v. Slaughter Const. Co., 961 So. 2d 889 (Ala. Civ. App. 2007).

Contractor that lost manhole rehabilitation bid brought fraudulent-misrepresentation action against bid administrator. The appellate court held that the contractor's sole remedy under the Competitive Bid Law was an action to enjoin the letting or execution of the contract. The court determined that in keeping with the Competitive Bid Law's purpose, "the remedy available to disappointed bidders is one that vindicates the public interest in protecting the public coffers, not one that is focused on the vindication of private interests and the interests of disappointed bidders."

3. RaCON, Inc. v. Tuscaloosa County, 953 So. 2d 321 (Ala. 2006).

A road contractor brought suit seeking to be compensated for extra work performed that was required by the bid, but which the contractor thought was unnecessary for completion of the road project. The Department of Transportation required the work, without payment. The Supreme Court held that the county did not owe the contractor for the work and did not consider oral discussions that allegedly changed the scope of the contract. The Court also held that the contractor was not entitled to damages for idle-equipment costs incurred when project was delayed as a result of delay in relocating gas pipeline.

4. Board of School Commissioners of Mobile County v. Coastal Builders, Inc., 945 So.2d 1059 (Ala Ct. App. 2005)

Winning bidder on school construction contract brought action against county board of school commissioners to recover cost of equipment that bidder had failed to include in its bid. The court held that competitive bid law precluded commissioners from being ordered to pay for cost of equipment not included in an original bid.

5. Vinson Guard Service, Inc. v. Retirement Systems of Alabama, 836 So. 2d 807 (Ala. 2002)

Unsuccessful bidder asked the court to declare it the winner of the contract. The Supreme Court held that the trial court has no power to compel an agency to award a contract to an unsuccessful bidder.

6. Ex Parte Seth Ballew (In re Seth Ballew v. Town of Priceville), 771 So. 2d 1040 (Ala. 2000)

Seth Ballew filed an action on behalf of his sanitation company in order to recover damages against the town of Priceville for a breach of contract. In 1987, Ballew and Priceville entered into a

contract (with no renewal terms) for Ballew to provide garbage collection services for the residents of Priceville over a three-year period. When the three-year period expired, the parties continued to comply with the terms of the contract, with a steady increase in compensation for Ballew. At no point after the expiration of the original contract was the contract rebid.

Summary judgment was granted to Priceville, since the courts found that the contract violated Alabama's competitive bid law and was void. The Supreme Court affirmed this decision, holding that the doctrine of estoppel could not preclude town's defense of noncompliance with the Competitive Bid Law.

This case overruled the once widely-cited Layman's Sec. Co. v. Water Works and Sewer Bd. of City of Prichard, 547 So. 2d 533 (Ala. 1989).

In Layman's, a security company sued a city water works and sewer board for breach of contract. The Supreme Court held, among other things that city was not estopped from terminating contract where security company presented no proof that it materially and detrimentally changed its position in reliance on contract.

Ex Parte Ballew's holding that the doctrine of estoppel could not preclude the town's defense of noncompliance with the Competitive Bid Law directly contradicted with Layman's because the Court essentially stated that the defense of non-compliance would effectively trump any arguments of estoppel, regardless of whether one party detrimentally changed its position or not.

An estoppel argument may be made only against city officials who merely failed to follow the formalities of contract execution.

#### 7. Alabama-Tennessee Natural Gas Co. v. Southern Natural Gas Co., 694 So. 2d 1344 (Ala. 1997)

The issue in this case was whether the City of Huntsville's twenty-year contract with the Southern Natural Gas Company (SNGC) violates ALA. CODE § 41-16-57(e) (1975), which provides "contracts for the purchase of personal property or contractual services shall be let for periods not greater than three years." The Alabama Supreme Court held that the SNGC-Huntsville contract did not violate § 41-16-57(e) because the three-year limit applies only to contracts that are competitively bid. The court noted that the Attorney General had issued an opinion stating that this contract for natural gas transportation services is exempt from the Competitive Bid Law due to the exemption for public contracts with regulated utilities.

Note: Although this case cites to provisions of the Competitive Bid Law which are applicable to local government, utility services are also exempt from bidding for state entities. *See Chapter 4-4, Fiscal Policies and Procedures Manual.*

#### 8. Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, et al., 657 So. 2d 857 (Ala. 1995)

The practice of requesting alternative bids is consistent with the Alabama Competitive Bid Law. The City of Birmingham sought to purchase a new public safety radio system. The request for bids included four alternatives that were formulated around competing technologies. The court upheld the use of alternate bids as within the discretion of the awarding authority. The awarding authority is not required under the Competitive Bid Law to award the contract to the overall low bidder but must award the bid to the lowest responsible bidder after weighing the relative merits of the competing technologies.

Note: Current law generally requires contracts to be awarded to the “lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation to bid.” Ala. Code § 41-4-132(g)(1).

9. Play Fair Racing, Inc. v. Birmingham Racing Commission, 672 So. 2d 8 (Ala. 1995)

The Birmingham Racing Commission is a public corporation and not a governmental entity. Section 22 of the Alabama Constitution (governing bid processes) does not apply to the conduct of the Commission. The selection process for the award of a license by the Commission established by Ala. Code § 11-65-14(f) (1975) does not violate Section 22 of the 1901 Constitution.

10. Spring Hill Lighting & Supply Co. v. Square D. Co., 662 So. 2d 1141 (Ala. 1995)

A tort action alleging intentional wrongful conduct by persons involved in the bidding process is not necessarily barred by the potential availability of injunctive relief pursuant to ALA. CODE §§ 41-16-31 and 41-16-61 (1975).

The remedy of injunctive relief provides no sanctions against intentional wrongful conduct by individuals involved and the court held that there was no reason why such individuals should be shielded from a responsibility for such intentional wrongful conduct.

Cases which have held that injunctive remedy is the only remedy for violation of the Competitive Bid Law were not intended to create a license for persons to permit fraud and other intentional torts.

Note: Legal and contractual remedies for violations of the Competitive Bid Law as applied to state entities are now governed by Ala. Code § 41-4-160 through 41-4-168.

11. Beavers v. County of Walker, 645 So. 2d 1365 (Ala. 1994)

This case involves a county commission's approval of a site for the development of a landfill. The Alabama Supreme Court held that the award of an exclusive franchise must be made in compliance with the Alabama Competitive Bid Law and held the contract void.

12. Ward International Trucks, Inc. v. Baldwin County Board of Education, 628 So. 2d 572 (Ala. 1993)

Defendant BOE ignored advice of attorney and various staff members in accepting bid of Moyer Ford. International met all specifications and was lowest bidder for 20 school buses. Therefore, these facts precluded summary judgment.

13. Masonry Arts, Inc. v. Mobile County Commission, 628 So. 2d 334 (Ala. 1993)

Appeal by unsuccessful bidder for public contract, from trial court's denial of injunction to prevent award of contract to another, was rendered moot by award and execution of contract pending appeal. Bidder's failure to request stay of execution of trial court's order pending appeal necessitated dismissal of appeal because trial court was no longer capable of granting injunction requested by bidder.

14. Union Springs Telephone Co., Inc. v. Rowell, 623 So. 2d 732 (Ala. 1993)

In declaratory judgment action brought by telephone company seeking to enjoin Department of Finance from effectuating contract with competitor to provide pay-telephone services to county correctional facility, trial court did not err in deciding the lack of contract for pay-telephone services caused emergency situation which entitled Department to authorize contract with competitor for provision of such services during pendency of bid process. Department did not seek to bypass bidding procedures and Attorney General had expressly stated that Department had authority to use emergency provision of ALA. CODE § 41-16-23 (1975). Scope of judicial review of emergency agreements entered into by state is limited, as proclamation of state agency is clothed with presumption of correctness and may not be overturned unless it is shown to be unreasonable, arbitrary, or capricious.

A later Supreme Court of Alabama decision, Anderson v. Fayette Cty. Bd. of Educ., 738 So. 2d 854, 857 (Ala. 1999), held that although Union Springs applied an abuse-of-discretion standard to the state agency's determination that it faced an "emergency," Union Springs should not be used to apply that standard to any exception to the Competitive Bid Law that someone may claim exists.

Note: The procurement of emergency contracts by state entities is now governed by Ala. Code § 41-4-136. *See also* Chapter 4-5H of the Fiscal Policies and Procedures Manual.

15. Crest Construction Corp. v. Shelby County Board of Education, 612 So. 2d 425 (Ala. 1992)

Decision of County BOE to award contract for construction of new school building to bidder that was not lowest bidder was not arbitrary or capricious in that Board properly determined that lowest bidder was not lowest responsible bidder. Before awarding the contract, Board questioned president and sole employee of lowest bidder, and Board awarded contract to another bidder based on legitimate concerns about lowest bidder's size, experience, and lack of equipment and other resources. Disappointed bidder could not recover bid preparation expenses. Bid law creates no enforceable rights in bidders.

16. Brown's Ferry Waste Disposal v. Trent, 611 So. 2d 226 (Ala. 1992)

Landfill contract between Limestone County Commission and landfill operator was subject to Competitive Bid Law. Failure to comply with the notice and hearing requirements rendered the contract null and void. Contract to develop and operate landfill did not fall within contract for professional services, renewal of existing contract, or contract that was by its very nature impossible of award by competitive bidding.

17. General Electric Co. v. City of Mobile, 585 So. 2d 1311 (Ala. 1991)

Contractor's broadcast tower, which would allow it to broadcast radio communications and fire-alerting system, did not render contractor "sole source" for system, so as to except contract from competitive bidding. To qualify as a "sole source," three requirements must be met:

- (1) Goods or service offered must be unique;
- (2) Uniqueness must be substantially related to intended purpose, use, and performance of goods or service sought; and
- (3) Entity seeking to be declared "sole source" must show that other similar goods or services cannot perform desired objectives of entities seeking goods or services.

Public contracts entered into in violation of competitive bidding requirements would not be upheld on ground that they were made in good faith.

Note: Sole source procurement, as applied to state entities, is now governed by Ala. Code § 41-4-135. *See also* Chapter 4-5I of the Fiscal Policies of Procedures Manual.

18. Steeley v. Nolen, 578 So. 2d 1278 (Ala. 1991)

A debtor in bankruptcy does not lose his rights as a taxpayer, so he has standing to bring action under the Competitive Bid Law. If the bond is submitted in the name of a third party instead of in the name of the bidder, then the bond is not sufficient to meet the requirements of the Competitive Bid Law.

19. Advance Tank and Construction Co. v. Arab Water Works, 910 F.2d 761 (11th Cir. 1990)

In trying to determine if a bidder is the "lowest responsible bidder" two distinct inquiries need to be made. It should be determined whether the decision to reject the apparent low bidder resulted from:

- (1) a decision process tainted by improper influence or fraud, or
- (2) gross negligence.

In the absence of improper influence, only bona fide, rational and articulable reasons for decisions are needed; not an assessment of a bidder's responsibility.

Note: Current law generally requires contracts to be awarded to the "lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation to bid." Ala. Code § 41-4-132(g)(1).

20. Horne Wrecker Service, Inc. v. City of Florence, 567 So. 2d 1285 (Ala. 1990)

Where neither bidder met the specifications when the bids were opened and the city council gave both parties extended time to meet the specifications, the extension was not in violation of the Competitive Bid Law.

21. Jenkins, Weber & Associates v. Hewitt, 565 So. 2d 616 (Ala. 1990)

Ala. Code § 41-16-31 (1975) does not allow monetary damages for an unsuccessful bidder.

Note: Legal and contractual remedies for violations of the Competitive Bid Law as applied to state entities are now governed by Ala. Code § 41-4-160 through 41-4-168.

22. Hospital System, Inc. v. Hill Rom. Inc., 545 So. 2d 1324 (Ala. 1989)

The hospital is a health care authority incorporated pursuant to the provisions of ALA. CODE § 22-21-310 (1975). It is a separate entity from the state and from any local political subdivision so it is exempted from the Competitive Bid Law.

23. Water Works Board of the City of Fort Payne v. Jones Environmental Construction, Inc., 533 So. 2d 225 (Ala. 1988)

A bidder that withdraws its bid (due to a mistake) after it has been submitted but before the contract has been awarded by the Water Works Board does not forfeit its bid bond.

24. J.F. Pate Contractors v. Mobile Airport Authority, 484 So. 2d 418 (Ala. 1986)

Competitive Bid Law does not apply to contract to construct new airport terminal building, as Airport Authority which awarded the contract came within statutory exemption of ALA. CODE § 4-3-60 (1975). This was a Department of Transportation assisted contract and there were certain Minority Business Enterprise (MBE) obligations. The court was satisfied that the court-determined lowest responsible bidder had made a "good faith effort" to meet the MBE participation and upheld the awarding authority and trial court.

25. Tin Man Roofing Co., Inc. v. Birmingham Bd. of Educ., 536 So. 2d 1383 (Ala. 1988)

A re-roofing contract does not come under ALA. CODE § 41-16-50(a) (1975), which states "that in the event a bid is received for an item of personal property to be purchased or contracted for from a person, firm or corporation deemed to be a responsible bidder, having a place of business

within the municipality, where the awarding authority is the municipality or instrumentality thereof... which such bid is no more than three percent greater than the bid of the lowest responsible bidder, the awarding authority may award the contract to such resident responsible bidder."

Tin Man was a non-resident of Birmingham. The court defined personal property within the proviso of § 41-15-50(a) as "a single specified article of movable, animate or inanimate, property, merchandise, supplies, raw materials, finished goods, or wares, or a group of such articles specified separately."

Since a re-roofing contract would not fall under the three-percent proviso of § 41-16-50(a), the court ruled that Tin Man was the lowest responsible bidder.

26. Urban Sanitation Corporation v. City of Pell City, Alabama, 662 F. Supp. 1041 (N.D. Ala. 1986)

The purpose of the competitive bid statute is to protect the public rather than to provide an action for damages to unsuccessful bidders. Ala. Code § 41-16-31 (1975) extends standing for unsuccessful bidders to bring actions seeking injunctions against violations of Competitive Bid Law but not any right or expectancy to insist upon the award of a contract.

Note: Legal and contractual remedies for violations of the Competitive Bid Law as applied to state entities are now governed by Ala. Code § 41-4-160 through 41-4-168.

27. Mobile Wrecker Owners Association, Inc. v. City of Mobile, 461 So. 2d 1303 (Ala. 1984)

Alleging failure or insufficiency of consideration in a contract between a city and a towing company does not raise the issue of whether the statutory bid laws compelling public advertising for bids were violated. A later suit brought by the same plaintiff, West v. City of Mobile, 689 So. 2d 14 (Ala. 1997), was barred by the doctrine of *res judicata*.

28. Maintenance, Inc. v. Houston County, Alabama, 438 So. 2d 741 (Ala. 1983)

A contract between the county and a solid waste corporation was void because of a failure to comply with the Competitive Bid Law. The doctrine of equitable estoppel cannot be used to validate a transaction which is illegal and against public policy.

29. Arrington v. Associated General Contractors of America, 403 So. 2d 893 (Ala. 1981)

If a city council adopts an ordinance that deters participation in the bidding process because the ordinance requirements are time consuming, costly to contractors, and requires certain procedures before the lowest bid is considered, then the ordinance is held to frustrate the open competitive bid requirement of Ala. Code § 41-16-50 (1975). The intent in passing the Competitive Bid Law is to get the best quality equipment (or public construction) at the lowest possible price.

30. International Telecommunications Systems v. State, 359 So. 2d 364 (Ala. 1978)

Competitive Bid Law does not require that the lowest bid be accepted. State did not act arbitrarily or capriciously in rejecting radio crystals for trooper's cars and in finding bid for supply of radio crystals unacceptable.

31. Franklin Solid Waste v. Jones, 354 So. 2d 4 (Ala. 1978)

Where contract for solid waste collection was awarded on low bid by county for a definite term of five years, extended for an additional five years upon contract holder's fulfilling his obligation under the terms of the contract, the contract was not an exclusive or special privilege banned by Section 22, Constitution of Alabama 1901.

32. White v. McDonald Ford Tractor Co., 248 So. 2d 121 (Ala. 1971)

Absent finding of bad faith, improper motive, fraud or a gross abuse of discretion, court was without authority to interfere with judgment and discretion of state officials in awarding contract for purchase of tractors to bidder, who submitted lowest bid of five qualifying and conforming bids, rather than to the lowest overall bidder, even though specifications were drawn to fit particular tractor, where invitation to bids specified that brand names and catalog numbers were used only to indicate level of quality and that bidder who wanted to offer compatible or better equipment could send his manufacturer's specifications to allow for comparison.

33. Wallace v. Board of Education of Montgomery County, 197 So. 2d 428 (Ala. 1967)

Proposed high school construction contract provision requiring contractors to pay predetermined minimum wage violated the competitive bid law, which provides that contract must be let to the lowest responsible bidder.

34. Glencoe Paving Co. v. Graves, 94 So. 2d 872 (Ala. 1957)

A contract to resurface an existing highway is a "repair" and not a public improvement. Therefore, contracts for repairs or maintenance on highways are not required to be let on competitive bids.

35. Townsend v. McCall, 80 So. 2d 262 (Ala. 1955)

The city commission rejected all bids except one which was allegedly made by a mistake and that bidder declined to accept a contract. The commission had the power to re-advertise for bids and award the contract to the same bidder as the lowest responsible bidder among those answering the second advertisement, even though the bid was submitted 20 minutes after the specified hour but before any bids were opened.

36. Huddleston v. Humble Oil & Refining Co., 71 So. 2d 39 (Ala. 1954)

Where the director of conservation fixed a Sunday to be the last day to receive the bids, the court held, pursuant to Section 12, Title 1, [now codified as ALA. CODE § 1-1-4 (1975)] that Sunday must be excluded and the following Monday shall be counted as the last day for submitting bids.

37. Mitchell v. Walden Motor Co., 177 So. 151 (Ala. 1937)

Where statute was amended “so as to read as follows” and the provision as to “lowest responsible bidder” was omitted, the amendatory act becomes a substitute for the original. In determining who is the lowest responsible bidder, the proper authority may take into consideration the quality of the materials as well as their adaptability to the particular use required.

38. Poyner v. Whiddon, 174 So. 507 (Ala. 1937)

When a county submits in its published bids the specifications for the article it wants to purchase, it must not modify the specifications to suit one of the bidders.

39. Carson Cadillac Corp. v. City of Birmingham, 167 So. 794 (Ala. 1936)

“The purpose of statutory or chapter provisions requiring municipal corporations to let contracts on competitive bidding after notice is ‘to secure economy and protect the citizens and taxpayers of the municipality from fraudulent favoritism in letting such contract.’”

40. Van Antwerp v. Board of Commissioners, 115 So. 239 (Ala. 1928)

Where there is no mandatory statute requiring contracts to be awarded on competitive bids, it is within the power of the city authorities to invite bids on such basis as it may deem best, reserving the power to reject all bids, or let the contract to the bidder submitting the most desirable proposal as long as they allow bidders to bid on the same thing.

41. Inge v. Board of Public Works, 33 So. 678 (Ala. 1902)

The contract entered into with the “lowest responsible bidder” contained conditions which were not in the publication notice for bidding. Any material departure in the contract awarded from the terms and conditions on which the bidding is had renders the contract invalid.

## CHAPTER 3

### TRANSACTIONS THAT MUST COMPLY WITH THE COMPETITIVE BID LAW

*See Appendix A for the Code of Alabama (1975) statutes referenced throughout this Chapter*

#### Article I: Introduction

With the passage of Act 2021-296, the Competitive Bid Law as applied to state entities underwent significant changes. One of those changes was the creation of the state's Chief Procurement Officer ("CPO") who is generally responsible for the procurement of all supplies and services for all state departments, boards, bureaus, commissions, agencies, offices, and institutions as well as executing and supervising the performance of all contracts and leases for the use and acquisition of any supplies and services. *See Ala. Code § 41-4-122; see also Chapter 4 of the Fiscal Policies and Procedures Manual.*

Subject to certain exceptions, generally, all contracts or purchase orders for supplies and non-professional services of more than \$25,000 by any state department, board, bureau, commission, committee, institution, corporation, authority, or office must be let by free and open competitive solicitation through the Division of Procurement. *See Ala. Admin. R. 355-4-3-.05; see also Chapter 4-5C of the Fiscal Policies and Procedures Manual.*

#### Article II: Attorney General Opinions

Section 41-4-132(a) provides the general rule that purchases by state agencies are subject to the Competitive Bid Law: "Except as otherwise provided in this division, contracts shall be awarded by competitive sealed bidding." Over time, there have been many Attorney General's Opinions issued as to the types of transactions that must comply with the Competitive Bid Law. This Chapter provides summaries of those opinions.

1. The new competitive bid law authorizes regulatory boards, with the approval of the Chief Procurement Officer, to utilize the request for proposal process, advertise the specifications on the RFP database through the CPO, evaluate the bids, conduct interviews, and visit the facilities for the purpose of contracting with management companies to administer their licensing and regulatory programs. Hon. Hendon B. Coody, General Counsel, Alabama Board of Electrical Contractors, 05-03-22, AG 2022-031.

**Note: Since this Opinion was issued, the management or administration of any occupational licensing board, as defined under Section 41-9A-1, by a person other than a state employee, is now statutorily defined as a "professional service" and should be procured through the Request for Proposal process. *See Section 41-4-114(a)(21).***

2. Assistant and/or deputy attorneys general assigned to other state departments and agencies may utilize the Request for Proposal ("RFP") responses received by the Attorney General's Office

to enter contracts for computerized legal research on their behalf. Hon. Jackie Graham, Director, State Personnel Department, 09-27-07, AG 2007-141.

3. State-funded mental health facilities must comply with the competitive bidding process, even if they are considered to be “non-profit” organizations. Hon. Jesse A. Keller, Attorney, Riverbend Center for Mental Health, 10-14-05, AG 2006-004.
4. Contracts between state licensure boards and a consultant for the services of an executive director, administrative staff, equipment, and/or physical facilities are subject to the Competitive Bid Law. Hon. Jimmy Warren, Member, House of Representatives, 12-3-01, AG 2002-078.

**Note: Since this Opinion was issued, the management or administration of any occupational licensing board, as defined under Section 41-9A-1, by a person other than a state employee, is now statutorily defined as a “professional service” and should be procured through the Request for Proposal process. See Section 41-4-114(a)(21).**

5. The Alabama Historic Ironworks Commission must comply with all relevant bid laws when rebuilding the Furnace Master’s Inn. The claim brought by the previous concessionaire may not be settled by the suggested agreement. Hon. Martin Everse, Parks Administrator, Alabama Historic Ironworks Commission, 7-12-99, AG 99-00244.
6. A contract between the Covington County Commission and Alabama Correctional Industries not in violation of the Public Works Laws or Competitive Bid Laws. Hon. Julie S. Moody, Attorney, Covington County Commission, 6-5-1997, AG 97-00202.
7. The Alabama Music Hall of Fame must comply with the Competitive Bid Law. The Music Hall of Fame is not required to use the state bid contract but must solicit bids pursuant to the terms of the Competitive Bid Law. Hon. Jimmy Johnson, Chairman, Alabama Music Hall of Fame, 12-7-95, AG 96-00057. This opinion was modified by a subsequent opinion addressed to Hon. Jimmy Johnson, Chairman, Alabama Music Hall of Fame, 2-12-97, AG 97-00108, which concluded that if the Alabama Music Hall of Fame is an agency whose principal business is honorariums, the agency is exempt from the Competitive Bid Law pursuant to § 41-16-21.2 (now codified at § 41-4-126(b)).
8. State or its agencies must purchase or lease telecommunications equipment by competitive bids under § 41-16-20, et seq., if not purchased pursuant to a master contract already bid, except in limited circumstances respecting equipment leased or rented prior to deregulation of the sale and supply of such equipment. Hon. James E. Previtt, Representative, District 55, 4-15-85, AG 85-00311.

## **CHAPTER 4**

### **EXEMPTIONS FROM THE COMPETITIVE BID LAW**

*See Appendices A and B for the Code of Alabama (1975) statutes referenced throughout this Chapter*

#### **ARTICLE I: Introduction**

Although most transactions involving goods and non-professional services for \$25,000 or greater made by state agencies are subject to the Competitive Bid Law, several statutory exemptions exist. The Legislature recognized that there would be certain situations in which the competitive bidding process would not be the most feasible, and therefore established exemptions for certain transactions and certain entities.

Ala. Code § 41-4-126 provides a list of supplies and services exempt from the Competitive Bid Law as applied to state agencies. Section 41-4-126(a) provides that “[u]nless otherwise ordered by rule, with approval of the Governor, the following supplies and services need not be procured through the Office of the Chief Procurement Officer and are exempt from the competitive requirements of this article: (1) works of art for museum and public display; (2) published books in any format such as digital, audio, or hardcopy; maps; periodicals; and technical pamphlets; (3) utility services where no competition exists or where rates are fixed by law; (4) purchases of alcoholic beverages by the Alcoholic Beverage Control Board; (5) purchases of products made or manufactured by the blind or visually handicapped under the direction or supervision of the Alabama institute for Deaf and Blind in accordance with Sections 21-2-1 to 21-2-4, inclusive; (6) photographs purchased from a federal agency; (7) barter transactions by the Department of Corrections; (8) the purchase of insurance and supplies or services related to the purchase of insurance; and (9) supplies and services that by their very nature are impossible to award by competitive process, as determined by the Chief Procurement Officer.”

Another exemption is codified in Ala. Code § 41-4-126(b), which provides that any state department or agency whose principal business is “honorariums” is also exempted from the provisions of the competitive bid laws. *Id.* (The Merriam-Webster dictionary defines “honorarium” as “a payment for a service (such as making a speech) on which custom or propriety forbids a price to be set.”)

Additional exemptions include the issuance of debt that is required to be repaid from sources other than state funds by any state authority, board, or other entity (Ala. Code § 41-4-126(f)); direct health care services provided by the Alabama Department of Public Health (Ala. Code § 41-4-126(g)); the administration of health benefit plans by a governmental body and supplies or services related thereto (Ala. Code § 41-4-126(h)); the purchase by a public hospital of certain medical products and supplies (Ala. Code § 41-4-126(i)); purchases and contracts for the repair of equipment used in the construction and maintenance of highways by the Department of Transportation (Ala. Code § 41-4-126(k)); the purchase by the Department of Transportation of

road building materials for transportation infrastructure in the state (Ala. Code § 41-4-126(m)); purchases and supplies and services for the maintenance and operation of highway infrastructure and right-of-way by the Department of Transportation (Ala. Code § 41-4-126(n)); purchases by the Department of Rehabilitation Services of supplies and services for its consumers (Ala. Code § 41-4-126(s); and the selection of professional services providers by the Alabama Medicaid Agency for contracts with certain health professionals which involve only service on agency task forces, boards, or committees (Ala. Code § 41-4-126(t)).

For purchases below the \$25,000.00 bid threshold, state entities should consult Chapter 4-5 of the Fiscal Policies and Procedures Manual as well as Rule 355-4-3-05 for information on small purchases. Other purchases exempt from some requirements of the Competitive Bid Law include professional services generally procured through the Request for Proposal process (pursuant to Section 41-4-133, Rule 355-4-3-03, and Chapter 5 of the Fiscal Policies and Procedures Manual), those purchases made via a sole source procurement (pursuant to Section 41-4-135, Rule 355-4-3-06, and Chapter 4-5I of the Fiscal Policies and Procedures Manual), emergency procurements (pursuant to Section 41-4-136, Rule 355-4-3-07, and Chapter 4-5H of the Fiscal Policies and Procedures Manual), and special procurements (pursuant to Section 41-4-137 and Rule 355-4-3-08).

## **Article II: Case Summaries**

The Legislature was very specific in detailing the exemptions from the competitive bid process. There are, however, Alabama cases illustrating that the line between transactions that are exempt from the Competitive Bid Law and those that are subject to the Competitive Bid Law can be very fine. This is often the case when the transaction includes both property and services.

An example of an exemption arising from a governmental entity's goal in acquiring property and services is Anderson v. Fayette County Board of Education, 738 So. 2d 854 (Ala. 1999). The Fayette County Board of Education ("Board") agreed to pay Trane for an "energy audit," and they entered into an agreement. Later, the Board entered into a larger agreement known as a "Performance Agreement for Comfort from Trane" ("PACT"). In accordance with the PACT the Board also entered into a maintenance agreement with Trane. The contracts were not competitively bid. Anderson alleged that the contracts between Trane and the Board violated the bid law. The Alabama Supreme Court held that the Board purchased more than just equipment; rather, the Board purchased a "comprehensive energy savings plan" under which they relied on Trane's expertise. The Alabama Supreme Court held that the contract between the Board and Trane was exempt from the Competitive Bid Law, primarily because Trane's "personality" was a major part of the contract. Specifically, the Court cited Ala. Code § 41-16-51(a)(3) and stated: "the language of the PACT...details not just physical labor but also various activities designed to achieve one particular goal that would require a 'high degree of professional skill where the personality of [Trane] would play a decisive part.'" Id. at 858. The Court, after listing the activities Trane would undertake through its professional staff, concluded that the Board purchased more than just equipment. Thus, the transaction should be exempt from the competitive bidding process. Id. at 859.

Exemption on the basis of the entity undertaking the transaction can be illustrated by Hospital Systems, Inc. v. Hill Rom, Inc., 545 So. 2d 1324 (Ala. 1989). In that case, the Athens and Limestone Health Care Authority submitted an invitation for bids for a construction project. Both Hospital System, Inc. (“HSI”) and Hill Rom, Inc. bid on the project. Although HSI was the lowest bidder, the hospital authority awarded the contract to Hill Rom. HSI sued, alleging that the Health Care Authority was in direct violation of Alabama’s Competitive Bid Law. The Alabama Supreme Court held that the hospital for which the bids were invited is, in fact, a health care authority incorporated pursuant to the provisions of Ala. Code § 22-21-310. Because of this, the hospital is considered a separate entity from the state and from any local political subdivision, and therefore is exempted from the Competitive Bid Law. See also J.F. Pate Contractors v. Mobile Airport Authority, 484 So. 2d 418 (Ala. 1986) (Competitive Bid Law does not apply to contract to construct new airport terminal building).

### Article III: Attorney General Opinions

When determining whether a transaction is exempt from the bid laws, statutory exemptions and case law must be examined. Questions frequently arise and numerous opinions have been issued by the Attorney General addressing various issues about the applicability of the bid laws. As the opinions reflect, the question of whether a transaction is exempt from the Competitive Bid Law is fact specific. Because of this, it is important to look at each aspect of a transaction to determine whether the property or services are subject to the Competitive Bid Law, whether the entity undertaking the transaction is subject to the Competitive Bid Law, and whether there is some other fact that might affect the applicability of the Competitive Bid Law. The following opinions of the Attorney General should be helpful determining whether a transaction is exempt from the bid laws.

1. The Marine Environmental Sciences Consortium is not subject to the oversight and authority of the Chief Procurement officer as it is an educational institution governed by a board of directors. See Ala. Code § 41-4-124(b)(1). Hon. John Valentine, Executive Director, Dauphin Island Sea Lab, 10-26-2023, AG 2024-006.
2. District attorneys using a nonexclusive fuel card are not required to competitively bid individual purchases. Because a district attorney’s travel is dictated by the dynamics of court cases, court orders, and other legal proceeding, a district attorney cannot possibly anticipate all trips for the office for the upcoming year. Therefore, sufficient specifications cannot be prepared for bidding suppliers to be able to designate gas stations for each route. Pursuant to the exemptions to the Competitive Bid Law set forth in § 41-16-21(a) for items that by their very nature would be “impossible of award by competitive bidding,” fuel usage is incapable of being competitively bid. Hon. Randy I. Hillman, Executive Director, Office of Prosecution Services, 1-3-16, AG 2017-013. Note: Since this Opinion was issued, the statute cited was repealed with the passage of Act 2021-296. However, similar language is now found in Ala. Code § 41-4-126(a)(9).

Note: Pursuant to Ala. Code § 41-4-124(d), district attorneys and sheriffs are subject to the local Competitive Bid Law, Ala. Code § 41-16-50, *et seq.*, except for the feeding of prisoners. See Ala. Code § 14-6-42(b)(3).

3. The authority to administer the disposition of state-owned surplus for volunteer ambulance services and volunteer rescue squads passed to the Alabama Department of Economic and Community Affairs (“ADECA”) with the enactment of Act 84-429, as codified in § 41-16-120, et. seq. The Board of Health Ambulance Advisory Board and the Alabama Association of Rescue Squads, Inc., are authorized to screen state-owned surplus property for volunteer ambulance services and volunteer rescue squads, respectively. ADECA is empowered to implement and administer this program. Hon. Richard J. Laird, Member, House of Representatives, 12-22-2010, AG 2011-022.
4. The purchase of court reporting services by the Attorney General’s Office is incapable of being competitively bid. Hon. Robert L. Childree, Office of State Comptroller, 03-10-2009, AG 2009-052.
5. The Administrative Office of Courts is authorized under § 12-17-272 to hire special court reporters as needed without hiring them as employees under the Unified Judicial System and without regard to the Competitive Bid Law or professional services law. Hon. Callie T. Dietz, Administrative Director of Courts, Administrative Office of Courts, 02-11-2009, AG 2009-040.
6. State agencies are subject to the Competitive Bid Law. The purchase of goods or services by the Alabama Public Library Service (“APLS”) for the Alabama Virtual Library (“AVL”) may be exempt from the requirements of the Competitive Bid Law if the online database vendors for the AVL qualify for any of the exemptions listed in sections §§ 41-16-21 or 41-16-75. Whether a vendor is a sole source is a factual determination that must be made by APLS with the approval of the Finance Department, Division of Purchasing. Honorable Rebecca S. Mitchell Director, Alabama Public Library Service, 09-20-07, AG 2007-137.
7. The Department of Public Health may purchase qualifying drugs and medicines directly from manufacturers or wholesalers without competitive bidding if the Department determines that the prices are lower than the savings and rebates that could be realized using the Joint Drug Purchase Program. Hon. Donald E. Williamson, State Health Officer, 12-13-05, AG 2006-033.
8. A public corporation, organized under the Health Care Authorities Act of 1982, is exempt from the Competitive Bid Law under § 22-21-335 when the public corporation purchases goods and services. Even if the public corporation is not subject to the Competitive Bid Law it must comply with the bid specifications, including any bid bond requirements, to be considered a responsive bidder when the public corporation submits a bid in response to an invitation for bids. Hon. James Allen Main, Director of Finance, 4-28-05, AG 2005-119.

9. Contracts for audit services do not fall within the competitive bidding procedure specified by § 36-29-6 but are professional services that must be procured in accordance with § 41-16-72(4) of the Competitive Bid Law. Hon. William L. Ashmore, Executive Director, State Employees' Insurance Board, 1-28-03, AG 2003-069. Note: Since this Opinion was issued, the statute cited was repealed with the passage of Act 2021-296. Procurement of professional services is now governed generally by Ala. Code § 41-4-133.
10. Purchases of drugs and other consumable medical supplies from suppliers, in accordance with Alabama's participation in the State of Minnesota Cooperative, as authorized by § 22-2A-1, et seq., may be done without competitive bidding because these suppliers qualify as sole source providers for these goods. Hon. Donald E. Williamson, State Health Officer, Alabama Department of Public Health, 11-1-02, AG 2003-024.
11. When there are numerous vendors that can provide library automation services to public library systems, the exemptions permitted under §§ 41-16-51(a)(11) and (13) of the Competitive Bid Law are not applicable. These library systems should bid both upgrades of software and new automated systems. Hon. Rebecca S. Mitchell, Director, Alabama Public Library Service, 4-10-02, AG 2002-206.
12. The purchase of goods, supplies, and services necessary for the maintenance and service of aircraft is exempted from the competitive bid requirements of § 41-16-21 (1975). Hon. Paul Bowlin, Director, Department of Transportation, 2-28-02, AG 2002-157. Note: Since this Opinion was issued, the statute cited was repealed with the passage of Act 2021-296. However, the exemption relied upon (services and purchases of personal property, which by their very nature are impossible to award by competitive bidding) is now found at Ala. Code § 41-4-126(a)(9).
13. The Alabama Institute for Deaf and Blind ("AIDB") may sell "blind-made" products to state agencies without complying with the Competitive Bid Law. Hon. Joseph F. Busta, Jr., President, Alabama Institute for Deaf and Blind, 1-3-02, AG 2002-110.
14. The medical services contract proposed by the Department of Corrections is exempt from the Competitive Bid Law. Under the proposed contract, the Department would negotiate with one contractor to provide three essential healthcare services, rather than contracting with individual physician groups near each correctional facility (which would be exempt from the Competitive Bid Law). Hon. Michael W. Haley, Commissioner, Alabama Department of Corrections, 2-1-01, AG 2001-089.
15. If the Alabama Music Hall of Fame is an agency whose principal business is honorariums, the agency is exempt from the Competitive Bid Law pursuant to § 41-16-21.2. Hon. Jimmy Johnson, Chairman, Alabama Music Hall of Fame, 2-12-97, AG 97-00108. Note: Since this Opinion was issued, the statute cited was repealed with the passage of Act 2021-296. However,

the exemption relied upon is now found at Ala. Code § 41-4-126(b).

16. The Competitive Bid Law does not apply to contracts for goods or services between two governmental entities of the State of Alabama, including municipalities and counties. Hon. Joe S. Hopper, Commissioner, Department of Corrections, 7-26-96, AG 96-00271.
17. The purchase of the equipment incidental to professional services which are exempted from the Competitive Bid Law by § 41-16-51(a)(3) are exempt from the Competitive Bid Law. If, upon a consideration of the totality of the circumstances, the professional services are incidental to the purchase of the equipment, the purchase of the equipment is subject to the Competitive Bid Law. Hon. Ron Jones, Commissioner, Alabama Department of Corrections, 11-27-95, AG 96-00046.
18. Discussion as to whether personal services contract between Alabama Emergency Management Agency and contract management specialists is exempt from the requirements of the Competitive Bid Law. Hon. Lee Helms, Acting Director, Emergency Management Agency, 4-11-95, AG 95-00181.
19. The Competitive Bid Law governing purchases by state or local agencies is not operative whenever the contract in question is between two governmental entities. Hon. Tandy D. Little, Jr., Administrator, Alabama Alcoholic Beverage Control Board, 1-4-91, AG 91-00131.
20. The Alabama Sports Hall of Fame and its Board are exempt from the State competitive bid requirements by virtue of § 41-16-21.2 (1975). Hon. Earl Goodwin, Member, State Senate, 11-9-90, AG 91-00082. Note: Since this Opinion was issued, the statute cited was repealed with the passage of Act 2021-296. However, the exemption relied upon is now found at Ala. Code § 41-4-126(b).
21. Act No. 88-475 does not require contracts securing the services of architects and engineers to be competitively bid nor does it require that architects and engineers submit proposals. Hon. J. Michael Horsley, Commissioner, State of Alabama Department of Mental Health and Mental Retardation, 7-20-89, AG 89-00362. Note: Since this Opinion was issued, procurement of services of architects, landscape architects, engineers, land surveyors, and geoscientists is governed generally by Ala. Code § 41-4-133(j)(1).
22. If a state agency or institution pays a travel agency when purchasing an airline ticket with the travel agency merely acting as a conduit so that payment is actually made by the state agency or institution to the airline, and the airline pays the travel agency for its services, the selection of a travel agency is not subject to the Competitive Bid Law. Hon. Beth Marietta, Member, House of Representatives, 7-20-89, AG 89-00353.
23. The Competitive Bid Law does not apply to the selection of a travel agency by a state agency or institution. Hon. Beth Marietta, Member, House of Representatives, 6-9-89, AG 89-00301.

24. Purchase of restored and reproduced antique furnishings and fixtures, etc., and contracts for services of artists to provide specialized painting, etc., are exempt from the provisions of the Competitive Bid Law. Hon. F. Lawrence Oaks, Executive Director, Alabama Historical Commission, 7-14-88, AG 88-00366.
25. The purchase of books and periodicals by a state library is exempt from the State Competitive Bid Laws under § 41-16-21(a); however, the purchase of furnishings is subject to the State Bid Law. Hon. James O. Williams, Chancellor, Auburn University at Montgomery, 8-20-85, AG 85-00477. Note: Since this Opinion was issued, the statute cited was repealed with the passage of Act 2021-296. However, the exemption relied upon is now found at Ala. Code § 41-4-126(a)(2).
26. Bureau of Tourism and Travel is excepted from the Competitive Bid Law in the purchase of tourist advertising under § 41-7-4. Hon. Ed Hall, Director, Alabama Tourism & Travel, 5-20-85, AG 85-00356.
27. Whether contract for feasibility study for State Veteran's Nursing Home should be exempt from competitive bid procedures discussed. Hon. Frank D. Wilkes, Director, Department of Veterans Affairs, 12-2-83, AG 84-00086.
28. Applicability of Competitive Bid Law to repair and maintenance of state-owned aircraft. (Exempt from bidding requirements.) Hon. Harry Mills, Director, Department of Air Transportation, 11-17-83, AG 84-00067.

## **CHAPTER 5**

### **PROCEDURE UNDER COMPETITIVE BID LAW**

*See Appendix A for the Code of Alabama (1975) statutes referenced throughout this Chapter*

#### **ARTICLE I: Introduction**

The Competitive Bid Law contains many detailed procedural requirements. Some procedural issues can be quite complex, and because of this, the Attorney General has written numerous opinions regarding procedural issues related to the Competitive Bid Law. This section is intended to provide a general overview of Competitive Bid Law procedures and is not an exhaustive list of all procedural requirements. Ala. Code § 41-4-132, along with the Department of Finance's Administrative Rules (Rule 355-4-3-02) and the Fiscal Policies and Procedures Manual provide procedures for competitive bidding.

Ala. Code § 41-4-132(a) states, "Except as otherwise provided in this division, contracts shall be awarded by competitive sealed bidding." This same statute also provides procedural requirements for invitations to bid (ITBs), including, but not limited to, the following:

- ITBs shall include a purchase description and all contractual terms and conditions applicable to the procurement (Ala. Code § 41-4-132(b)). Administrative Rule 355-4-3-02(1)(b) provides additional requirements for ITB content. Rule 355-4-3-02(12)(a) also provides that no bid shall be evaluated for any requirement that is not disclosed in the ITB.
- Adequate public notice of the ITB shall be given a reasonable time prior to bid opening (Ala. Code § 41-4-132(c)). Administrative Rule 355-4-3-02(2) has set this reasonable time at a minimum of 14 days unless a shorter time is deemed necessary as determined in writing by the CPO or the head of the Purchasing Agency. Additionally, Rule 355-4-3-02(4) specifies that publication for ITBs over \$25,000.00 shall be publicized in one or more of a list of allowable manners, including electronic mailing lists, agency websites, and methods approved by the CPO.
- Bids must be opened publicly in the presence of one or more witnesses at the time and place designated in the ITB. Bid amounts, bidder names, and any other information required by rule shall be recorded. (Ala. Code § 41-4-132 (d)).
- Evaluation and award of bids is discussed at length in Rule 355-4-3-02(12) but generally, as stated in Ala. Code § 41-4-132(g)(1), contracts are to be awarded to the "lowest responsible and responsive bidder whose bid meets the requirements set forth in the ITB." Bid awards must be publicized and made available to the public.

Additionally, pursuant to the authority provided by Ala. Code § 41-4-132(f)(1), the CPO has adopted Rule 355-4-3-02(11), which provides for procedures when a mistake is made by a bidder. Whether a mistake in a submitted bid may be corrected generally depends on when the mistake is discovered. Rule 355-4-3-02(11)(b) provides that mistakes discovered before bid opening may be corrected by withdrawing or correcting the bid as provided in Rule 355-4-3-02(8).

Mistakes discovered at or after bid opening but before award may be corrected for minor informalities, mistakes such as typographical errors and arithmetical errors, and incidents where the mistake is clearly evidenced on the face of the bid document or when the bidder submits proof which clearly and convincingly demonstrates that a mistake was made. Lastly, Rule 355-4-3-.02(11)(d) provides that mistakes discovered after an award is made shall not be corrected except where the CPO or the head of a Purchasing Agency makes a written determination that it would be unconscionable not to allow the mistake to be corrected. Corrections to mistakes discovered after an award must be made through an amendment to the contract, or alternatively, the contract may be terminated, and a new solicitation be issued.

Another predominant procedural issue is particular bid specifications for public contracts. The Competitive Bid Law, specifically Ala. Code § 41-4-151, authorizes the CPO, by rule, to set standards for the preparation, maintenance, and content of bid specifications. Specifications are discussed in Rule 355-4-4-.02. This rule provides that specifications, to the extent practicable, shall “emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State.”

According to Opinions interpreting the Competitive Bid Law, these specifications must be justified and in writing. Brand names or specific product information can be included in bid specifications, as long as they are included in order to ensure quality. See Mobile Dodge v. Mobile County, 442 So. 2d 56 (1983) (although bid specifications might preclude eligible bidders, these specifications were acceptable as long as the specifications were not intentionally drawn to exclude a particular bidder).

Section 41-4-144 explains the time limits placed on the Competitive Bid Law. Specifically, “a contract for supplies or services may be entered into for any period of time that is in the best interests of the state, so long as the terms of the contract and the conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal year at the time of contracting.” The CPO has adopted Rule 355-4-3-.14, which limits multi-year contracts to five years, including extension or renewals, unless determined otherwise in writing by the CPO. Procedures for multi-year contracts are also provided by this Rule.

## **ARTICLE II: Attorney General Opinions**

Although several procedural issues related to the Competitive Bid Law are case-specific, a few recurring issues present themselves in the Opinions prepared by the Attorney General and are summarized within this Chapter.

1. No exceptions found in § 41-16-123 authorize an agency to automatically “scrap on site” property merely because it costs less than \$500, is broken, or no longer needed by an agency. Hon. Jim Ziegler, State Auditor, 6-11-20, AG 2020-042.
2. The state may issue an invitation to bid with bid specifications that contain brand names,

products, and other offerings associated with particular products and/or services as long as the specifications are related to the use of products and/or services and the objectives of the State. The State may include particular bid specifications if they are intended only to indicate a level of quality. If the state determines that separate bid specifications are required to handle separate functions, the state may issue multiple invitations to bid and award separate contracts for products and/r services that run contemporaneously. To justify the narrow specifications in each invitation to bid issued, however, the State must have a reasonable basis for the specifications that are related to the use of the product and/or services and the objectives of the state. Hon. Gerald O. Dial, Member, Alabama State Senate, 5-22-2006, AG 2006-098.

3. The Department of Finance may not, absent additional legislative authority, create a process that limits the number of vendors to whom a request for proposal will be sent when actual services are needed. Hon. James Allen Main, Director, State Finance Department, 10-25-2004, AG 2005-010.
4. Under the Competitive Bid Law, state agencies, local jurisdictions, and municipalities may not purchase items directly under a contract issued by the Defense Logistics Agency without engaging in a new bid process. Hon. James M. Walker, Jr., Director, Department of Homeland Security, 4-5-2004, AG 2004-111.
5. Without competitive bidding, granting a company the exclusive right to place a link on a state agency's website offering to make reservations is an exclusive grant of a special privilege that violates Section 22 of the Constitution of Alabama. Hon. Mark D. Berson, Director, Bureau of Tourism and Travel, 11-20-01, AG 2002-068.
6. The bid specifications for public contracts let by governmental agencies must be in writing. Hon. Neal Morrison, Member, House of Representatives, 9-20-00, AG 2000-239.
7. Use of restrictive specifications by an awarding authority without justification documented in the bid file is not permissible. Hon. Robert B. Crumpton, Director, State Building Commission, 10-2-87, AG 88-00001.
8. Section 41-16-123 is not violated by Department of Finance trading in old weapons as part of the purchase price of new weapons. In determining whether the purchase of new revolvers involves \$2000 or more, the value of revolvers which are to be traded in must be added to cash purchase price. Hon. Henry B. Steagall, II, Director of Finance, 6-21-85, AG 85-00396.
9. Discussion of the limitation period of one-year for contracts of contractual services by state departments. Hon. Henry B. Steagall II, Director of Finance, 8-3-84, AG 84-00384.
10. Competitive bid specifications may use brand names provided that a bidder may submit a bid on a product that is equal to the brand name specified. Hon. Frank Vandiver, Director, State Building Commission, 7-23-84, AG 84-00371.

11. In order to competitively bid a repair contract, the owner (state) must be able to prepare plans and specifications that are sufficiently definite to allow potential bidders to prepare bids intelligently and on a comparison basis. If the amount of repair work needed cannot be determined prior to the performance of the contract, such circumstances make the contract incapable of being competitively bid. Hon. S. Richardson Hill, Jr., M.D., President, University of Alabama in Birmingham, 6-30-81, AG 81-00443.
12. Once a bid is accepted as responsible and a contract signed thereto, a contract cannot be amended to increase compensation, but should be performed in accordance to the bid submitted. Opinion of Attorney General to Hon. John M. McMillan, Jr., Commissioner, Department of Conservation, 10-7-80, AG 81-00008.
13. A wide range of flexibility is vested in the State (owner) to accept or reject a proposal or to weigh informalities or technical errors contained in the proposal where the best interest of the State would be served. Hon. Ira L. Myers, M.D., State Health Officer, 12-14-79, AG 80-00124.
14. In the event that all bids are rejected on a project, the project must be rebid. Hon. Ralph Smith, Jr., Attorney, Marshall County Hospital, 10-29-79, 80-00047.
15. A written proposal on the outside of a sealed envelope in which a bid is contained made prior to the opening of the bid may be considered as part of the bid proposal. Hon. Thomas M. Galloway, 5-2-74.
16. Sealed bids should be opened at the hour stated in the notice. However, in the instance where all bidders orally agree to allow another bidder to take an additional amount of time to calculate and submit his bid, and that bid is the low bid, the award can be made to said "late" low bidder regardless of the subsequent protests of the bidders who originally agreed to grant the additional time. Hon. L. R. Driggers, 2-14-73.

## **CHAPTER 6**

### **CONFLICTS OF INTEREST**

*See Appendices A and B for the Code of Alabama (1975) statutes referenced throughout this Chapter*

#### **ARTICLE I: Introduction**

To prevent conflicts of interest and to ensure that members of governing boards do not give preferential treatment in order to further their personal interests, the Legislature has enacted statutory rules regarding conflicts of interest in competitive bidding process.

Section 41-4-151(e) provides that bid specifications may be prepared by third parties when necessary but goes on to state that the CPO shall exercise due diligence to assure that such third party does not have a conflict of interest or an unfair competitive advantage in any subsequent procurement. Additionally, vendors who participate in preparing bid specifications are required to disclose the same on vendor disclosure statements filed pursuant to Section 41-16-82. Furthermore, Section 41-4-148 states that when collusion or anti-competitive practices are suspected during the procurement process, a notice of the relevant facts shall be sent to the Attorney General and, if applicable, to the Ethics Commission.

Although there are very few cases on record involving conflicts of interest under the Competitive Bid Law, one case involving conflicts of interest has been decided by the Alabama Supreme Court. In City of Montgomery v. Brendle Fire Equipment, Inc., 279 So. 2d 480 (Ala. 1973), an unsuccessful bidder attempted to, among other things, enjoin the city from accepting bids from a particular individual because of an alleged conflict of interest. Although the Circuit Court originally granted the injunction, the city appealed. The Alabama Supreme Court ultimately held that although a member of the city housing authority board of commissioners had an interest in a firefighting equipment company, there was no conflict of interest because the city housing authority was not involved in a city contract for firefighting equipment and because the member did not have any part in the decision-making process. The court concluded that Section 41-16-60 was only intended to prohibit bidding by a member who has an interest in the bidder and who will be involved in the decision-making procedure. The Court remanded to the lower court the issue of whether another unsuccessful bidder could enjoin a city from accepting bids.

In December 2001, the Legislature enacted Act No. 2001-955, later codified as Ala. Code §§ 41-16-80 to 88, requiring all persons who submit a proposal, bid, contract, or grant proposal to the State of Alabama to disclose their family relationship with public officials and public employees and their family members. Section 41-16-83 gives a list of the information required (name and address of the related parties, description of any benefit that may be gained through a contractual relationship, and names and addresses of any paid consultants or lobbyists for the project). Section 41-16-84 mandates that governments furnish disclosure statement forms to bidders. Section 41-16-85 provides that the relationship disclosure forms are public records to be

filed with the awarding entity, the Department of Examiners of Public Accounts, and the Contract Review Permanent Legislative Oversight Committee. Section 41-16-86 provides civil penalties for violations of the act, which include voidance of the contract and payment of the lesser of \$10,000 or 10% of the contract terms to the State General Fund. Section 41-16-87 provides that this disclosure form requirement does not apply to entities that do not receive state funds. Also, no relationship disclosure form is required to be completed or filed for contracts between state agencies or departments.

## **ARTICLE II: Attorney General Opinions**

1. Act 2010-760 does not prohibit a legislator from serving on a Regional Planning Commission and Development Commission Revolving Loan Fund Board (“Loan Fund Board”) when the legislator is neither employed nor receives reimbursement for his or her services, assuming that the legislator’s family-owned bank does not have contracts with the Loan Fund Board. The appointment of a legislator to a Regional Planning and Development Commission Revolving Loan Fund Board would not violate conflict-of-interest provisions as long as the legislator does not make decisions regarding a loan for an immediate family member or his or her own personal interests. Hon. Harri Anne Smith, Member, Alabama State Senate, 03-03-2011, AG 2011-043.
2. Public policy prohibits an individual, who is the secretary for the Board of Directors of the East Alabama Water, Sewer and Fire District, from bidding on a project of the Lee Chambers Utilities District because the East Alabama District performs the administrative, managerial and maintenance work for the Lee Chambers Utilities District. Hon. Curt Johnson, Attorney, Lee Chambers Utility District, 11-19-93, AG 94-00035.

## **CHAPTER 7**

### **LEASE AGREEMENTS**

*See Appendix A for the Code of Alabama (1975) statutes referenced throughout this Chapter*

#### **ARTICLE I: Introduction**

Although many people incorrectly assume that the Competitive Bid Law governs only purchases made by governmental entities, Ala. Code § 41-4-143 authorizes “any type” of contract that will promote the state’s best interests. The CPO has adopted Rule 355-4-3-.13(1) which specifies leases and leases with purchase options as allowable contracts. Additionally, Rule 355-4-3-.13(2) provides that a purchase option in a lease for supplies may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding or competitive sealed proposals, or the leased supply is the only supply that can meet the state’s requirements, as determined in writing by an officer above the level of the procurement officer. Additionally, leases exceeding \$10,000,000 annually from a State General Fund appropriation are subject to review by the Legislative Contract Review Oversight Committee, pursuant to Ala. Code § 29-2-41.6.

Section 9-15-71 provides that “[a]ll sales and leases made by, or on behalf of, the State of Alabama, or any department, board, bureau, commission, institution, corporation, or agency, of real property or any interest therein owned by the State of Alabama having an appraised value of more than twenty thousand dollars (\$20,000) shall be made by free and open competitive advertised public auction or advertised sealed bids to the highest bidder.”

The Lands Division of the Department of Conservation and Natural Resources must conduct the bidding process for leasing property by state agencies. Certain state agencies, however, are exempt from the above requirements: Forestry Commission, universities with separately constituted boards, Alabama Historical Commission. Section 9-15-82 provides that various transactions, such as timber sales and leases, are exempt from the requirement to handle the sale or lease through the Lands Division, and that the competitive bidding requirement does not apply to leases of easements and rights of way where there is no market for such rights. § 9-15-82.

#### **ARTICLE II: Attorney General Opinions**

1. The Decatur-Morgan County Port Authority may lease real estate it owns to a private entity without competitively bidding the lease as the Authority is covered under the exemption set out in Ala. Code § 9-15-82(b). Hon. Barney Lovelace, Decatur-Morgan County Port Authority, 09-15-2022, AG-2022-050.
2. The authority given to the Alabama Public Library Service (“APLS”) in § 41-8-5 allows APLS to rent available space in its building to other state agencies and to charge state agencies and nonstate organizations for the use of APLS meeting room spaces. Hon. Rebecca S. Mitchell,

Director, Alabama Public Library Service, 08-10-2011, AG 2011-086.

3. The Department of Corrections is not precluded under any provisions of the Code of Alabama from leasing a roof attached to a prison facility from a private entity pursuant to a lease-purchase arrangement. However, this Opinion does not address whether the lease-purchase arrangement violates any constitutional provisions such as section 213 of the Alabama Constitution. Hon. Richard F. Allen Commissioner, Department of Corrections, 04-21-08, AG 2008-074.
4. Lease tax is levied upon the lessor and measured by the gross proceeds received by the lessor. If the parties have previously agreed to do so, then the tax burden may be shifted to the lessee unless the lessee is a state, municipality, or a county. The only way that such a tax can be passed on to one of these governmental entities is if the flat amount collected by the lessor includes both the tax and the leasing fee. Hon. Jay M. Ross, Mobile County Attorney, 1-18-07, AG 2007-038.
5. The State of Alabama may lease tower sites owned by it to private companies or individuals provided that if the value of the property to be leased is greater than \$10,000 such lease must be made pursuant to the competitive bid requirements of Act No. 95-280. The State of Alabama may charge a user fee to local entities of government to access the Alabama Communication Statewide Network. Hon. Gene Mitchell, Director, Department of Public Safety, 7-31-95, AG 95-00272.
6. Lease agreement requires Alabama Department of Corrections, as lessee, to pay all expenses, taxes, fees, and costs; lease agreement requires no act or performance on the part of the lessor; payment of amounts of lease is subject to appropriations by Legislature. Hon. Freddie V. Smith, Commissioner, Department of Corrections, 4-29-86, AG 86-00236.
7. Regional library may not enter into a lease for a period greater than one year unless the lease contract contains a provision which allows the library to renew or terminate the lease at the end of each year. Hon. Anthony W. Miele, Director, Alabama Public Library Service, 9-18-84, AG 84-00457.
8. State Mental Health Department may negotiate a contract with American Bell, Inc., for the purchase of equipment currently leased without soliciting competitive bids. Hon. Ken Wallis, Receiver and Acting Commissioner, Department of Mental Health, 5-15-84, AG 84-00280.
9. Data processing equipment presently rented by the State may be purchased without the necessity of taking competitive bids provided that certain conditions exist. Hon. John N. Pappanastos, Director, Department of Finance, 11-8-79, AG 80-00069.
10. There is no requirement for competitive bids in a lease contract where a public agency is the lessor. Opinion of Attorney General to Sen. J. Richard Pearson, 12-19-77.

11. A state agency may enter into a long-term lease provided it contains a termination clause. Opinion of the Attorney General to Hon. J. Ben Swindle, 4-18-77.

**PART II**  
**PUBLIC WORKS**  
**CHAPTER 8**  
**INTRODUCTION TO PUBLIC WORKS LAW**

*See Appendix C for the Code of Alabama (1975) statutes referenced throughout this Chapter*

The Public Works Law is codified in Ala. Code (1975) §§ 39-1-1, et. seq. Section 39-2-1(6) defines Public Works as “[t]he construction, installation, repair, renovation, or maintenance of public buildings, structures, sewers, waterworks, roads, curbs gutters, side walls, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, installed, repaired, renovated, or maintained on public property and to be paid, in whole or in part, with public funds or with financing to be retired with public funds in the form of lease payments or otherwise.” If a contract is deemed to fall into one of these categories, then it falls under the provisions of the Public Works Law.

The Public Works Law begins in Chapter 1 with a bond requirement statute, requiring that performance bonds be submitted by winning bidders to secure contracts that are equal to or exceed \$100,000.00 in value. Specifically, among other requirements, Section 39-1-1 (1975) states:

(a) Any person entering into a contract with an awarding authority in this state for the prosecution of any public works, before commencing the work, shall execute a performance bond, with penalty equal to 100 percent of the amount of the contract price. In addition, another bond, payable to the awarding authority 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 attorney fees incurred by successful claimants or plaintiffs in civil actions on the bond.

(b) Any person that has furnished labor, materials, or supplies for or in the prosecution of a public work and payment has not been made may institute a civil action upon the payment bond and have their rights and claims adjudicated in a civil action...

The purpose of the Public Works bond statute is to ensure that a materialman receives full payment for labor or materials that he supplies to a public works project. See SGB Const. Services, Inc. v. Ray Sumlin Const. Co., Inc., 644 So.2d 892 (Ala. 1994).

In Section 39-1-4, the Alabama Legislature sought to prevent favoritism and corruption in the purchase of insurance and bonds, stating:

- (a) No officer or employee of an awarding authority and no person acting or purporting to act on behalf of such officer or employee of an awarding authority, except a public agency or authority created pursuant to agreement or compact with another state, shall, with respect to any public works contract, require the bidder to obtain or procure any surety bond or contract of insurance specified in connection with such contract or specified by any law, ordinance, or regulation from a particular surety company, insurance company, bonding company, agent, or broker...
- (b) The provisions of subsection (a) shall not prevent an officer or employee on behalf of an awarding authority from exercising the right to approve the form, sufficiency, or manner of execution of the surety bonds or contracts of insurance furnished by the surety company, insurance company, or bonding company selected by the bidder to underwrite surety bonds or contracts of insurance...

The remaining portions of § 39-1-1 discuss other aspects of the bid bond requirements.

In 2023, the Legislature modified the notice requirements of the Public Works Law. Specifically, Ala. Code § 39-1-1(f) states that immediately upon completion of the contract, the contractor shall give notice of the completion by publishing notice, “for a minimum of three weeks using one or more of the following methods:

- a. In a newspaper of general circulation in the county or counties in which the work, or some portion thereof, has been done.
- b. On a website that is maintained by a newspaper of general circulation in the county or counties in which the work, or some portion thereof, has been done.
- c. On a website utilized by the awarding authority for publishing notices.

Section 39-1-1(f)(2) further provides that if no newspaper is published in the county in which the work was done, and if the awarding authority does not utilize a website for posting 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 awarding authority and the contractor.

Chapter 2, § 39-2-1, et. seq., requires that public works contracts involving an amount in excess of **one hundred thousand dollars (\$100,000)**, much like competitive bid contracts, must be let by advertisement and competitive bid. The purpose of these statutes requiring contracts to be let by public bids is to protect the public from collusion and prevent contracts awarded solely on

the basis of favoritism. See Glencoe Paving Co. v. Graves, 94 So. 2d 872 (Ala. 1957).

Section 39-2-2(d) specifies certain contracts that are excluded from the bidding requirements, including (1) contracts with persons who shall perform only architectural, engineering, construction management, program management, or project management services in support of the public works and who shall not engage in actual construction, repair, renovation, or maintenance of the public works with their own forces, by contract, subcontract, purchase order, lease, or otherwise, and (2) contracts for the purchase of any heating or air conditioning units or systems by any awarding authority subject to the Competitive Bid Law, provided certain provisions set forth in the statute are met.

Section 39-2-11 highlights the procedure(s) to be followed in the event the successful bidder fails to comply with the bid bond and potential securities requirements; specifically:

(a) Should the successful bidder or bidders to whom a contract is awarded fail to execute a contract and furnish acceptable contract securities and evidence of insurance as required by law within the period as set forth in Section 39-2-8, the awarding authority 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 for such default. Any sums so retained or recovered shall be the property of the awarding authority.

(b) In the event of the death of a low bidder between the date of the opening of bids and the 15 days following the date of award of contract as allowed in Section 39-2-8 for furnishing of contract securities and evidence of insurance, the awarding authority shall return the proposal guaranty intact to the estate of the deceased low bidder.

Section 39-3-5(a) notes that when awarding contracts, the awarding authority should give preference to resident contractors (contractors that are domiciled to the state of Alabama); specifically:

(a) In the letting of public contracts in which any state, county, or municipal funds are utilized, except those contracts funded in whole or in part with funds received from a federal agency, preference shall be given to resident contractors, and a nonresident bidder domiciled in a state having laws granting preference to local contractors shall be awarded Alabama public contracts only on the same basis as the nonresident bidder's state awards contracts to Alabama contractors bidding under similar circumstances; and resident contractors in Alabama, as defined in Section 39-2-12, be they corporate, individuals, or partnerships, are to be granted preference over nonresidents in awarding of contracts in the same manner and to the same extent as provided by the laws of the state of domicile of the nonresident.

Chapter 5 provides that contracts made in violation of the Public Works Laws are unenforceable. § 39-5-1. The remaining portions of Chapter 5 discuss ramifications of contracts that are false, fraudulent, made in bad faith, or noncompliant, and provides that contractors are presumed to have notice of the Public Works Law.

## CHAPTER 9

### CASES INTERPRETING PUBLIC WORKS LAWS

*See Appendix C for the Code of Alabama (1975) statutes referenced throughout this Chapter*

1. Lake Cyrus Dev. Co. v. Attorney Gen. of Ala. ex rel. Bessemer Water Serv., 143 So. 3d 771 (Ala. 2014).

After a public works contract entered into by Bessemer's water utility was held to be void under Ala. Code § 39-2-2 because it was not advertised for sealed bids, the Attorney General intervened pursuant to Ala. Code § 39-5-3, seeking to recover the payments made by the water utility. The Supreme Court of Alabama held that the Attorney General was not entitled to recover because Ala. Code § 39-5-3 requires by a showing of clear and convincing evidence that the contractor knew the contract was in violation of the law, and there was no evidence to support the contractor's knowledge.

2. Bessemer Water Serv. v. Lake Cyrus Dev. Co. Inc, 959 So. 2d 643 (Ala. 2006).

A ratepayer brought an action against Bessemer's water utility, alleging that the water authority had misused public funds when it transferred substantial funds to the City of Bessemer without any legal or industry standard used to determine whether the rates were reasonable. The ratepayer then sought to enjoin the development company who held a contract with the utility board to increase the size of a main water line, alleging that the contract was invalid because it had not been competitively bid. The Court held that the contract between developer and water utility was a public works project, and, thus, the contract violated the statutory provision requiring water utility to advertise and take bids on the project. The Court further held that the developer was not entitled to any payment from water utility for work performed under the contract because the contract had been entered into in direct violation of the Public Works laws. The contract between the developer and the water system was declared void in its entirety.

3. SGB Constr. Servs., Inc. v. Ray Sumlin Constr. Company, 644 So. 2d 892 (Ala. 1994).

The purpose of a public works bond statute is to ensure that the materialman receives full payment for the labor or materials that he supplies to the contract. The public works bond statute does not, however, require privity of contract among primary contracting parties in order to receive full payment for labor or materials that he supplies to the project.

4. Bunn Constr. Co. v. Cataphote, Inc., 621 So. 2d 1325 (Ala. Civ. App. 1993).

The bond requirement of the public works statute should be liberally construed in such a manner that those providing labor and/or materials will be secured.

5. Water Works, Gas & Sewer Bd. of the City of Oneonta, Inc. v. Buchanan Contracting Co., 318 So. 2d 267 (Ala. 1975).

If the issued bond is a common performance bond, as required by statute, the surety cannot be held liable for any injuries that may occur to third parties due to the alleged negligence of the principal.

6. Clark Constr. Co., Inc. v. State of Ala. Highway Dept., 451 So. 2d 298 (Ala. Civ. App. 1984).

Suit was instituted by contractor to have its bid on a public works contract rescinded and its bid bond returned. The Circuit Court, Montgomery County, H. Randall Thomas, J., declined to rescind and ordered bid bond forfeited, and contractor appealed. The Court of Civil Appeals held that where contractor listed in figures under "Amount Bid" on highway construction contract the sum of \$368,000 and, under "Item With Unit Price Written In Words," inserted the words "Three hundred sixty eight" immediately before "Dollars," mistakenly deleting the word "Thousand," the Highway Department was required by statute to refer to the written words "Three Hundred Sixty Eight" rather than the figure "\$368,000" in computing the bid, so that when the contractor refused to accept the job after it was denied permission to withdraw its bid on the basis of a mistake, contractor was required by that same statute to forfeit its \$10,000 bid bond, and was not entitled to an equitable rescission under the rule in Perusini on basis of a unilateral mistake.

7. Montgomery Bridge and Eng'g, Inc. v. State of Ala. Highway Dept., 440 So. 2d 1114 (Ala. Civ. App. 1984).

In bids for public contracts, if a discrepancy exists between the amount expressed in words and the amount expressed in figures, the statute providing that the amount expressed in words will govern will be strictly construed.

8. Wallace v. Board of Education of Montgomery Co., 197 So. 2d 428 (Ala. 1967).

A contract must be awarded to lowest responsible bidder and in compliance with the conditions of bid invitations. Requirements by the contractor that the successful bidder pay a particular wage to the laborers violates the competitive bid and public works contracts, which require that the contract be awarded to the lowest bidder.

9. Universal Electric Const. Co. v. Robbins, 194 So. 194 (Ala. 1940).

The construction of an electric distribution system is subject to the Public Works Law. The statute requiring bid bonds must be complied with. The purpose of this statute was to protect laborers and materialmen. A public contractor is responsible for knowing the requirements of the bond statute.

## **CHAPTER 10**

### **ATTORNEY GENERAL OPINIONS**

### **INTERPRETING PUBLIC WORKS LAW**

*See Appendix C for the Code of Alabama (1975) statutes referenced throughout this Chapter*

Over time, many Attorney General Opinions have been issued interpreting the Public Works Law. Please note that while many of the Opinions provided herein reference the monetary threshold for the application of the Public Works Law at the time the Opinion was issued, the current threshold for application of the Public Works Law is \$100,000.00.

1. The Town of Cherokee Ridge may enter into a mutual agreement with the Cherokee Ridge Property Owners Association in which the Town would use public funds for payment to the Cherokee Ridge Property Owners Association, Inc. for street repair and fire hydrant maintenance in exchange for the dedication of those streets and sidewalks as being “public” for reasonable compensation so long as the terms of the contract comply with all laws of Alabama, including the Public Works Law. Hon. Rodney Edmondson, Town Attorney, Town of Cherokee Ridge, 04-17-2024, AG 2024-029.
2. 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. Hon. Joel David Taylor, 05-18-2023, AG 2023-031.
3. The University of West Alabama did not substantially comply with the requirements of the Public Works Law, because no advertisements were published in any newspaper for at least two weeks as required by § 39-2-2(b)(2), and accordingly, may not proceed with its contract. The Public Works Law, specifically, § 39-2-2(a) requires advertising for sealed bids at least once each week for three consecutive weeks in a newspaper of general circulation in the county or counties in which the improvement or some part thereof is to be made. Additionally, for all public works contracts involving an estimated amount in excess of \$500,000.00, awarding authorities shall also advertise for sealed bids at least once in three newspapers of general circulation throughout the state. However, § 39-2-2(b)(2) provides that an awarding authority may enter into a contract for public works if an advertisement for sealed bids for the contract was submitted by the awarding authority to a newspaper and the newspaper only published the advertisement for two weeks if the authority can provide proof that it in good faith submitted the advertisement to the newspaper with instructions to publish the notice in accordance with the provisions of § 39-2-2(a). The University could not provide proof that its advertisement was submitted to any newspapers and as such, did not substantially comply with the requirements of the Public Works Law. Hon. Ken Tucker, President, University of West Alabama, 5-20-21, AG 2021-037.
4. After soliciting bids for a courthouse renovation project and receiving multiple bids, all of

which exceed the funds available, the Butler County Commission may rebid the project with new specifications or have the work performed by force account. Pursuant to § 39-2-6(b), an awarding authority is permitted to negotiate outside the typical Public Works Law requirements. However, such authorization is expressly limited to situations where the awarding authority receives only one bid or no bids. In other words, an awarding authority may only negotiate with companies vying for a public works project if it has solicited bids and received either one or zero responsible and responsive bids. Hon. Calvin Poole, III, County Attorney, Butler County Commission, 5-4-21, AG 2021-033.

5. A contract entered into by the Jefferson County E-911 Board (“the Board”) to allow a private company to erect a cell tower on a fire station for dispatch services must be competitively bid under the Public Works Law. Pursuant to § 39-2-2(g), if ALEA makes a determination that confidentiality would be required to protect the safety of persons or facilities, then the contract may be let without public advertisement. Hon. Jay Murrill, Attorney, Jefferson County 9-1-1 Emergency Communications District, 3-13-20, AG 2020-015.
6. Local boards of education are required, pursuant to § 16-1-44, to adopt a comprehensive school safety plan for each school under authority of the board. The purchase, installation, or upgrading of school security systems is subject to the Public Works Law. Pursuant to § 39-2-2(g), if ALEA makes a finding that the project would impact the security or safety of persons or facilities and requires confidentiality, a contract may be let without public advertising. Hon. Michael Douglas, Superintendent, Decatur City Board of Education, 8-28-19, AG 2019-048.
7. The renovation of the municipal court’s administrative offices falls within the definition of public works, and therefore if the cost of the project exceeds \$50,000, the project is subject to the competitive bidding requirements of the Public Works Law. Hon. Carl E. Chamblee, Jr., Municipal Judge, Trussville, 8-20-19, AG 2019-042. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000 See Ala. Code § 39-2-2.**
8. The Birmingham-Jefferson Civic Center Authority (“the Authority”) may divide a stadium construction project into phases and award a contract for each to a different low bidder in order to meet construction deadlines. The purpose of the Public Works Law requiring contracts to be let by public authorities to the lowest responsible bidder is designed to protect the public against collusive contracts and to prevent favoritism toward contractors by public officials; here, the Authority seeks to divide the instant project merely to meet construction deadlines, not to evade bidding. Hon. Tad Snider, Executive Director/Chief Executive Officer, Birmingham-Jefferson Civic Center Authority, 4-1-19, AG 2019-028.
9. 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. Pursuant to § 41-16-51(a)(15), if ALEA makes a finding that the project would impact the security or safety of persons or facilities and require confidentiality,

a contract may be let without public advertising. Hon. Mark S. Culver, Chairman, Houston County Commission, 10-27-17, AG 2018-004.

10. A contract for a Supervisory Control and Data Acquisition System (“SCADA”) is a public work under the Public Works Law, § 39-2-1(6). Hon. Patrick Bryant, City Manager, City of Talladega, 3-29-17, AG 2017-026.
11. The Water Works Board of the City of Vincent wished to upgrade its water system by replacing meters that must be read manually with meters read by radios, but the County did not possess the funds to purchase all of the meters needed to replace the entire system at a cost exceeding \$50,000 in one year. There is an important difference between a public entity with the means to pay \$50,000 or more that evades the Public Works Law and a public entity lacking the means to pay \$50,000 or more that is financially incapable of completing, within a year, a public works project that costs more than \$50,000. Compliance with the Public Works Law is a factual determination involving the following factors, which are not exhaustive: (1) time period between purchases, (2) knowledge of the total cost of the project and ability to pay that total cost, and (3) the interchangeability or likeness of the purchased items or units. If the City can demonstrate, using those factors, that it is not evading the Public Works Law by spreading out its meter purchases over several years as funds become available, then the County will not violate the Public Works Law, § 39-2-2(a). Hon. William R. Justice, Attorney, Water Works Board of the City of Vincent, 12-7-16, AG 2017-010. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
12. It is well settled that awarding authorities may waive technical deficiencies and minor irregularities in bids under the Public Works Law, the Competitive Bid Law for state agencies [§ 41-16-20(a)], and the Competitive Bid Law for local agencies [§ 41-16-50]. 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 are minor irregularities not defeating the responsiveness of the lowest bidder, it may award the contract to that bidder. Hon. John R. Cooper, Alabama Department of Transportation, 10-21-15, AG 2016-006.
13. The Houston County Board of Education (“the Board”) determined that, to meet the needs of its students, it must construct a new Career & Technical Center that is centrally located between five public schools. The 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 Board should comply with the disclosure requirements of § 9-15-100. Hon. Kevin Walding, Attorney, Houston County Board of Education, 9-14-15, AG 2015-064.
14. A newspaper meeting the requirements of § 6-8-60 is a newspaper of general circulation in the county for purposes of the Public Works Law. Section 6-8-60 requires that the newspaper must: (1) be printed in English, (2) be of general circulation in the county, (3) have its principal

editorial office in the county, and (4) hold a second-class mailing permit for a minimum of 51 weeks a year. Hon. Teddy Pouncey, Chairman, South Dallas Water Authority, 5-12-15, AG 2015-046.

15. A private entity approached the City of Saraland and expressed its desire to construct a City Hall Complex (“Complex”) on the privately owned portion of the Plaza North Shopping Center (“Plaza”), of which the City owns 25% and utilizes said property for City offices. Because the total cost of the project exceeds \$50,000 and the City will possess a contractual right to purchase the property upon which the Complex will be built, the construction thereof is a public works project subject to bidding in compliance with the Public Works Law. Hon. Andrew J. Rutens, Attorney, City of Saraland, 12-15-14, AG 2015-019. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
16. A project for maintenance of multiple water tanks that exceeds \$50,000 is subject to the Public Works Law. Where the Colbert County Commission was well aware of the ongoing annual maintenance needs of the county’s water tanks, and where the county engineer stated there is no reason why the maintenance of the various tanks cannot be combined into a single contract, the project may not be divided into parts. The contract cannot be renewed without competitive bidding. Hon. James A. Patton, Attorney, Colbert County Commission, 11-3-14, AG 2015-008. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
17. Pursuant to § 39-2-1, the purchase and installation of a security system in a county courthouse is considered to be a public work, but if the project involves a total cost of less than \$50,000, it is not subject to competitive bidding requirements. If personal mobile panic alarm devices are purchased for judges’ use outside of public property, this purchase would not be considered a public work, so it is governed by the competitive bidding requirements of § 41-16-50, et. seq. Section 41-16-51(15), however, exempts products relating to the safety or security of persons, so the purchase would not be subject to competitive bidding requirements. Hon. J. Kevin Moulton, Circuit Judge, Place 2, 20th Judicial Circuit, 12-20-13, AG 2014-031. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
18. The McAdory Area Fire District (“District”) may contract with the Warrior River Water Authority (“Authority”) for the use, installation, and maintenance of fire hydrants. The Authority and District should cooperate to enable the District to provide the most effective fire protection for a reasonable cost for its residents. If the District enters into a contract that requires the District to install and maintain the hydrants, the District is subject to the Public Works Law. The contract between the District and the Authority is not required to be competitively bid Hon. Jeff Wyatt, Fire Chief, McAdory Area Fire District, 09-27-12, AG 2012-092.
19. Based upon the facts presented, the Town of Fyffe may enter into a change order that allows

the town to use the remaining surplus funds from a grant/local match to purchase additional grinder pumps to be installed by employees of the sewer department. Hon. L. Jayson Carroll, Attorney, Town of Fyffe, 01-18-12, AG 2012-025.

20. This Office is unaware of any statutory provisions that would preclude the Mobile Commission from leasing a roof attached to the Mobile County Government Plaza Atrium from a private entity pursuant to a lease-purchase arrangement. This Office is unaware of any statutory or other legal impediment that would preclude the inclusion of a provision in the contemplated agreement mandating that, in the event of a default by the Commission and upon the provision of appropriate notice and failure to cure, the Commission would be obligated to purchase the roof within a reasonable time after said default. This Office is unaware of any statutory or other legal impediment that would preclude the Commission from soliciting competitive bids that include each bidder's determination of an appropriate roof system sufficient to meet the Commission's performance criteria and specifications. Hon. Jay M. Ross, Attorney, Mobile County Commission, 09-28-11, AG 2011-106.
21. A court may find that the City of Pelham substantially complied with the advertisement of bids for its backup water supply based upon the substantial number of bids received and the number of states involved in the bidding process. Hon. Frank C. Ellis, Jr., Attorney for Shelby County, 09-20-11, AG 2011-100.
22. If the county commission determines that the facts are as outlined and that the changes are necessary for the proper completion of the project, it can find that the circumstances are extraordinary and justify a change order in excess of 30 percent. Hon. Joey Hargrove, Chairman, Lawrence County Commission, 07-20-11, AG 2011-078.
23. Under the facts outlined, the Coosa County Commission substantially complied with the Public Works Law, and the county may enter into the proposed contract. Hon. Todd J. Adams, Chairman, Coosa County Commission, 05-06-11, AG 2011-058. Specifically, the county made a good faith effort by placing ads in two of the requisite three newspapers of general circulation in the state, the ads stated the bid opening date, and the bids were opened publicly. Although the opening date was moved, it was a minor delay of less than one week, and it was merely delayed, not moved forward, which would not have prevented potential bidders responding to the ads from submitting a timely bid. Moreover, the county directly contacted the seven companies that requested plans and specifications, and, similar to Owens, the county notified them of the new date.
24. The purchase and placement of sod by a contractor for the construction of a softball complex is a public works project. Hon. Barry Mask, Member, House of Representatives, 03-04-10, AG 2010-048.
25. The preference to resident contractors over out-of-state contractors, found in § 39-3-5(a) applies if the contract is under the Public Works Law; if the contract utilizes any state, county, or municipal funds, except if funded in whole or in part with federal funds; and if the law of

the state of the out-of-state contractor gives preference to its resident contractors. The Jefferson 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. Hon. Jeffrey M. Sewell County, Attorney, Jefferson County Commission, 01-26-10, AG 2010-040.

26. A tank maintenance contract that is in excess of \$50,000 is subject to the Public Works Law. Hon. Fred O. Ferguson, Chairman, Stewartville Water Authority, 08-25-09, AG 2009-100. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
27. If public funds are transferred to a private entity, such funds are not subject to Alabama laws regarding competitive bidding or public works. Hon. J. Bradford Boyd Hicks, Attorney, Town of Magnolia Springs, 06-29-09, AG 2009-086.
28. If the City of Geneva determines that a public purpose will be served, the City may join with nonprofit organizations to finance a community center. The competitive bid laws are not applicable to private funds. Once public funds are given to a private entity, those funds cease being public in nature. Hon. Wynnton Melton, Mayor, City of Geneva, 04-16-09, AG 2009-061.
29. The University of South Alabama may enter into the described unit price contracts or Job Order Contracts if the contracts are executed in compliance with the Public Works Law and are limited to the repair and renovation contracts described in the opinion request. Hon. V. Gordon Moulton, President, University of South Alabama, 04-14-09, AG 2009-060.
30. City may contract with a community center to renovate the center in exchange for the center making cultural facilities available to the public; however, if the project exceeds \$50,000, it is subject to the Public Works Law. City may contract with a third party to dispose of solid waste from and provide maintenance for the Turkey Creek Nature Preserve. If the contract involves \$15,000 or more, it is subject to the Competitive Bid Law. If the maintenance contract exceeds \$50,000, or otherwise qualifies as a public works, it must be bid under the Public Works Law. Hon. E. Shane Black, Attorney, City of Pinson, 01-22-09, AG 2009-033. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
31. A contract that exceeds \$50,000 for the construction of a water line to a public school is subject to the bidding requirements of the Public Works Law. Hon. R. Champ Crocker, Attorney for Cullman County Board of Education, 12-16-08, AG 2009-022. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
32. If an agency or municipality makes a “good faith” estimate that a project is less than \$500,000, then it does not have to advertise in three newspapers of general circulation throughout the

state. See AG 2008-106, the Town of Argo “substantially complied” with the requirement by advertising in one newspaper of general circulation that resulted in internet publication statewide. Hon. Hugh E. Holladay Attorney, Town of Argo, 07-10-08, AG 2008-106.

33. Painting contracts of \$50,000 or less entered into by the Alabama Department of Postsecondary Education qualify as public works under § 39-2-2(b) and may be let without advertising or sealed bids. Hon. Renee Culverhouse, Interim Chancellor, Alabama Department of Postsecondary Education, 5-3-07, AG 2007-089. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
34. Under the Competitive Bid and Public Works Laws, a conviction and debarment by a federal agency are factors that a county commission may use to determine if a bidder is responsible, including in the prequalification procedure. Hon. Jay M. Ross, Attorney, Mobile County Commission, 3-28-07, AG 2007-063.
35. Based on the facts presented, the contracts for cutting grass in public cemeteries in the city should be bid pursuant to the Competitive Bid Law if the costs exceed \$7500. Contracts for the construction, repair, and maintenance of markers, headstones and walls in a municipally owned cemetery are considered “public works,” subject to bid under the Public Works Law if the costs are in excess of \$50,000.00. Hon. William L. Nix, Attorney, City of Lanett, 1-9-07, AG 2007-030. **Note: Since entry of this Opinion, the language of the controlling statute (with respect to the Competitive Bid Law), § 41-16-50(a), has been amended to cover funds of \$30,000 or more. Additionally, the threshold for application of the Public Works Law has been increased to \$100,000. See Ala. Code § 39-2-2.**
36. A contract by the Smiths Water and Sewer Authority to install a main sewer outfall line must be bid under § 39-2-2. Hon. Kenneth Vann, Smiths Water and Sewer Authority, 10-24-06. AG 2007-007.
37. The Huntsville-Madison County Marina and Port Authority is a public corporation subject to the Competitive Bid Law. A public works project paid, in whole or in part, with public funds is subject to the Public Works Law. The Authority may borrow money from standard commercial entities, such as a bank or credit union for any corporate purpose. Hon. Jada R. Leo, Secretary Treasurer, Huntsville-Madison County Marina and Port Authority, 01-19-05, AG 2005-045.
38. The Boaz City Council may appropriate funds to a nonprofit organization for the renovation of a building for a community center if the council determines that a public purpose is served. If the project will be paid for entirely with private funds, the project is not subject to the competitive bidding requirements of the Public Works Law. Hon. Barbara Walden, City Clerk/Treasurer for the City of Boaz, 09-27-04, AG 2004-223.
39. In a public works project funded, in part, by federal transportation monies received by the state

through the Alabama Department of Transportation, federal laws and regulations prohibit the Town of Collinsville from requiring a general contractor, submitting a bid for work to be performed on a project, to provide the contractor's license number on the bid documents before the submission of a bid or before the bid may be considered for award of a contract. The Town of Collinsville may, however, require proof of a license upon or subsequent to the award of the contract. Hon. Ernest Willingham, Mayor of Collinsville, 03-19-04, AG 2004-099

40. The use of asphalt obtained through the award of a public works contract is restricted for use on public works projects as they are defined by the statute. Any additional outsourced work on individual public works projects that would push the total cost of an individual public works project over the \$50,000.00 threshold must be competitively bid. Hon. Gregory B. White, Chairman, Covington County Commission, 3-1-04, AG 2004-083. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
41. 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 Law. Hon. Bobby Hayes, Mayor, City of Pelham, 11-18-03, AG 2004-026.
42. By advertising a contract in a local newspaper that would not be considered to be substantially circulated within the state and awarding the contract to the lowest bidder, the Town of South Vinemont has substantially complied with the Public Works Law under the doctrine of substantial compliance articulated by Alabama's appellate courts, and the Town may proceed with the executed contract. Hon. Melba Patton, Mayor, Town of South Vinemont, 10-31-2003, AG 2004-018.
43. The West Alabama Mental Health Board is a public corporation subject to the Competitive Bid Laws and the Public Works Laws. Hon. H. A. Lloyd, West Alabama Mental Health Board, 10-30-02, AG 2003-017.
44. The Town of Crossville may contract with a developer to pave an unpaved city street within the town, provided all the applicable laws, rules, and regulations regarding paving public roads are followed, including the Public Works Law. Hon. Ronald West, Mayor, Town of Crossville, 05-08-02, AG 2002-228.
45. The construction and lease of a fire station should be considered a public work and thus must be competitively bid pursuant to the Public Works Law. Hon. James M. Tingle, Attorney, City of Gardendale, 05-02-02, AG 2002-223.
46. Pursuant to § 39-2-1, waterworks boards are subject to the Public Works Law when building construction costs exceed \$50,000. Hon. William R. Justice, Attorney for Water Works Board of the Town of Columbiana, 02-27-02, AG 2002-152. **Note: Since this Opinion was published,**

the threshold for application of the Public Works Law was increased to \$100,000. *See Ala. Code § 39-2-2.*

47. Because a project was divided and bids were not solicited for additional work, the Bibb County Commission is prohibited by the Public Works Law from paying an invoice in the amount of \$22,844.75 for unapproved work performed on a building by a contractor, which is in addition to the original project price of \$42,313.60. The Public Works Law prohibits applying the principle of quantum meruit for the recovery of work and labor done or materials furnished under any contract let in violation of the competitive bidding requirements as prescribed by the laws. Hon. George E. Jones III, Bibb County Attorney, 01-24-02, AG 2002-126.
48. A contract that exceeds \$50,000 for the repair, improvement, and maintenance of a water storage tank is subject to the competitive bidding requirements of the Public Works Law. Hon. Craig L. Williams, Attorney, Water and Sewer Board, 11-19-2001, AG 02-072. This opinion was subsequently modified to the extent that it is in conflict with the opinion issued to Hon. Craig L. Williams, Attorney, Parrish Water and Sewer Board, 2-12-02, AG 2002-137. The latter opinion did not address issues related to competitive bidding but rather procedures the Board should follow with respect to repaying and retaining deposits held by the Board. *Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.*
49. A bid accepted by an awarding authority under the Public Works Law is null and void where it was not the lowest responsible bid and was accepted by error. Hon. W. David Ryan, Tuscaloosa City Board of Education, Tuscaloosa County, 11-28-01, AG 2002-071.
50. The costs expended by the county in acquiring easements from private landowners for a water pipeline to deliver water to plant sites is not subject to the Public Works Law. The intake facility improvements or the construction of water transportation facilities to be used for purposes of furnishing raw untreated water to consumers are not subject to the state Public Works Laws. Hon. Barry D. Vaughn, Talladega County Attorney, 11-02-01, AG 2002-052.
51. County commission must solicit bids under the Public Works Law in awarding a contract for the construction of a new county jail and juvenile facility. Hon. Lena M. Powell, Chairman, Wilcox County Commission, 10-2-01, AG 2002-006.
52. County commission has the authority to enter contracts for the construction of a training facility to be used by the sheriff's office. If the cost of the project exceeds \$50,000, the contract must be awarded pursuant to the Public Works Law unless the force account method is used. Hon. Robert W. Koncar, Baldwin County Administrator, 06-13-01, AG 2001-202. *Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.*
53. The requirements of the Competitive Bid Law do not apply to purchases of equipment, supplies, or materials needed, used, and consumed in the normal and routine operation of the

County Water and Sewer Authority. If the Authority's purchase of equipment, supplies, or materials exceeds \$50,000 and is included in a contact for the construction, renovation repair, or maintenance of the sewer and water works, it is subject to the Provisions of the Public Works Law. Hon. Winston V. Legge, Jr, Attorney, Limestone County Water and Sewer Authority, 03-30-01, AG 2001-139. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**

54. The Tuscaloosa County Commission may set the priorities for projects to be handled by its department of Public Works and its county engineer, which operate under a unit system of county road maintenance. Hon. Barry L. Mullins, Attorney, Tuscaloosa County Commission, 03-28-01, AG 2001-134.
55. The bid specifications for public contracts let by governmental agencies must be in writing. Hon. Neal Morrison, Member, House of Representatives, 09-20-00, AG 2000-239.
56. A general service contract is usually excluded from the competitive bid law, but each factual situation must be considered individually. The Public Works Law is applicable to capital improvements that are in excess of \$50,000. Hon. William L. Nix, Chattahoochee Valley Water Supply District, 06-02-00, AG 2000-161. **Note: Since this Opinion was published, the threshold for application of the Public Works Law was increased to \$100,000. See Ala. Code § 39-2-2.**
57. The purchase of lights by a municipality for a ballpark is a purchase of equipment and subject to the competitive bid requirements if the costs meet or exceed the criteria. If the purchase of lights is included in the construction costs of the renovation project, then this purchase is subject to the requirements of the Public Works Law. Hon. Phil Crigler, Member, House of Representatives, 02-28-00, AG 2000-099.
58. Absent statutory authority, construction contract renewals must comply with the competitive bid law or, where applicable, the public works law. Hon. V. Edward Freeman, II, Attorney, Warrior River Water Authority, 02-08-00, AG 2000-078.
59. The Tuscaloosa County Park and Recreation Authority is not prohibited from accepting a gift of construction services from a board member. This gift will not be subject to the Competitive Bid Law or public works bidding requirements of § 39-2-1, et seq. Hon. Don Kelly, Tuscaloosa County Park and Recreation Authority, 10-07-99, AG 2000-003.
60. As an awarding authority under the Public Works Law, UAB is statutorily prohibited from providing any insurance other than builder's risk insurance and owner's protective insurance on public works projects it lets for bid. Any other insurance desired by UAB may be required in the invitation to bid but must be supplied by the contractor. Hon. Steve Windom, Lieutenant Governor, 03-17-99, AG 99-00142.
61. The Competitive Bid Law and the Public Works Law are not applicable where an educational

building authority issues revenue bonds to finance facilities for a private school when the authority is not a party to the contract, the school is not an agent of the authority, and there are no public funds obligated or used to pay for such bonds or facilities. Hon. Heyward C. Hosch III, Educational Building Authority of the City of Tuscaloosa, 01-25-99, AG 99-00095.

62. When work is done by force account there is no contract to be signed; therefore, the bid requirement found in § 39-2-2 has no effect. When a city is undertaking a public works construction project under the “force account” method, the city is required to 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. Hon. O. Stanley Thornton, Attorney, City of Talladega, 12-18-98, AG 99-00065.
63. Construction of a municipal golf course by the Town of Courtland is subject to the Public Works Law but not the Competitive Bid Law. Bids are not required for architectural design services, engineering services, or project management services needed for the construction of a golf course. If the Park and Recreation Board of the Town of Courtland develops the golf course, neither the Competitive Bid Law nor the Public Works Law are applicable. Hon. Timothy D. Littrell, Attorney, Town of Courtland, 12-08-98, AG 99-00056.
64. The State Docks Department is exempt from the requirement that public works projects exceeding \$50,000 be bid. Hon. Jack E. Ravan, Alabama State Docs Department, 03-03-98, AG 98-00101.
65. Incorporated industrial boards are exempt from Public Works Law but grant funds may require projects using such funds to be competitively bid. Hon. J. Mack Edwards, Chairman, Industrial Development Board of the Town of Collinsville, 12-11-97, AG 98-00051.
66. Act No. 97-225 does not require advertisement of sealed bids for a project to be done by force account. Hon. Hobson Manasco, Jr., Winston County, 11-19-97, AG 98-00039.
67. The Public Works Law is applicable to a renovation project of the Housing Authority of the City of Fort Payne. Hon. Sarah L. Tate, Housing Authority of the City of Fort Payne, 11-13-97, AG 98-00031.
68. If the Town of Double Springs determines that the omission of the category and license expiration date from the outside of the bid envelope is a minor irregularity so as not to defeat the responsiveness of the lowest bidder, it may award the contract for construction of a water line to that bidder, if it deems such bidder to be “responsible.” Hon. B. C. Seymour, Mayor, Town of Double Springs, 09-17-97, AG 97-00281.
69. Municipalities cannot, in bid specifications, provide for withholding more than five percent (5%) of a public works project or provide that retainages shall continue to be withheld after the project is fifty percent (50%) complete. Hon. Frank C. Ellis, Jr., City Attorney, City of Pelham, 08-11-97, AG 97-00256.

70. A newspaper, publishing items of interest to the general public, having more than a de minimis number of subscribers, whose readers are not confined to an isolated community or geographic section, available to any member of the public within the state should be considered a newspaper of general circulation. Advertisements for bids for public works costing more than \$500,000 must be made in three such papers, in addition to the local paper, and published a reasonable time before bids are to be opened. Performance bond should be based on the contract price. Hon. C. Wade Johnson, Attorney, Utilities Board of the City of Bridgeport, 08-01-97, AG 97-00247.
71. A Public Works contract between county and Alabama Correctional Industries does not violate §§ 39-1-1, et seq., and § 41-16-20 and §§ 41-16-50, et seq. Hon. Julie S. Moody, Covington County Commission, 06-05-97, AG 97-00202.
72. Public Works Consultant's services for preparation of request for proposals may be procured without competitive bidding in accordance with the Code of Alabama (1975). Subject to competitive bidding, the Department of Corrections may contract for the private operation of a state prison. A contract for the completion of construction of the Brent Prison may proceed without the need for a formalized process of competitive bidding due to the prevailing extraordinary condition. Hon. Ron Jones, State of Alabama Department of Corrections, 01-29-96, AG 96-00113.

**PART III**  
**APPENDICES**

**APPENDIX A**  
**COMPETITIVE BID LAW**

**Code of Alabama (1975), Title 41, Chapter 4**

**ARTICLE 5, DIVISION 1**  
**GENERAL PROVISIONS.**

- 41-4-110.** Purposes and policies.
- 41-4-111.** Relation to other laws.
- 41-4-112.** Good faith requirement.
- 41-4-113.** Retention of written determinations.
- 41-4-114.** Definitions.
- 41-4-115.** Public record status of certain procurement information.
- 41-4-116.** Use of electronic media.

**Section 41-4-110. Purposes and policies.**

- (a) This article shall be construed and applied to promote its underlying purposes and policies.
- (b) The underlying purposes and policies of this article are to do all of the following:
  - (1) Simplify, clarify, and modernize the law governing procurement by the state.
  - (2) Permit the continued development of procurement policies and practices.
  - (3) Make as consistent as possible the procurement laws among the various jurisdictions.
  - (4) Provide for increased public confidence in the procedures followed in public procurement.
  - (5) Ensure the fair and equitable treatment of all persons who deal with the procurement system of this state.
  - (6) Provide increased economy in state procurement activities and maximize to the fullest extent practicable the purchasing value of public funds of the state.
  - (7) Foster effective broad-based competition within the free enterprise system.
  - (8) Provide safeguards for the maintenance of a procurement system of quality and integrity.
  - (9) Obtain in a cost-effective and responsive manner the materials and services required by state agencies in order for those agencies to better serve this state's businesses and residents.

**Section 41-4-111. Relation to other laws.**

Unless displaced by the particular provisions of this article, the principles of law and equity, including the Uniform Commercial Code, the law merchant, and law relative to capacity to

contract, agency, fraud, misrepresentation, duress, coercion, mistake, and bankruptcy shall supplement this article.

### **Section 41-4-112. Good faith requirement.**

This article requires all parties involved in the negotiation, performance, or administration of state contracts to act in good faith. Good faith means honesty in fact in the conduct or transaction concerned.

- (1) This article applies to contracts solicited and entered into after October 1, 2022.
- (2) Except as otherwise provided in this article, this article applies to every expenditure of public funds by a governmental body of this state under a contract for supplies or services.
- (3) This article does not apply to either of the following:
  - a. Gifts, grants, or contracts between state agencies, between state agencies and political subdivisions, or between the state and other governments.
  - b. All expenditures of funds of whatever nature made by or on behalf of the county commissions and the governing boards of instrumentalities of counties, including waterworks boards, sewer boards, gas boards, and other like utility boards, and commissions for which procurement activities are currently governed by Article 3, commencing with Section 41-16-50, of Chapter 16.

### **Section 41-4-113. Retention of written determinations.**

Written determinations required by this article shall be retained in the appropriate official contract file of the Chief Procurement Officer or the purchasing agency.

### **Section 41-4-114. Definitions.**

- (a) For purposes of this article, the following words have the following meanings:
  - (1) Business. Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or other private legal entity.
  - (2) Capital equipment. Tangible personal property that can be appraised for value, is not disposable or consumable, is stand alone, and has a useful life of one year or more.
  - (3) Change order. A written order signed by the procurement officer directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor.
  - (4) Chief procurement officer. The individual holding the position created in Section 41-4-120, as the head of the Office of the Chief Procurement Officer Division of Procurement.
  - (5) Contingency fee contract. An agreement, express or implied, for litigation legal services of an attorney or attorneys, including any associated counsel, under which

compensation is contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement. The payment may be in an amount which either is fixed or is to be determined under a formula.

- (6) Contingency fee counsel. An attorney or attorneys performing services under a contingency fee contract.
- (7) Contract. All types of state agreements, regardless of what they may be called, for the procurement of supplies or services.
- (8) Contract modification. Any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.
- (9) Contracting agency. The Governor, Attorney General, or director of a state agency, department, bureau, commission, authority, public corporation, or instrumentality of the State of Alabama that seeks to enter a contract.
- (10) Contractor. Any person having a contract with a governmental body.
- (11) Data. Recorded information, regardless of form or characteristic.
- (12) Designee. A duly authorized representative of a person.
- (13) Electronic. Electrical, digital, magnetic, optical, electromagnetic, or other similar technology.
- (14) Governmental body. Except as otherwise provided in this article, an agency, department, board, bureau, commission, committee, institution, corporation, authority, or office of this state. The term does not include the legislative or judicial departments of the state or a legislative or judicial agency, the Alabama State Port Authority, municipalities, or the county commission and governing boards of instrumentalities of counties including waterworks boards, sewer boards, gas boards, and other like utility boards and commissions.
- (15) Grant. The furnishing by the state or federal government of assistance, whether financial or otherwise, to any person to support a program authorized by law. The term does not include an award with a primary purpose to procure an end product, whether in the form of supplies or services.
- (16) Judicial agency. Any department, appellate court, trial court, board, body, bureau, commission, committee, institution, corporation, authority, or office created, established, and operating as an agency of the judicial department of this state. The term includes, but is not limited to, the Administrative Office of Courts, the State Law Library, the Court of the Judiciary, and the Sentencing Commission.
- (17) Legislative agency. The Alabama State Legislature and any department, board, body, bureau, commission, committee, institution, corporation, authority, or office created, established, and operating as an agency of the legislative department of this state. The term includes, but is not limited to, the Legislative Services Agency and the Department of Examiners of Public Accounts.
- (18) Person. An individual, corporation, association, partnership, limited liability corporation, union, committee, club, other organization, or group.
- (19) Procurement. Buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services. The term includes all functions that pertain to the obtaining of any supply or service, including description of requirements, selection and

solicitation of sources, preparation and award of contracts, and all phases of contract administration. The term does not include the leasing of real property.

(20) Procurement officer. Any individual duly authorized by the Chief Procurement Officer to enter into and administer contracts and make written determinations with respect to those contracts. The term includes an authorized representative acting within the limits of authority.

(21) Professional services. The services of physicians, architects, engineers, landscape architects, land surveyors, geoscientists, attorneys, teachers, artists, appraisers, and other individuals, or business entities offering the services of those individuals, who possess a high degree of scientific or specialized skill and knowledge where the experience and professional qualifications of the service provider are particularly relevant to the provision of the required service. This term also includes the management or administration of any occupational licensing board, as defined under Section 41-9A-1, by a person other than a state employee.

(22) Public funds. Money, regardless of its source, that is owned or held by a governmental body.

(23) Public notice. The distribution or dissemination of information to interested parties using methods that are reasonably available, including but not limited to, publication in newspapers of general circulation, electronic or paper mailing lists, and websites designated by the state and maintained for that purpose.

(24) Purchasing agency. A governmental body, other than the Office of the Chief Procurement Officer, that is authorized by this article, its implementing rules, or by delegation from the Chief Procurement Officer to enter into contracts.

(25) Services. The furnishing of labor, time, or effort by a contractor. The term does not include the delivery of a specific end product, other than reports that are merely incidental to the required performance.

(26) Signature. A manual signature or an electronic signature, as defined in Section 8-1A-2.

(27) Solicitation. Any request to submit quotes, bids, or offers to the state for the procurement of supplies or services. The term includes invitations to bid and requests for proposals.

(28) Supplies. All property, including equipment, materials, and printing. The term does not include land or a permanent interest in land.

(29) Using agency. A governmental body that utilizes any supplies or services procured under this article.

(30) Written or in writing. The product of any method of forming characters on paper, other materials, or viewable screens, which can be read, retrieved, and reproduced, including information that is electronically transmitted and stored.

(b) The terms state, state department, state agency, agency, state entity, instrumentality of the state, and governmental body do not include municipalities, political subdivisions, county commissions, or the governing boards of instrumentalities of counties including waterworks boards, sewer boards, gas boards, and other like utility boards and commissions.

**Section 41-4-115. Public record status of certain procurement information.**

- (a) Except as provided in subsection (b), procurement information is a public record to the extent provided by state law and shall be available to the public.
- (b) Procurement information that is any of the following is not a public record:
  - (1) Commercial or financial information obtained in response to a solicitation that is designated as privileged or confidential by the person or entity submitting such information in compliance with instructions in the solicitation for marking information exempt from public disclosure. Information not marked as required is a public record.
  - (2) Evaluative documents, bids, or proposals prior to award.
  - (3) When the public disclosure of procurement information would be detrimental to the safety or security of persons or property or to the public interest as determined, in writing, by the Chief Procurement Officer.
  - (4) Any procurement information identified by the Chief Procurement Officer under subsection (c).
- (c) The Chief Procurement Officer, by rule, shall establish a process for identifying and protecting procurement information that is excepted from disclosure.

**Section 41-4-116. Use of electronic media.**

The use of electronic media, including acceptance of electronic signatures, is authorized consistent with the state's applicable statutory, regulatory, or other guidance for use of the media, so long as the guidance provides for both of the following:

- (1) Appropriate security to prevent unauthorized access to the bidding, approval, and award processes.
- (2) Accurate retrieval or conversion of electronic forms of such information into a medium that permits inspection and copying.

**ARTICLE 5, DIVISION 2**  
**PROCUREMENT ORGANIZATION**

**41-4-120.** Office of the Chief Procurement Officer created.

**41-4-121.** Appointment of Chief Procurement Officer; qualifications.

**41-4-122.** Powers and duties of Chief Procurement Officer.

**41-4-123.** Delegation of authority.

**41-4-124.** Transfer of rights, duties, etc. to Chief Procurement Officer; applicability of article; procedures for procurement of supplies or services.

**41-4-125.** Employment of attorneys.

**41-4-125.01** Selection of physicians retained to provide medical services to the state.

**41-4-126.** Exemptions.

**41-4-127.** Rulemaking authority.

**41-4-128.** Collection and preparation of statistical data.

**41-4-129.** Procurement advisory council.

**Section 41-4-120. Office of the Chief Procurement Officer created.**

There is created within the Department of Finance the Division of Procurement, headed by the Chief Procurement Officer.

**Section 41-4-121. Appointment of Chief Procurement Officer; qualifications.**

The Chief Procurement Officer shall be appointed by the Director of Finance with the approval of the Governor. The Chief Procurement Officer shall have relevant, recent experience in public procurement and shall be a person with demonstrated executive and organizational ability.

**Section 41-4-122. Powers and duties of Chief Procurement Officer.**

(a) The Chief Procurement Officer shall serve as the central procurement officer of the state.

(b) Consistent with this article, the Chief Procurement Officer shall adopt operational procedures governing the internal functions of the Division of Procurement.

(c) Except as otherwise specifically provided in this article, the Chief Procurement Officer, in accordance with rules adopted under this article, shall do all of the following:

- (1) Except for alcoholic beverages, which shall be purchased by the Alcoholic Beverage Control Board, procure or supervise the procurement of all supplies and services needed by the state.
- (2) Ensure compliance with this article and the rules implementing this article by reviewing and monitoring procurements conducted by any designee, department, agency, or official delegated authority under Section 41-4-123.
- (3) Perform other functions and duties of the Department of Finance as may be assigned by the Director of Finance.

(d)(1) The Chief Procurement Officer may establish and maintain a system for the purchase of supplies and services by governmental bodies that conduct their procurement activities through the Division of Procurement, through the utilization of approved credit cards. County and municipal governments and instrumentalities or public corporations thereof may participate in the state fleet fuel card program subject to the terms and conditions of the program related to the utilization of the fleet fuel card; provided, however, that county and municipal governments and instrumentalities or public corporations thereof shall not otherwise be subject to this subsection.

(2) The Chief Procurement Officer shall establish by rule a process for the competitive solicitation of credit card providers. The state Comptroller and the Chief Procurement Officer shall adopt fiscal procedures governing the payment of charges incurred by credit card users and the utilization of credit cards. The use of approved credit cards shall be established by the state Comptroller and the Chief Procurement Officer, with the approval of the Director of Finance, and be published through the Alabama fiscal procedures, in which each purchase made using approved credit cards is required to have prior approval by the department head or his or her designee and a record of each purchase and approval is to be maintained. The Chief Procurement Officer may select the provider or providers offering the highest fees to the division for the use of its credit card or credit cards.

(3) Fees received by the division for the use of credit cards shall be placed in a special fund entitled the State Procurement Fund in the State Treasury for the use of the division and the funds shall be appropriated, budgeted, and allotted in accordance with Sections 41-4-80 to 41-4-96, inclusive, and 41-19-1 to 41-19-12, inclusive, and only in amounts stipulated in general appropriations bills and other appropriation bills.

(4) Approved credit cards may be issued to requisitioning agencies upon the recommendation of the Chief Procurement Officer and the approval of the Director of Finance. Approved credit cards shall be assigned to the department and limited in number. Approved credit cards may be utilized to purchase items of supplies and services, and may not exceed the limitations set forth by rule.

(5) The director of the governmental body utilizing credit cards is responsible for the proper use of credit cards assigned to his or her agency, in accordance with rules established by Alabama fiscal procedures. The Chief Procurement Officer may collect any credit card from any governmental body at any time due to improper use. The Chief Procurement Officer shall submit an annual report and accounting regarding the use of credit cards by each governmental body to the Director of Finance and the Governor.

(e) The Division of Procurement may charge a biannual registration fee to vendors desiring to register with the office to receive invitations to bid for any supplies or services solicited by the division and to governmental bodies for their proportionate share of operating costs of the office. Any fee shall be set by administrative rule upon the approval of the Director of Finance. Any fees collected under this subsection shall be deposited in the State Treasury to the credit of the State Procurement Fund and shall be appropriated, budgeted, and allotted in accordance with Sections 41-4-80 to 41-4-96, inclusive and 41-19-1 to 41-19-12, inclusive, and only in amounts stipulated in general appropriations bills and other appropriation bills.

(f) The Chief Procurement Officer may make purchases, contracts, or leases for any county, instrumentality of a county, municipal corporation, local board of education, or other local public body upon the request of the local public body.

(g) The Chief Procurement Officer shall adopt rules consistent with this article to govern the procurement of supplies and services procured by the state.

**Section 41-4-123. Delegation of authority.**

Subject to rules adopted under this article, the Chief Procurement Officer may delegate his or her authority to designees or to any department, agency, or official.

**Section 41-4-124. Transfer of rights, duties, etc. to Chief Procurement Officer; applicability of article; procedures for procurement of supplies or services.**

(a) Except as otherwise provided in this article, all rights, power, duties, and authority relating to the procurement of supplies and services now vested in, or exercised by, any governmental body under existing law are transferred to the Chief Procurement Officer.

(b) The following governmental bodies are subject to this article except as it relates to the purchase of professional services and the oversight and authority of the Chief Procurement Officer, but shall establish and maintain procurement offices and personnel and shall adopt rules as may be necessary to comply with this article:

- (1) All educational and eleemosynary institutions governed by a board of trustees or similar governing body.
- (2) The Retirement Systems of Alabama.
- (3) The Department of Mental Health.

(c) The Alabama Department of Transportation is subject to this article except as it relates to the purchase of professional services and shall adopt rules governing the purchase of professional services by the department which are consistent with the principles contained in this article and promote fairness, competition, transparency, integrity, and value in the procurement process.

(d) The procurement of any supplies, services, or professional services by a district attorney or sheriff shall be solely governed by Article 3, commencing with Section 41-16-50 of Chapter 16.

(e) The procurement of any supplies or services by a legislative agency or judicial agency shall be solely governed by procedures adopted by the Legislative Council for all legislative agencies and by rules adopted by the Supreme Court of Alabama for all judicial agencies. The procedures adopted shall be consistent with any applicable requirements of the Constitution of Alabama of 2022, and shall be established in accordance with the underlying purposes and policies of promoting responsible and efficient use of public funds dedicated and appropriated to the agencies for their use, providing consistency of application of rules and requirements across all agencies within the applicable branch of state government, and promoting fairness, competition, transparency, integrity, and value in the procurement process. In no case may the legislative and judicial departments of the state adopt procedures that conflict with the laws of this state regarding

the public disclosure of the use of public funds and the transparency of public expenditures, or that otherwise conflict with state law regarding public records and public access to those records. Except for the requirement to act in good faith, no other provision of this article shall apply to legislative or judicial agencies; provided, that the legislative and judicial departments may adopt all or any part of this article and its accompanying rules.

(f) The procurement of any supplies or services by the Alabama State Port Authority shall be solely governed by procedures adopted by the Board of Directors of the Alabama State Port Authority. The procedures adopted shall be consistent with any applicable requirements of the Constitution of Alabama of 2022, and shall be established in accordance with the underlying purposes and policies of promoting responsible and efficient use of the funds of the Alabama State Port Authority, providing consistency of application of rules and requirements across all agencies within the applicable branch of state government, and promoting fairness, competition, transparency, integrity, and value in the procurement process. Except for the protection of information otherwise legally considered commercially confidential, sensitive, or of a nature that upon release would harm the competitive advantage of itself or its customers, concessionaires, lessees, or suppliers, the Alabama State Port Authority may not adopt procedures that conflict with the laws of this state regarding public records and public access to those records. Except as provided in this subsection and the requirement to act in good faith, no other provision of this article shall apply to the Alabama State Port Authority; provided, however, that the Alabama State Port Authority may adopt all or any part of this article and its accompanying rules.

#### **Section 41-4-125. Employment of Attorneys.**

(a)(1) Except as otherwise provided in this section, attorneys retained to represent the state in litigation shall be appointed by the Attorney General in consultation with the Governor from a list of attorneys maintained by the Attorney General. All attorneys interested in representing the state may apply and shall be included on the list. The selection of the attorney or law firm shall be based upon the level of skill, experience, and expertise required in the litigation and the fees charged by the attorney or law firm shall be taken into consideration so that the state receives the best representation for the funds paid. Fees shall be negotiated and approved by the Governor in consultation with the Attorney General. Maximum fees paid for legal representation that does not involve a contingency fee contract may be established by executive order of the Governor.

(2) Attorneys retained by any state purchasing entity to render nonlitigation legal services shall be selected by the entity from a list of attorneys maintained by the Legal Advisor to the Governor. All attorneys interested in representing any purchasing state entity may apply and shall be included on the list. The selection of the attorney or law firm shall be based upon the level of skill, experience, and expertise required for the services, but the fees charged by the attorney or law firm shall be taken into consideration so that the state entity shall receive the best representation for the funds paid. Fees for the services shall be negotiated by the state entity requiring the services and shall be subject to review and approval of the Governor or the Director of Finance when so designated by the Governor.

(b) This article does not apply to either of the following:

- (1) The appointment of attorneys or experts by a court.
- (2) The retention of experts by the state for the purposes of litigation or avoidance of litigation.

(c) Nothing in this section shall be construed as altering or amending the Governor's authority to retain attorneys under Section 36-13-2; provided, the Governor shall select the attorneys from the list maintained by the Attorney General.

(d)(1) A governmental body may not enter into a contingency fee contract with any attorney or law firm unless the contracting agency makes a written determination prior to entering into a contingency fee contract that contingency fee representation is both cost effective and in the public interest. Any written determination shall include specific findings for each of the following factors:

- a. Whether there are sufficient and appropriate legal and financial resources within the state to handle the matter without a contingency contract.
- b. The expended time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the attorney services properly.
- c. The geographic area where the attorney services are to be provided.
- d. The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases.

(2) Subject to subdivision (3), the state may not enter into a contingency fee contract that provides for the contingency fee counsel to receive an aggregate contingency fee calculated from the gross recovery resulting from a judgment or settlement in each action, exclusive of expenses, in excess of the total of all of the following:

- a. Twenty-two percent of any recovery that does not exceed ten million dollars (\$10,000,000); plus
- b. Twenty percent of any portion of the recovery that exceeds ten million dollars (\$10,000,000) but does not exceed twenty-five million dollars (\$25,000,000); plus
- c. Sixteen percent of any portion of the recovery that exceeds twenty-five million dollars (\$25,000,000) but does not exceed fifty million dollars (\$50,000,000); plus
- d. Twelve percent of any portion of the recovery that exceeds fifty million dollars (\$50,000,000) but does not exceed seventy-five million dollars (\$75,000,000); plus
- e. Eight percent of any portion of the recovery between seventy-five million dollars (\$75,000,000) and one hundred million dollars (\$100,000,000); plus
- f. Seven and one-tenth (7.1) percent of any portion of the recovery exceeding one hundred million dollars (\$100,000,000).

(3) The aggregate fee paid under a contingency fee contract may not exceed seventy-five million dollars (\$75,000,000).

(4) All litigation expenses incurred by the contingency fee counsel shall be paid or reimbursed upon approval on a monthly basis upon presentation of documentation of the expenses to the contracting agency.

(5) The Attorney General may certify in writing to the Governor that, in the opinion of the Attorney General, an issue affecting the public health, safety, convenience, or economic welfare of the state exists that justifies that the contingency fee limitations set forth in subdivision (2) or (3) be suspended in the case of a particular contingency fee contract. Upon receipt of the written certification, the Governor, by the issuance of an executive order, may waive the limitations with respect to the specified contingency fee contract.

(6) A governmental body may not enter into a contingency fee contract unless all of the following requirements are met throughout the entire contract period, including any extensions of the period:

- a. A government attorney has complete control over the course and conduct of the case.
- b. A government attorney with supervisory authority is personally involved in overseeing the litigation.
- c. A government attorney retains veto power over any decisions made by the contingency fee counsel.
- d. After giving reasonable notice to the contingency fee counsel, any defendant that is the subject of the litigation may contact the lead government attorney directly unless directed to do otherwise by that attorney. Contingency fee counsel may participate in the discussion with the lead government attorney or attorneys unless, after consultation with contingency fee counsel, the lead government attorney agrees to the discussion without contingency fee counsel being present.
- e. A government attorney with supervisory authority for the case shall attend all settlement conferences.
- f. Decisions regarding settlement of the case shall be reserved exclusively to the discretion of the government attorney and the state.

(7) The Attorney General shall develop a standard addendum to every contract for contingent fee attorney services that shall be used in all cases, describing in detail what is expected of both the contingency fee counsel and the state, including, without limitation, the requirements listed in subdivision (6).

(8) Copies of any executed contingency fee contract and the contracting agency's written determination to enter into the contingency fee contract with the contingency fee counsel and any payment of any contingency fees shall be posted online as provided in Section 41-4-65.

(9) Every contingency fee counsel, from the inception of the contingency fee contract until at least four years after the contract expires or is terminated, shall maintain detailed current records, including documentation of all time records, expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of the attorney

services. The contingency fee counsel shall make all the records available for inspection and copying upon request by the Governor, Attorney General, or contracting agency. In addition, the contingency fee counsel shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the contract in six-minute increments and, upon request, shall provide promptly these records to the Governor, Attorney General, or contracting agency.

(10) Any contingency fee paid to a private attorney or law firm shall be paid from the State Treasury from the funds recovered as a result of the contingency fee contract within 30 days of receipt of the recovery unless ordered to do otherwise by a court with jurisdiction over the litigation subject to the contingency fee contract.

#### **Section 41-4-125.01. Selection of physicians retained to provide medical services to the state.**

Physicians retained to provide medical services to the State of Alabama shall be selected by the purchasing state entity from a list of qualified physicians maintained by the Alabama Medical Licensure Commission. All physicians interested in providing medical services to the State of Alabama may apply and shall be included on the listing.

#### **Section 41-4-126. Exemptions.**

(a) Unless otherwise ordered by rule, with approval of the Governor, the following supplies and services need not be procured through the Division of Procurement and are exempt from the competitive requirements of this article:

- (1) Works of art for museum and public display.
- (2) Published books in any format such as digital, audio, or hardcopy; maps; periodicals; and technical pamphlets.
- (3) Utility services where no competition exists or where rates are fixed by law.
- (4) Purchases of alcoholic beverages by the Alcoholic Beverage Control Board.
- (5) Purchases of products made or manufactured by the blind or visually handicapped under the direction or supervision of the Alabama Institute for Deaf and Blind in accordance with Chapter 2 of Title 21.
- (6) Photographs purchased from a federal agency.
- (7) Barter transactions by the Department of Corrections.
- (8) The purchase of insurance and supplies or services related to the purchase of insurance.
- (9) Supplies and services that by their very nature are impossible to award by competitive process, as determined by the Chief Procurement Officer.

(b) Any state department or agency whose principal business is honorariums is exempted from this chapter on purchases and contracts for services made by that department or agency.

(c) Nothing in this article is intended to repeal or limit any provision of Section 23-1-40 or Article 5 or Article 6 of Chapter 2 of Title 23, commencing with Section 23-2-140, relating to the

procurement authority of the State Department of Transportation and the Alabama Toll Road, Bridge and Tunnel Authority. To the extent any provision contained in this article conflicts with Section 23-1-40 or Article 5 or Article 6 of Chapter 2 of Title 23, the latter governs.

(d) Nothing in this article repeals or limits any provision of Section 41-4-400, relating to the procurement authority of the Division of Construction Management. To the extent any provision contained in this article conflicts with Section 41-4-400, the latter governs.

(e) Nothing in this article repeals or limits any provision of Section 14-7-8, relating to the procurement authority of Alabama Correctional Industries. To the extent any provision contained in this article conflicts with Section 14-7-8, the latter governs.

(f) This article does not apply to any state authority, board, or other entity with respect to contracts relating to the issuance of debt that is required to be repaid from sources other than state funds.

(g) This article does not apply to direct health care services provided by the Alabama Department of Public Health.

(h) Nothing in this article applies to the administration of health benefit plans by a governmental body and supplies or services related thereto.

(i) Except for capital equipment, this article does not apply to the purchase by a public hospital of medical products, medical supplies, medical devices, services, implants, pharmaceuticals, fluids, gases, or any other medical products which are used in the course of treating patients, or to support the treatment of patients.

(j)(1) Except as provided in subdivision (2), the purchase of supplies or services negotiated on behalf of two-year and four-year colleges and universities may be awarded without competitive bidding, provided that no state revenues, appropriations, or other state funds are expended or committed and when it is determined by the respective board that financial benefits will accrue to the institution.

(2) When an Alabama business entity organized under the laws of this state is available to supply the product or service purchased or negotiated under subdivision (1), the Alabama business entity shall have preference unless the product or service supplied by a foreign corporation is substantially different or superior to the product or service supplied by the Alabama business entity.

(3) Public notice shall be provided by the purchasing agency within 10 days of the execution of a contract under this subsection. The public notice shall include, at a minimum, the terms and conditions of any of the supplies or services that are contracted through negotiation without being competitively bid and the name and address of the recipient of the contract.

(k) This article does not apply to purchases and contracts for the repair of equipment used in the construction and maintenance of highways by the Department of Transportation.

(l) This article does not apply to public works projects governed by Title 39.

(m) This article does not apply to the purchase by the Department of Transportation of road building materials for transportation infrastructure in the state. Road building materials may be purchased from private landowners or commercial providers from the nearest or most cost-effective source available for the particular application. Road building materials include dirt, gravel, stone, slag, or borrow materials, in natural state or processed by crushing, grading, or screening processes.

(n) This article does not apply to purchases of supplies and services for the maintenance and operation of highway infrastructure and right-of-way by the Department of Transportation.

(o) Nothing in this article is intended to repeal or limit any provision of Article 2, Chapter 1, Title 23, relating to the powers and authority of the Department of Transportation. To the extent any provision contained in this article conflicts with Article 2, Chapter 1, Title 23, the latter governs.

(p) Governmental bodies may purchase supplies from any vendor that offers the item at a price at least ten percent below the price established on a statewide contract by the Division of Procurement for the same item, provided that each purchase, whether for a single item or multiple items, does not exceed an amount established by rules of the Chief Procurement Officer. The Division of Procurement shall confirm that the terms and conditions of the purchases are substantially similar to those of the statewide contract for the same item prior to the approval of any purchase under this subsection. Any purchase that would be directly connected to any information technology network used by the state shall require prior approval by the Secretary of Information Technology. If the purchaser is to take possession of the purchased supplies at the vendor's physical location, any acquisition of supplies under this subsection may be purchased only from vendors physically located within the state. The price of any supplies purchased under this subsection shall be the market price readily available to the public at large. The acquisition of supplies under this subsection is subject to the supervision and administration of the Division of Procurement.

(q) Nothing in this article is intended to repeal or limit any provision of Chapter 61E of Title 16, relating to the powers and authority of the Department of Education to enter into joint purchasing agreements on behalf of educational institutions. To the extent any provision contained in this article conflicts with Chapter 61E of Title 16, the latter governs.

(r) Nothing in this article shall be construed as repealing Section 9-2-106 or Section 9-2-107.

(s) This article does not apply to purchases by the Alabama Department of Rehabilitation Services of supplies and services for the Alabama Department of Rehabilitation Services consumers.

(t) This article does not apply to the Alabama Medicaid Agency for purposes of the selection of professional service providers for contracts with physicians, pharmacists, dentists, optometrists, opticians, nurses, and other health professionals which involve only service on agency task forces, boards, or committees.

#### **Section 41-4-127. Rulemaking authority.**

(a) The Chief Procurement Officer, with approval of the Director of Finance and the Governor, shall adopt rules to implement and administer this article. The rules shall be made in accordance with the applicable provisions of the Administrative Procedure Act.

(b) The Chief Procurement Officer may not delegate the power to adopt rules.

(c) A rule may not change any commitment, right, or obligation of the state or of a contractor under a contract in existence on the effective date of the adoption of the rule.

#### **Section 41-4-128. Collection and preparation of statistical data.**

The Chief Procurement Officer shall collect and prepare statistical data concerning the procurement of all supplies and services and employ trained personnel as may be necessary to carry out this function. All using agencies shall furnish reports as required by the Chief Procurement Officer concerning usage, needs, and stocks on hand. The Chief Procurement Officer may prescribe forms to be used by the using agencies in requisitioning, ordering, and reporting of supplies and services.

#### **Section 41-4-129. Procurement Advisory Council.**

(a) The Chief Procurement Officer may establish a Procurement Advisory Council. If created, the council, upon adequate public notice, shall meet at least once a year for the discussion of problems and recommendations for improvement of the procurement process. When requested by the Chief Procurement Officer, the council shall conduct studies, research, analyses, and make reports and recommendations with respect to subjects or matters within the jurisdiction of the Chief Procurement Officer. The council shall consist of qualified representatives of state and local government and other persons selected by the Chief Procurement Officer.

(b) The Chief Procurement Officer may appoint advisory groups to assist with specifications or procurement in specific areas and to assist with any other matter within the authority of the Chief Procurement Officer.

## **ARTICLE 5, DIVISION 3** **SOURCE SELECTION AND CONTRACT FORMATION.**

- 41-4-130.** Definitions.
- 41-4-131.** Methods for Awarding State Contracts.
- 41-4-132.** Competitive Sealed Bidding Procedures.
- 41-4-133.** Competitive Sealed Proposals.
- 41-4-134.** Small Purchase Procedures.
- 41-4-135.** Award of Supply or Service Contracts Without Competition.
- 41-4-136.** Emergency Procurements.
- 41-4-137.** Special Procurement for Small Purchases.
- 41-4-138.** Cancellation or Rejection of Bids, Proposals, Etc.
- 41-4-139.** Written Determination of Nonresponsibility of Bidder or Offeror.
- 41-4-140.** Prequalification of Prospective Suppliers.
- 41-4-141.** Request of Price or Cost Information from Bidders or Offerors.
- 41-4-142.** Vendors, Contractors, and Affiliates to Comply with State and Local Tax Requirements; Certification.
- 41-4-143.** Types of Contracts.
- 41-4-144.** Contract Periods; Renewal or Extension Provisions.
- 41-4-145.** Inspection of Sites and Systems of Contractors or Subcontractors.
- 41-4-146.** Audit or Examination of Books and Records; Recordkeeping Requirements.
- 41-4-147.** Finality of Determinations.
- 41-4-148.** Collusion or Other Anti-Competitive Practices.
- 41-4-149.** Maintenance of Contract Records.

### **Section 41-4-130. Definitions.**

As used in this division, the following terms shall have the following meanings:

- (1) **COST-REIMBURSEMENT CONTRACT.** A contract under which a contractor is reimbursed for costs that are allowable and allocable in accordance with the contract terms and the provisions of this article, and a fee, if any.
- (2) **ESTABLISHED CATALOGUE PRICE.** The price included in a catalogue, price list, schedule, or other form that does all of the following:
  - a. Is regularly maintained by a manufacturer or contractor.
  - b. Is either published or otherwise available for inspection by customers.
  - c. States prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.
- (3) **INVITATION TO BID.** All documents, whether attached or incorporated by reference, utilized for soliciting bids.

(4) PREFERRED VENDOR. A person that is granted preference priority according to the following:

- a. Priority #1. Produces or manufactures the product within the state.
- b. Priority #2. Has an assembly plant or distribution facility for the product within the state.
- c. Priority #3. Is organized for business under the applicable laws of the state as a corporation, partnership, or professional association and has maintained at least one retail outlet or service center for the product or service within the state for not less than one year prior to the deadline date for the competitive bid.
- d. Priority #4. Is physically located in the state and is more than 50 percent owned by a person who was discharged or released under conditions other than dishonorable and who has at least 24 months of active service in the United States military, naval, or air service, or who has less than 24 months of active service in any of the foregoing and was separated with a service-connected disability, or a national guardsman or reservist who completed active federal service for purposes other than training or who served at least 180 days of continuous service for purposes other than training.

(5) PURCHASE DESCRIPTION. The words used in a solicitation to describe the supplies or services to be purchased. The term includes any specifications attached to, or made a part of, the solicitation.

(6) REQUEST FOR PROPOSALS. All documents, whether attached or incorporated by reference, that are used for soliciting proposals.

(7) RESPONSIBLE BIDDER OR OFFEROR. A person who has the capability in all respects to perform fully the contract requirements and who has the integrity and reliability to assure good faith performance.

(8) RESPONSIVE BIDDER OR OFFEROR. A person who has submitted a bid or offer that conforms in all material respects to the invitation for bid or request for proposal.

### **Section 41-4-131. Methods for awarding state contracts.**

(a) Unless otherwise authorized by law, all state contracts shall be awarded by the use of one of the following methods:

- (1) Competitive sealed bids, pursuant to Section 41-4-132.
- (2) Competitive sealed proposals, pursuant to Section 41-4-133.
- (3) Small purchase procedures pursuant to Section 41-4-134.
- (4) A sole source procurement pursuant to Section 41-4-135.
- (5) An emergency procurement pursuant to Section 41-4-136.
- (6) A special procurement pursuant to Section 41-4-137.

(b) In the event a bid or offer is received for the supplies or services from a person deemed to be a responsible bidder or offeror and a preferred vendor and the bid is no more than five percent greater than the bid of the lowest responsible bidder or offeror who is not deemed to be a preferred vendor, the Chief Procurement Officer or purchasing agency may award the contract to the preferred vendor.

**Section 41-4-132. Competitive sealed bidding procedures.**

(a) Except as otherwise provided in this division, contracts shall be awarded by competitive sealed bidding.

(b) An invitation to bid shall be issued and shall include a purchase description and all contractual terms and conditions applicable to the procurement.

(c) Adequate public notice of the invitation to bid shall be given a reasonable time prior to the date set forth in the invitation for the opening of bids, in accordance with rules adopted under this article.

(d) Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation to bid. The amount of each bid, the name of each bidder, and any other information required by rule shall be recorded. The record and each bid shall be open to public inspection to the extent required by Section 41-4-115.

(e) Bids shall be unconditionally accepted without alteration or correction, except as authorized in this article. Bids shall be evaluated based on the requirements set forth in the invitation to bid, which may include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Any criteria that will affect the bid price and will be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation to bid shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluations that are not set forth in the invitation to bid.

(f)(1) When a bid is submitted that contains an error, the Chief Procurement Officer or head of a purchasing agency may authorize the correction or withdrawal of the bid or may cancel the award of the contract. The authorization of the correction or withdrawal shall be done in accordance with rules adopted by the Chief Procurement Officer.

(2) After a bid has been opened, with the exception of price negotiations with the lowest responsible bidder, no changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition shall be permitted.

(g)(1) Unless there is a compelling reason to reject bids, as prescribed by rules, notice of intent to award to the lowest responsive and responsible bidder whose bid meets the requirements set

forth in the invitation to bid shall be given by posting the notice at a location specified in the invitation to bid. Before posting the notice of intent to award, the Chief Procurement Officer or head of the purchasing agency may negotiate with the lowest responsive and responsible bidder to lower the bid price within the scope of the invitation to bid. The invitation to bid and notice of intent to award shall contain a statement of the bidder's right to protest.

(2) The Chief Procurement Officer may award multiple purchase contracts resulting from a single invitation to bid where the specifications of the items of supplies or services intended to be purchased by a requisitioning agency or agencies are determined, in whole or in part, by technical compatibility and operational requirements. In order to make multiple awards under this subdivision, the awarding authority shall include in the invitation to bid a notice that multiple awards may be made and the specific technical compatibility or operational requirements necessitating multiple awards. Multiple awards of purchase contracts with unique technical compatibility or operational specifications shall be made to the lowest responsible bidder complying with the unique technical compatibility or operational specifications. The requisitioning agency shall provide the awarding authority with the information necessary for it to determine the necessity for the award of multiple purchase contracts under this subdivision.

(h) When it is considered impractical by the Chief Procurement Officer to initially prepare a purchase description to support an award based on price, an invitation to bid may be issued requesting the submission of unpriced offers to be followed by an invitation to bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

(i)(1) Before soliciting bids, the Chief Procurement Officer may authorize issuance of a request for qualifications from prospective bidders. The request shall contain, at a minimum, a description of the scope of work to be solicited by the invitation for bids, the deadline for submission of information, and how prospective bidders may apply for consideration. The request shall require information concerning the prospective bidders' product specifications, qualifications, experience, and ability to perform the requirements of the contract. Adequate public notice of the request for qualifications shall be given in the manner provided in subsection (c).

(2) After receipt of the responses to the request for qualifications from prospective bidders, all qualified bidders, as determined by the Chief Procurement Officer, shall have an opportunity to bid. The determination regarding which bidders are qualified is not subject to review.

### **Section 41-4-133. Competitive sealed proposals.**

(a)(1) A contract may be entered into by competitive sealed proposals when the Chief Procurement Officer or the head of a purchasing agency, in accordance with rules, determines that the use of competitive sealed bidding is either not practicable or not advantageous to the state. Unless determined otherwise by the Chief Procurement Officer, professional services shall be procured by competitive sealed proposals.

(2) The Chief Procurement Officer may determine by rule when it is either not practicable or advantageous to the state to procure specified types of supplies or services by competitive sealed bidding.

(b) Proposals shall be solicited through a request for proposals.

(c) Adequate public notice of the request for proposals shall be given in the same manner as provided in subsection (c) of Section 41-4-132.

(d) Proposals shall be opened so as to avoid disclosure of contents to competing offerors prior to contract award. A register of proposals shall be prepared in accordance with rules and shall be open for public inspection after award of the contract.

(e) A request for proposals shall state the relative importance of price and other factors and subfactors, if any.

(f) Discussions may be conducted with responsible offerors who submit proposals determined by the Chief Procurement Officer or purchasing agency to be reasonably competitive for award to assure full understanding of, and responsiveness to, the solicitation requirements. The determination of the Chief Procurement Officer or purchasing agency is not subject to review. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions of proposals may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there may not be disclosure of any information derived from proposals submitted by competing offerors.

(g) Contracts shall be awarded to the responsible offeror whose proposal conforms to the solicitation and is determined in writing to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. Public notice of the award of a contract shall be promptly given.

(h) The Chief Procurement Officer may provide debriefings that furnish the basis for the source selection decision and contract award.

(i)(1) Before soliciting proposals, the Chief Procurement Officer may authorize issuance of a request for qualifications from prospective offerors. The request shall contain, at a minimum, a description of the scope of work to be solicited by the request for proposals, the deadline for submission of information, and how prospective offerors may apply for consideration. The request shall require information concerning the prospective offeror's product specifications, qualifications, experience, and ability to perform the requirements of the contract. Adequate public notice of the request for qualifications shall be given in the same manner as provided in subsection (c) of Section 41-4-132.

(2) After receipt of the responses to the request for qualifications from prospective offerors, all qualified offerors, as determined by the Chief Procurement Officer, shall have an opportunity to submit proposals. The determination regarding which offerors are qualified is not subject to review.

(3) If a professional service provider is prohibited by law or policy from submitting proposals in response to a request for proposals, the Chief Procurement Officer or purchasing agency shall utilize the request for qualifications process to determine the awardee.

(j)(1) In addition to the requirements of Section 34-11-35.1(d) or any rule adopted thereunder, the professional services of architects, landscape architects, engineers, land surveyors, and geoscientists shall be procured in accordance with competitive, qualification-based selection policies and procedures. Selection shall be based on factors to be developed by the procuring state entity which may include, among others, the following:

- a. Specialized expertise, capabilities, and technical competence, as demonstrated by the proposed approach and methodology to meet project requirements.
- b. Resources available to perform the work, including any specialized services within the specified time limits for the project.
- c. Record of past performance, quality of work, ability to meet schedules, cost control, and contract administration.
- d. Availability to and familiarity with the project locale.
- e. Proposed project management techniques.
- f. Ability and proven history in handling special project contracts.

(4) Notice of a need for professional services shall be widely disseminated to the respective professional community in a full and open manner. Procuring state entities shall evaluate professionals that respond to the notice of need based on the state entity's qualification-based selection process criteria. The procuring state entity shall then make a good faith effort to negotiate a contract for professional services from the selected professional after first discussing and refining the scope of services for the project with the professional.

(5) For those governmental bodies subject to the requirements of this article, where the Division of Construction Management of the Department of Finance has set a fee schedule for the professional services sought, the fees shall not exceed the schedule without approval of the Director of the Division of Construction Management and the Governor.

#### **Section 41-4-134. Small purchase procedures.**

Any procurement not exceeding the small purchase amount established by rule may be made in accordance with small purchase procedures. A procurement may not be artificially divided so as to constitute a small purchase under this section.

#### **Section 41-4-135. Award of supply or service contracts without competition.**

A contract may be awarded for a supply or service without competition when the Chief Procurement Officer determines in writing that there is only one source for the required supply or service. In any event, sole source contracts may not exceed one year unless the Chief Procurement Officer determines in writing that there continues to be only one source for the required supply or service.

#### **Section 41-4-136. Emergency procurements.**

Notwithstanding any other provision in this article, the Chief Procurement Officer or the head of a purchasing agency may make emergency procurements when there is a threat to public health, welfare, or safety under emergency conditions, as defined by rule. Emergency procurements made under this section shall be made with as much competition as is practicable under the circumstances. The authority to make emergency procurements may not be delegated. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

#### **Section 41-4-137. Special procurement for small purchases.**

Notwithstanding any other provision of this article, the Chief Procurement Officer or the head of a purchasing agency, with prior public notice, may initiate a procurement above the small purchase amount specified in Section 41-4-134 when the officer or agency head determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest. Any special procurement under this section shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the procurement and for the selection of the particular contractor shall be included by the Chief Procurement Officer or the head of the purchasing agency in the contract file. The Chief Procurement Officer shall publish an annual report, subject to Section 41-4-115, that describes all determinations made under this section during the prior calendar year.

#### **Section 41-4-138. Cancellation or rejection of bids, proposals, etc.**

When it is determined to be in the best interest of the state, as specified by rule, an invitation to bid, a request for proposals, or other solicitation under this article may be cancelled, and any or all bids or proposals received may be rejected.

#### **Section 41-4-139. Written determination of nonresponsibility of bidder or offeror.**

(a) A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with rules adopted by the Chief Procurement Officer. The unreasonable failure of a bidder or offeror to promptly supply the information in connection with an inquiry with respect to responsibility for may be grounds for a determination of nonresponsibility with respect to the bidder or offeror.

(b) Confidential information furnished by a bidder or offeror under this section may not be disclosed outside of the Division of Procurement or the purchasing agency without the prior written consent of the bidder or offeror.

**Section 41-4-140. Prequalification of prospective suppliers.**

Prospective suppliers may be prequalified for particular types of supplies or services. The method of submitting prequalification information and the information required in order to be prequalified shall be determined by the Chief Procurement Officer.

**Section 41-4-141. Request of price or cost information from bidders or offerors.**

The Chief Procurement Officer may request factual information reasonably available to the bidder or offeror to substantiate that the price or cost offered, or some portion of it, is reasonable when either of the following occurs:

- (1) The price is not any of the following:
  - a. Based on adequate price competition.
  - b. Based on established catalogue or market prices.
  - c. Set by law or rule.
- (2) The price or cost exceeds an amount established by rule.

**Section 41-4-142. Vendors, contractors, and affiliates to comply with state and local tax requirements; certification.**

(a) For the purpose of this section, the following terms shall have the respective meanings ascribed by this section:

- (1) **AFFILIATE.** A related party as defined in subsection (b) of Section 40-23-190 as that provision exists on January 1, 2004.
- (2) **STATE DEPARTMENT OR AGENCY.** Every state office, department, division, bureau, board, or commission of the State of Alabama.

(b) A state department or agency may not contract for the purchase or lease of supplies from a vendor, contractor, or an affiliate of a vendor or contractor, unless that vendor, contractor, and all of its affiliates that make sales for delivery into Alabama or leases for use in Alabama are properly registered, collecting, and remitting Alabama state and local sales and use tax, or simplified sellers use tax, and lease tax, as provided for by Article 4 of Chapter 12 of Title 40 and Articles 1, 2, and 4 of Chapter 23 of Title 40, or by any local act or ordinance.

(c) Each vendor, contractor, or affiliate of a vendor or contractor that is offered a contract to do business with a state department or state agency shall be required to certify that the vendor or affiliate is appropriately registered to collect and remit sales and use tax, or simplified sellers use

tax and lease tax as required by this section and submit to that state department or agency certification required by the Alabama Department of Revenue.

(d) Every bid submitted and contract executed by the state shall contain a certification by the bidder or contractor that the bidder or contractor is not barred from bidding for or entering into a contract under this section and that the bidder or contractor acknowledges that the contracting state agency may declare the contract void if the certification completed is false.

(e) Each vendor or contractor that sells or leases supplies to a state department or agency, and each affiliate of that vendor or contractor that makes sales for delivery into Alabama, shall be required to collect and remit the Alabama sales and use tax, or simplified sellers use tax, and lease tax on all its sales and leases into the state.

#### **Section 41-4-143. Types of contract.**

(a) Subject to the limitations of subsection (b), any type of contract that will promote the bests interests of the state may be used under this article.

(b)(1) The use of a cost-plus-a-percentage-of-cost contract is prohibited.

(2) A cost-reimbursement contract may be used only when a determination is made in writing that either of the following apply:

- a. The cost-reimbursement contract is likely to be less costly to the state than any other type of contract.
- b. It is impracticable to obtain the supplies or services required except under a cost-reimbursement contract.

#### **Section 41-4-144. Contract periods; renewal or extension provisions.**

(a) Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time that is in the best interests of the state, so long as the terms of the contract and the conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal year at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds.

(b) A multi-year contract may be used when the estimated requirements cover the period of the contract and are reasonably firm and continuing, and the contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement.

(c) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in

the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for that purpose.

**Section 41-4-145. Inspection of sites and systems of contractors and subcontractors.**

The Chief Procurement Officer or his or her designee, at reasonable times, may inspect a part of the plant, the place of business, or the logical and physical electronic systems of a contractor or any subcontractor that is related to the performance of any contract awarded or to be awarded by the state.

**Section 41-4-146. Audit or examination of books and records; recordkeeping requirements.**

In addition to the authority of the Department of Examiners of Public Accounts, as set forth under Chapter 5A of Title 41, the Department Finance, at reasonable times and places, may audit or examine the books and records of any person who has submitted data in substantiation of offered prices under Section 41-4-141 to the extent that the books and records relate to that data. Any person who receives a contract, change order, or contract modification for which data is required under Section 41-4-141 shall maintain the books and records that relate to the cost or pricing data for three years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

**Section 41-4-147. Finality of determinations.**

The determinations required by subsection (f) of Section 41-4-132, subsection (a) or (g) of Section 41-4-133, Section 41-4-135, Section 41-4-136, Section 41-4-137, subsection (a) of Section 41-4-139, Section 41-4-141, Section 41-4-143, and subsection (b) of Section 41-4-144 are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to the law.

**Section 41-4-148. Collusion or other anti-competitive practices.**

When for any reason collusion or other anti-competitive practices are suspected during the procurement process, a notice of the relevant facts shall be transmitted to the Attorney General and, if applicable, to the Ethics Commission.

**Section 41-4-149. Maintenance of contract records.**

(a) The Chief Procurement Officer shall maintain a record listing all contracts made under Section 41-4-135, 41-4-136, or 41-4-137 for a minimum of one year. The record shall contain all of the following:

- (1) Each contractor's name.
- (2) The amount and type of each contract.
- (3) A listing of the supplies or services procured under each contract.

(b) A copy of the record shall be available for public inspection, except where disclosure would be detrimental to the safety or security of persons or property or to the public interest as determined by the Chief Procurement Officer.

## **ARTICLE 5, DIVISION 4. SPECIFICATIONS.**

**41-4-150. Definition.**

**41-4-151. Standards and use of specifications.**

### **Section 41-4-150. Definition.**

As used in this division, the term “specification” means any description of the physical or functional characteristics, or of the nature of a supply or service, and may include a description of any requirement for inspecting, testing, or preparing a supply or service for delivery.

### **Section 41-4-151. Standards and use of specifications.**

(a) The Chief Procurement Officer, by rule, may set standards for the preparation, maintenance, and content of specifications for supplies or services required by the state.

(b) The Chief Procurement Officer shall monitor the use of specifications for supplies or services required by a purchasing agency.

(c) The Chief Procurement Officer shall obtain expert advice and assistance from personnel of using agencies in the development of specifications and may delegate in writing to a using agency the authority to prepare and utilize its own specifications.

(d) All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the state's needs and shall not be unduly restrictive.

(e) Specifications may be prepared by persons other than state employees when necessary. The Chief Procurement Officer shall exercise diligence to assure that any third party who prepares specifications or requirements does not have a conflict of interest or an unfair competitive advantage in any subsequent procurement. Vendors that participate in the drafting of specifications for the state shall disclose the same on its vendor disclosure statement required by Section 41-16-82.

## **ARTICLE 5, DIVISION 5. MODIFICATION AND TERMINATION OF CONTRACTS FOR SUPPLIES AND SERVICES.**

**41-4-155.** Rules for adjusting contract provisions; remedies; justification for variations.

**Section 41-4-155. Rules for adjusting contract provisions; remedies; justification for variations.**

(a) The Chief Procurement Officer may adopt rules permitting or requiring the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate covering both of the following subjects:

- (1) The unilateral right of the state to order in writing both of the following:
  - a. Changes in the work within the scope of the contract.
  - b. The temporary stopping of work or delaying performance.
- (2) Variations occurring between estimated quantities of work in a contract and actual quantities.

(b)(1) Adjustments in price pursuant to clauses adopted under subsection (a) shall be computed in one or more of the following ways:

- a. By agreement on a fixed-price adjustment before commencement of the performance or as soon as practicable.
- b. By unit prices specified in the contract or subsequently agreed upon.
- c. By the costs attributable to the events or situations under the clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon.
- d. In any other manner as the contracting parties may mutually agree.
- e. In the absence of agreement by the parties, by a unilateral determination by the state of the costs attributable to the events or situations under the clauses with adjustment of profit or fee.

(2) A contractor shall be required to submit cost or pricing data if any adjustment in the contract price is subject to Section 41-4-141.

(c) The Chief Procurement Officer may adopt rules to implement this division, including rules permitting or requiring the inclusion in state contracts of clauses providing for appropriate remedies covering all of the following subjects:

- (1) Specified excuses for delay or nonperformance.
- (2) Termination of the contract for default.
- (3) Termination of the contract in whole or in part for the convenience of the state.

(d) The Chief Procurement Officer may vary the clauses adopted by rule under subsection (a) and (c) for inclusion in any particular state contract, so long as any variation is supported by a

written determination that states the circumstances justifying the variation. Notice of any material variation shall be stated in the invitation to bid or request for proposals.

## **ARTICLE 5, DIVISION 6. LEGAL AND CONTRACTUAL REMEDIES**

### **Part A. Resolution of Controversies.**

**41-4-160.** Written procedures for exempted governmental bodies to resolve controversies.

**41-4-161.** Filing of protests; resolution; administrative review.

**41-4-162.** Suspension or debarment of persons or entities.

**41-4-163.** Dispute resolution process.

**41-4-164.** Appeals.

### **Part B. Solicitations or Awards in Violation of Law.**

**41-4-165.** Applicability of part.

**41-4-166.** Solicitation or proposed award of contract in violation of law—Cancellation or revision.

**41-4-167.** Solicitation or proposed award of contract in violation of law—Ratification and affirmation; termination; voiding of contract.

**41-4-168.** Civil action to enjoin execution of contract.

### **Section 41-4-160. Written procedures for exempted governmental bodies to resolve controversies.**

(a) Contracts of a governmental body listed under subsection (b) of Section 41-4-124 are not subject to this part as it relates to the authority of the Chief Procurement Officer and Director of Finance.

(b) The governmental bodies listed under subsection (b) of Section 41-4-124 shall establish written procedures keeping with the spirit and intent of this part to do all of the following:

- (1) Resolve protested solicitations and awards.
- (2) Establish criteria and review procedures for suspension and debarment of persons or entities.
- (3) Resolve contract disputes.

### **Section 41-4-161. Filing of protests; resolution; administrative review.**

(a)(1) A bona fide prospective bidder or offeror who is aggrieved in connection with the solicitation of a contract may protest to the Chief Procurement Officer within 14 days of the date of issuance of the solicitation or any amendment to it, if the amendment is at issue.

(2)a. Except as provided in paragraph b., a bona fide actual bidder or offeror who is aggrieved in connection with the intended award or award of a contract may protest

to the Chief Procurement Officer within 14 days of the date the award or notification of intent to award, whichever is earlier, is posted in accordance with this article.

b. A matter that could have been raised under subdivision (1) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(3) A protest filed under subdivision (1) or (2) shall be in writing, be filed with the Chief Procurement Officer, and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided.

(b) The Chief Procurement Officer, or his or her designee, may settle and resolve the protest of a bona fide actual or prospective bidder or offeror concerning the solicitation or award of a contract in accordance with rules adopted under this article.

(c) If the protest is not resolved by mutual agreement within 10 days after the protest is filed, the Chief Procurement Officer shall commence an administrative review of the protest and issue a decision in writing within 14 days of the review.

(d) A copy of the decision under subsection (c) shall be mailed or otherwise furnished immediately to the protestor and any other party intervening.

(e) A decision under subsection (c) shall be final and conclusive, unless fraudulent, or a party adversely affected by the decision appeals administratively to the Director of Finance in accordance with Section 41-4-164.

(f) In the event of a timely protest under subsection (a) or an appeal under Section 41-4-164, the state may not proceed further with the solicitation or with the award of the contract until five days after notice of the final decision is provided to the protestor, except that solicitation or award of a protested contract is not stayed if the Chief Procurement Officer, after consultation with the head of the using agency or the head of a purchasing agency, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interests of the state.

### **Section 41-4-162. Suspension or debarment of persons or entities.**

(a) After reasonable notice to the person or entity involved and reasonable opportunity for that person or entity to be heard, the Chief Procurement Officer, after consultation with the using agency, may do either of the following:

(1) Terminate existing contracts and debar a person or entity for cause from consideration for award of contracts. The debarment may not be for a period of more than three years.

(2) Suspend a person or entity from consideration for award of contracts if there is probable cause for debarment. The suspension may not be for a period exceeding three months.

(b) The Chief Procurement Officer may suspend or debar a person from consideration for award of contracts under subsection (a) for any of the following:

- (1) Conviction of a criminal offense that is in connection with obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract.
- (2) Conviction under state or federal law of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty as a state contractor.
- (3) Conviction under state or federal antitrust law arising out of the submission of bids or proposals.
- (4) Violation of a contract provision of a character that is regarded by the Chief Procurement Officer to be so serious as to justify debarment action, including either of the following:
  - a. Deliberate failure, without good cause, to perform in accordance with the specifications or within the time limit provided in the contract.
  - b. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts that was not caused by acts beyond the control of the contractor.
- (5) Violation of the ethical standards set forth in Chapter 25 of Title 36.
- (6) Violation of an order of the Chief Procurement Officer.
- (7) Any other cause the Chief Procurement Officer determines to be serious and egregious misconduct.

(c) Any decision by the Chief Procurement Officer to debar or suspend a person shall be in writing. The writing shall state the reasons for the action taken.

(d)(1) A copy of the decision made under subsection (c) shall be mailed or otherwise furnished immediately to all of the following:

- a. The debarred or suspended person.
- b. Any other party intervening.
- c. All state procurement officials governed by this article with contracting authority who shall decide whether the suspension or debarment warrants termination of existing contracts with the suspended or debarred person or entity.

(2) Contracts may not be awarded to the suspended or debarred person during the suspension or debarment period established by the Chief Procurement Officer.

(e) A decision under subsection (c) shall be final and conclusive, unless fraudulent, or the debarred or suspended person appeals administratively to the Director of Finance in accordance with Section 41-4-164.

(f) The Chief Procurement Officer shall maintain a list of suspended or debarred persons or entities and make it reasonably available for inspection.

#### **Section 41-4-163. Dispute resolution procedures.**

The Chief Procurement Officer, by rule, shall establish procedures to resolve disputes between the state and a contractor that arise under, or by virtue of, a contract between them, including disputes based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

#### **Section 41-4-164. Appeals.**

(a) A party that receives an adverse decision from the Chief Procurement Officer under subsection (c) of Section 41-4-161 or subsection (c) of Section 41-4-162 may appeal the decision to the Director of Finance.

(b) An appeal to the Director of Finance shall be made in writing within five days of receipt of the adverse decision from the Chief Procurement Officer.

(c) The Director of Finance shall hold unlawful and set aside any decision issued by the Chief Procurement officer that the director finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(d) The Director of Finance shall issue a written decision within 14 days of receipt of the appeal.

(e) A copy of the decision under subsection (d) shall be mailed or otherwise furnished immediately to the parties.

(f) A decision under subsection (d) shall be final and conclusive unless fraudulent.

#### **Section 41-4-165. Applicability of part.**

This part applies when a determination is made that a solicitation or award of a contract is in violation of law.

#### **Section 41-4-166. Solicitation or proposed award of contract in violation of law—Cancellation or revision.**

If, prior to an award, a solicitation or proposed award of a contract is determined to be in violation of law, the solicitation or proposed award shall be cancelled or revised to comply with the law.

**Section 41-4-167. Solicitation or proposed award of contract in violation of law—Ratification and affirmation; termination; voiding of contract.**

If, after an award, a solicitation or award of a contract is determined to be in violation of law, then:

- (1) If the person awarded the contract has not acted fraudulently or in bad faith, the contract may be ratified and affirmed by the Chief Procurement officer, so long as doing so is in the best interests of the state, or the contract may be terminated by the Chief Procurement Officer and the person awarded the contract shall be compensated for the supplies provided or services rendered under the contract prior to termination.
- (2) If the person awarded the contract has acted fraudulently or in bad faith, the contract may be declared void by the Chief Procurement Officer or the contract may be ratified and affirmed by the Chief Procurement Officer, so long as the action is in the best interests of the state. A contract ratified and affirmed under this subdivision does not prejudice the state's right to any available damages.

**Section 41-4-168. Civil action to enjoin execution of a contract.**

A bona fide unsuccessful bidder or offeror on a particular contract who has exhausted the administrative remedies contained in this division and any taxpayer of the area within the jurisdiction of the awarding authority may bring a civil action in the Circuit Court of Montgomery County to enjoin the execution of any contract entered into in violation of this article.

**ARTICLE 5, DIVISION 7  
INTERGOVERNMENTAL RELATIONS**

**41-4-170. Definitions.**

- 41-4-171.** Cooperative purchasing agreement for certain supplies or services.
- 41-4-172.** Sale, acquisition or use of supplies or services between public procurement units.
- 41-4-173.** Cooperative purchase or use of supplies by public procurement units.
- 41-4-174.** Compliance with article.
- 41-4-175.** Collection of information concerning supplies or services.
- 41-4-176.** Resolution of controversies.

**Section 41-4-170. Definitions.**

As used in this division, the following terms shall have the following meanings:

(1) COOPERATIVE PURCHASING. Procurement conducted by, or on behalf of, one or more public procurement units.

(2) EXTERNAL PROCUREMENT ACTIVITY. A buying organization not located in this state which, if located in this state, would qualify as a public procurement unit. The term includes agencies of the United States and of any other state.

(3) LOCAL PUBLIC PROCUREMENT UNIT. Any of the following:

- a. A unit that is governed by this article and is also a municipality or other political subdivision of the state.
- b. An agency of any political subdivision, public authority, or educational, health, or other institution.
- c. Any nonprofit corporation operating a charitable hospital.
- d. To the extent provided by law, any entity that expends public funds for the procurement of supplies or services and is governed by this article.

(4) PUBLIC PROCUREMENT UNIT. Any one of the following:

- a. A local public procurement unit.
- b. An external procurement activity.
- c. A state public procurement unit.
- d. Any not-for-profit entity comprised of more than one unit or activity listed in paragraph a., b., or c.

(5) STATE PUBLIC PROCUREMENT UNIT. The Office of the Chief Procurement Officer or the equivalent officer of any other state and any purchasing agency of this state or any other state.

**Section 41-4-171. Cooperative purchasing agreement for certain supplies or services.**

(a) A public procurement unit that is governed by this article may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any supplies or services with one or more public procurement units in accordance with an agreement entered into between the participants. The cooperative purchasing agreement may include joint or multi-party contracts between public procurement units and open-ended public procurement unit contracts that are made available to other public procurement units.

(b) All cooperative purchasing conducted under this division shall be through contracts awarded using source selection methods substantially equivalent to those specified in Division 3.

**Section 41-4-172. Sale, acquisition, or use of supplies or services between public procurement units.**

A public procurement unit may sell to, acquire from, or use any supplies or services belonging to another public procurement unit without regard to the requirements of Division 3.

**Section 41-4-173. Cooperative purchase or use of supplies or services by public procurement units.**

A public procurement unit may enter into an agreement, without regard to the requirements of Division 3, with any other public procurement unit for the cooperative purchase or use of supplies or services under the terms agreed upon between the parties.

**Section 41-4-174. Compliance with article.**

(a) When a public procurement unit administering a cooperative purchase complies with the requirements of this article, a public procurement unit participating in the purchase shall be deemed to have complied with this article.

(b) Public procurement units may not enter into a cooperative purchasing agreement for the purpose of circumventing this article.

**Section 41-4-175. Collection of information concerning supplies or services.**

To the extent possible, the Chief Procurement Officer or any public procurement unit may collect information concerning the type, cost, quality, and quantity of commonly used supplies or services being procured or used by public procurement units and make the collected information available to any other public procurement unit upon request.

**Section 41-4-176. Resolution of controversies.**

Under a cooperative purchasing agreement, controversies arising between an administering public procurement unit and its bidders, offerors, or contractors shall be resolved between the ordering public procurement unit and the supplying bidders, offerors, or contractors in accordance with Division 6.

**ARTICLE 1.  
GENERAL PROVISIONS.**

**41-16-1.** Repealed.

**41-16-2.** Limitation on prosecutions for violations of competitive bid laws.

**41-16-3.** Timely execution of state contracts required.

**41-16-4.** Limitation on use of reverse auction process.

**41-16-5.** Public contracts with entities engaging in certain boycotting activities.

**Section 41-16-1. Withdrawal by contractor of amounts retained from payments under contract.**

Repealed by Acts 1997, No. 97-225, p. 348, § 4, effective April 22, 1997.

**Section 41-16-2. Limitation on prosecutions for violations of competitive bid laws.**

A prosecution for any offense in violation of the competitive bid laws of Articles 2 and 3 of this chapter must be commenced within six years after the commission of the offense.

**Section 41-16-3. Timely execution of state contracts required.**

(a) Whenever the State of Alabama is a party to any contract, the contract shall be executed by all parties in a timely fashion. When a party to a contract, other than the state, has fully executed the responsibility under the contract and there remains only the payment of funds by the state, payment shall be made in a timely manner. If the amount due by the state is not in dispute, payment shall be made within 30 days after the other party has completed his or her portion of the contract and presented a proper invoice. If the amount payable is not paid within 30 days, interest on the amount shall be charged. A party who receives a payment from the state in connection with a contract shall pay each of its subcontractors or sub-subcontractors the portion of the state's payment to the extent of that subcontractor's or sub-subcontractor's interest in the state's payment in accordance with the payment terms agreed to by the contractor and the subcontractor, but if payment terms are not agreed to, then within seven days after receipt of payment from the state. The payment shall include interest, if any, that is attributable to work performed by the subcontractor or sub-subcontractor. The interest rate shall be the legal amount currently charged by the state. Interest shall be paid from the same fund or source from which the contract principal is paid. Nothing in this subsection shall prevent the state, contractor, or subcontractor from withholding payments if there is a bona fide dispute over one or more of the following:

- (1) Unsatisfactory job progress.
- (2) Defective construction not remedied.
- (3) Disputed work.
- (4) Third party claims filed or reasonable evidence that a claim will be filed.
- (5) Failure of the contractor, subcontractor, or sub-subcontractor to make timely payments for labor, equipment and materials.
- (6) Property damage to owner, contractor, or subcontractor.
- (7) Reasonable evidence that the contract, subcontract, or sub-subcontract cannot be completed for the unpaid balance of the contract or contract sum.

(b) In the event that there is a bona fide dispute over all or any portion of the amount due on a progress payment from the owner, contractor, or subcontractor then the owner, contractor, or subcontractor may withhold payment in an amount not to exceed two times the disputed amount.

(c) An owner is required to notify a contractor in writing within 15 days of receipt of any disputed request for payment. A contractor, subcontractor, and sub-subcontractor is required to provide written notification within five days of disputed request for payment or notice of disputed request for payment.

(d) The amount of retainage withheld by the contractor to the subcontractor or the subcontractor to the sub-subcontractor shall not exceed the retainage withheld by the state unless interest is applied to the withheld amount.

#### **41-16-4. Limitation on use of reverse auction process.**

The reverse auction process shall not be used to procure professional services of architects, landscape architects, engineers, land surveyors, geoscience and other professions, as described in Section 41-16-51(a)(3), or contracts for construction, repairs, renovation, or maintenance of public works.

#### **41-16-5. Public contracts with entities engaging in certain boycotting activities.**

(a) For the purposes of this section, the following terms shall have the following meanings:

(1) BOYCOTT. To blacklist, divest from, or otherwise refuse to deal with a person or business entity when the action is based on race, color, religion, gender, or national origin of the targeted person or entity or is based on the fact that the boycotted person or entity is doing business in a jurisdiction with which this state can enjoy open trade and with which the targeted person or entity is doing business.

(2) BUSINESS ENTITY. A corporation, partnership, limited liability company, organization, or other legal entity conducting or operating any trade or business in Alabama or a corporation, organization, or other legal entity operating in Alabama that is exempt from taxation under Section 501(c)(3) or (4) of the Internal Revenue Code.

(3) GOVERNMENTAL ENTITY. The state or any political subdivision thereof, or any department, agency, board, commission, or authority of the state, or any political subdivision, or any public corporation, authority, agency, board, commission, state college, or university, municipality, or other governmental entity controlled by the state or any political subdivision.

(4) JURISDICTION WITH WHICH THIS STATE CAN ENJOY OPEN TRADE. Includes World Trade Organization members and those with which the United States has free trade or other agreements aimed at ensuring open and nondiscriminatory trade relations.

(b) Subject to subsection (c), a governmental entity may not enter into a contract governed by Title 39 or Chapter 16, Title 41, with a business entity unless the contract includes a representation that the business entity is not currently engaged in, and an agreement that the business entity will not

engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with which this state can enjoy open trade.

(c)(1) This section does not apply if a business fails to meet the requirements of subsection (b) but offers to provide the goods or services for at least 20 percent less than the lowest certifying business entity.

(2) This section does not apply to contracts with a total potential value of less than fifteen thousand dollars (\$15,000).

(d) Nothing in this section requires a business entity or individual to do business with any other particular business entity or individual in order to enter into a contract with a governmental entity.

**ARTICLE 3B.**  
**SUBMISSIONS FOR PUBLIC CONTRACTS**  
**AND GRANTS, DISCLOSURE REQUIREMENTS.**

**41-16-80.** Legislative findings.

**41-16-81.** Definitions.

**41-16-82.** Disclosure statement required.

**41-16-83.** Required information.

**41-16-84.** Furnishing of disclosure statement; affirmative defense.

**41-16-85.** Filing of disclosure statement; public records.

**41-16-86.** Violations.

**41-16-87.** Applicability.

**41-16-88.** Relation to ethics law.

**Section 41-16-80. Legislative findings.**

The Legislature of Alabama finds and declares that information currently available to the public does not include the disclosure of all persons who for the purpose of financial gain submit a proposal, bid, contract, or grant proposal to the State of Alabama.

**Section 41-16-81. Definitions.**

For purposes of this article, the following terms shall have the following meanings:

(1) **FAMILY MEMBER OF A PUBLIC EMPLOYEE.** The spouse or a dependent of the public employee.

(2) **FAMILY MEMBER OF A PUBLIC OFFICIAL.** The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse's parents, or a sibling and his or her spouse, of the public official.

(3) FAMILY RELATIONSHIP. A person has a family relationship with a public official or public employee if the person is a family member of the public official or public employee.

(4) PERSON. An individual, firm, partnership, association, joint venture, cooperative, or corporation, or any other group or combination acting in concert.

(5) PUBLIC OFFICIAL and PUBLIC EMPLOYEE. These terms shall have the same meanings ascribed to them in Sections 36-25-1(25) and 36-25-1(26), except for purposes of the disclosure requirements of this article, the terms shall only include persons in a position to influence the awarding of a grant or contract who are affiliated with the awarding entity. Notwithstanding the foregoing, these terms shall also include the Governor, Lieutenant Governor, members of the cabinet of the Governor, and members of the Legislature.

#### **Section 41-16-82. Disclosure statement required.**

(a) This article shall only apply in cases where the proposed grant or proposed contract at issue exceeds five thousand dollars (\$5,000).

(b) All persons who, for the purpose of direct financial gain, submit a proposal, bid, contract, or grant proposal to the State of Alabama, shall include a disclosure statement developed by the Attorney General and approved by the Legislative Council. The disclosure statement shall not be required for contracts for gas, water, and electric services where no competition exists, or where rates are fixed by law or ordinance. In circumstances where a contract is awarded by competitive bid, the disclosure statement shall be required only from the person receiving the contract and shall be submitted within 10 days of the award.

#### **Section 41-16-83. Required information.**

(a) The information required on the disclosure statement shall be made under oath and penalty as prescribed herein and shall include, but not be limited to, the following:

(1) A list of the names and addresses of any public official and public employee, and family members of the public official and public employee, who have a family relationship with the person or his or her immediate family members, or his or her employees, who may directly personally benefit financially from the contract, proposal, request for proposal, invitation to bid, or grant proposal.

(2) A description of any financial benefit that may be knowingly gained by any public official, public employee, and family members of the public official and public employee that may result either directly or indirectly from the person or his or her immediate family members, or his or her employees.

(3) The names and addresses of any paid consultant or lobbyist for the contract, proposal, request for proposal, invitation to bid, or grant proposal.

(b) The State of Alabama shall not enter into any contract or appropriate any public funds with any person who refuses to provide information required by this section.

**Section 41-16-84. Furnishing of disclosure statement; affirmative defense.**

Each state agency, department, or division receiving a proposal, bid, contract, or grant proposal from all persons shall inform each person of this article and shall give each person a disclosure statement to complete. It shall be an affirmative defense under this article if any awarding agency fails to furnish and require the return of the disclosure statement.

**Section 41-16-85. Filing of disclosure statement; public records.**

A copy of the disclosure statement shall be filed with the awarding entity and the Department of Examiners of Public Accounts and if it pertains to a state contract, a copy shall be submitted to the Contract Review Permanent Legislative Oversight Committee. Any disclosure statement filed pursuant to this article shall be a public record.

**Section 41-16-86. Violations.**

(a) A person who knowingly violates this article shall be subject to civil penalty in an amount of ten thousand dollars (\$10,000), or 10 percent of the amount of the contract, whichever is less, to be deposited in the State General Fund. The statute of limitations for the acts covered in this article shall be one year. Any action brought to enforce the provisions of this article shall be initiated by the Attorney General in the circuit or district court in the county in which the awarding entity is located.

(b) If there is a finding of a knowing violation of this article, the contract or grant shall be voidable by the awarding entity.

**Section 41-16-87. Applicability.**

This article shall not apply to any entity which does not receive state funds.

**Section 41-16-88. Relation to ethics law.**

Nothing in this article shall be construed to alter, amend, or repeal any disclosure required under the ethics law.

**ARTICLE 6.**  
**DISPOSITION OF SURPLUS PERSONAL PROPERTY**  
**OWNED BY STATE.**

**41-16-120.** Powers and duties; definitions.

**41-16-121.** Availability of surplus property; publication and dissemination of list of property; disposition of hazardous material prohibited.

**41-16-122.** Authority of division.

**41-16-123.** Provisions applicable to certain property held by division.

**41-16-124.** Effect of article upon status of division employees.

**41-16-125.** State plan of operation for state agency for federal property assistance.

**Section 41-16-120. Powers and duties; definitions.**

(a) The Director of the Department of Economic and Community Affairs shall be responsible for the distribution, transfer, or disposal of all surplus personal property owned by the state and all right, title, interest, and equity in the property shall be transferred to the department for such purpose. The director may delegate to the Director of the Surplus Property Division such supervision and control of the distribution or disposal of state owned surplus personal property.

(b) As used in this article, the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise:

(1) **DIVISION.** Surplus Property Division of the Department of Economic and Community Affairs.

(2) **SURPLUS PROPERTY.** That property declared by the property manager of each state department, bureau, board, commission, or agency to be surplus and so designated in writing to the director of the division. All real property owned by any state department, bureau, board, commission, agency, or institution, and any subdivision thereof; including, but not limited to, real property owned by any state college, university, two-year college, technical school, or other postsecondary institution of higher learning shall be handled in the manner provided in Section 41-4-33, or such other provisions of law as may be appropriate but in no circumstance shall any law regarding real property acquired, owned, or disposed of by the state or any subdivision thereof be amended, substituted, or in other manner altered by this article.

(3) **ELIGIBLE ENTITY.** Any public agency or nonprofit educational or public health institution or organization that is eligible to participate as a recipient of surplus property pursuant to the Federal Property and Administrative Services Act of 1949, as amended, and that is not found to be in violation of division rules and regulations during the 12 months immediately preceding the intended purchase.

(4) **PROPERTY MANAGER.** That officer or employee who shall be designated by the head of each department, board, bureau, commission, institution, corporation, or agency of the state, in writing, to the division and the State Auditor's office, to be the property manager.

(5) PUBLISH. Print or electronic distribution of information.

(c) The property manager shall report to the Surplus Property Division of the Department of Economic and Community Affairs any personal property declared surplus by his or her department, board, bureau, commission, institution, corporation, or agency and deliver the property to any place designated by the division to be the proper place for such delivery.

(d) The director or his or her designee shall be authorized to promulgate such administrative rules and regulations as deemed necessary including, but not limited to:

(1) Promotion of surplus property.

(2) Shipment of surplus property.

(3) Storage of surplus property.

(4) Length of retention of surplus property.

(5) Public auction of surplus property.

(6) Such other rules and regulations as, from time to time, may be determined to be necessary.

(e) The division shall have authority to sell surplus property at fair market value, as established by the division and set out in its published rules, to eligible entities as defined in subsection (b)(3). Payment for purchases by any of the eligible entities shall be made within 30 days after such purchase. Payment plans may be established at the discretion of the division director or his or her designee within guidelines approved by the Director of ADECA. If payment is not made within 60 days after a purchase, in cases where a payment plan has not been established, then such purchase shall be declared void and in default, and the property shall be returned immediately by the defaulting purchaser to the division.

(f) Any eligible entity authorized to purchase federal surplus property shall be authorized to purchase state surplus property under this section provided the corporation complies with all federal laws, regulations, and guidelines regarding the purchase of surplus federal property.

**Section 41-16-121. Availability of surplus property; publication and dissemination of list of property; disposition of hazardous material prohibited.**

(a) Surplus property shall be made available at such times and places as determined to be appropriate by the division for inspection and acquisition by those agencies determined to be eligible for such acquisition under criteria developed and published by the division.

- (b) The division shall periodically publish a list of all surplus property held by it at the time of such publication.
- (c) The published list shall be made available to all state departments, boards, bureaus, commissions, institutions, corporations, or agencies.
- (d) The published list shall also be made available to all eligible counties, cities, boards of education, civil defense agencies, and volunteer fire departments.
- (e) The division will determine the manner in which the list of surplus personal property shall be published.
- (f) The division shall not be authorized to handle or dispose of any regulated hazardous materials.

**Section 41-16-122. Authority of division.**

- (a) The division shall be authorized to collect fees for transfer, handling, shipping, classification, warehousing, bidding, destruction, scrapping, or other disposal of property and such other fees as may be deemed appropriate in order to insure the continued efficient operation of the surplus property function of the department.
- (b) The division shall be exclusively authorized to receive donated federal surplus property from any source, including the General Services Administration (GSA), for distribution following required federal guidelines in the same manner as state surplus property. The division shall also be exclusively authorized to purchase GSA property of any nature including, but not limited to, vehicles of any type for resale.
- (c) The division shall establish three accounts within the State Treasury for the operation of the surplus property function as follows:
  - (1) The first account shall be known as the Federal Surplus Property Account into which all moneys received from the distribution of federally donated surplus property shall be deposited;
  - (2) The second account shall be known as the State Surplus Property Account into which all moneys received from the distribution of state owned surplus property and any funds appropriated from the State General Fund for the operation of the surplus property function shall be deposited.
  - (3) The third account shall be known as the Surplus Federal Property Inventory Purchase Account into which moneys received by the division from the sale and distribution of surplus federal and state property and deposited into the Federal Surplus Property Account or the State Surplus Property Account may be transferred and deposited as approved by the director, and the moneys from which account shall be used for the purchase of surplus federal property for resale within the State of Alabama, as established by the division and set out in its published rules. This

account shall not be subject to appropriation spending restrictions but shall be a perpetual inventory account. Initial moneys to establish this account shall be deposited from such other department moneys as approved by the director. Transfers of moneys may be made from time to time, with approval of the director, between this account and the Federal Surplus Property Account, and between this account and the State Surplus Property Account, subject to the needs of each account.

(d) Any moneys deposited into any of the three aforementioned surplus property accounts may be expended from time to time by the department for operation of the surplus property function including, but not limited to, repairs, salaries, rent, travel, acquisition of exchange and surplus property, and all other necessary operating expenditures providing, however, that on September 30 any unencumbered moneys remaining in the State Surplus Property Account, up to an amount equal to the operating expenses of the quarter ending on September 30, shall be set aside for use during the quarter beginning October 1 for the purposes heretofore stated and any remainder shall revert to the State General Fund. The Federal Surplus Property Account and the Surplus Federal Property Inventory Purchase Account shall be perpetual accounts, and funds therein shall not revert to the State General Fund.

#### **Section 41-16-123. Provisions applicable to certain property held by division.**

This section shall apply only to that property that has been held by the division for a period of not less than 60 days from the date the property is first published in the list of surplus property, as set out in subsection (b) of Section 41-16-121, and not purchased by any eligible entity as set out in subsection (e) of Section 41-16-120 as follows:

- (1) All contracts made by or on behalf of the State of Alabama or a department, board, bureau, commission, institution, corporation, or agency thereof, of whatever nature for the sale or disposal of tangible personal property owned by the State of Alabama, other than the following:
  - a. Alcoholic beverages.
  - b. Products of the Alabama Institute for Deaf and Blind.
  - c. Barter arrangements of the state prison system.
  - d. Books.
  - e. School supplies.
  - f. Food.
  - g. Property used in vocational projects.
  - h. Livestock.
  - i. Property owned by any state college or university, including those state two-year colleges under the control of the Board of Education of the State of Alabama, which has market value or which has trade-in value which may be credited against the cost of replacement property purchased in accordance with the Alabama competitive bid laws. For property owned by those state two-year colleges under control of the State Board of Education, the college shall file with the Chancellor of the Postsecondary Education Department, on forms provided by the Chancellor, a list of the property to be sold, the auctioneer to be used, the place the property will be sold, and when and

where the property will be advertised pursuant to state law. After the sale, the college shall file a report with the Chancellor stating the property sold at auction, the price paid for each piece of property, the amount received from sale of each piece of property, the account to which auction receipts were deposited, a copy of the advertisement, and the commission paid to the auctioneer.

j. Types of property, the disposal of which is otherwise provided for by law or which, by nature, are incapable of sale by auction or bid, shall be let by free and open competitive public auction or sealed bids. This subsection shall not be construed to prevent disposal by the division of property owned by a state college or university should there be an agreement between the division and the respective college or university for the disposal by free and open competitive public auction or sealed bids as described in this subsection.

k. Alabama State Port Authority surplus property.

l. Surplus personal computers may be designated as scrap by the division. The division is hereby authorized to sell by sealed bid property designated as scrap at such intervals as deemed necessary by the division.

m. Surplus property of the Alabama Space Science Exhibit Commission and of the Alabama Space Science Exhibit Finance Authority.

(2) Every proposal to make a sale covered by this section shall be advertised for at least two weeks in advance of the date fixed for receiving bids. The advertisement shall appear at least once a week for two consecutive weeks in a newspaper of general circulation in the county where the sale is to be made, and a copy of the proposal shall simultaneously be posted on a readily accessible public bulletin board at the main office of the director of the division. Advertisements for bids shall state the item or items to be sold, by class and description, where the property is located and the dates, time, and place the property may be inspected. The advertisements shall further state the date, time, and place of auction or opening of sealed bids, and no bid shall be received at any time after the time advertised.

(3) The bids shall be publicly taken or opened, in case of sealed bids, by the director of the division and all bidders shall be entitled to be present in person or by representative.

(4) The award of the contract shall be made to the successful bidder within 72 hours after taking of the bids.

(5) The bid of the successful bidder so marked, as well as the bids of the unsuccessful bidders in the case of sealed bids, shall be placed on file open to public inspection and shall become matters of public record.

(6) If a successful bidder shall fail to accept award of a contract, then he or she shall be prohibited from bidding at any sale held by the division unless reinstated by the director.

(7) The director of the division may sell all items by lot or by individual item, whichever method, in his or her opinion, will bring the highest return for the items advertised.

(8) In the event all bids received are less than the estimated market value of the property, the director of the division may reject all bids and readvertise and rebid.

(9) Nothing herein shall be construed to prevent the director of the division from contracting with the highest bidder for any type of property to sell to that bidder all of that type of property at his or her bid price during that fiscal year providing that arrangement was included in the initial request for bids.

(10) All property advertised pursuant to this section shall be available for inspection during the normal state office hours and at whatever place advertised for at least 48 hours prior to sale.

(11) All property sold pursuant to this section shall be paid for by the purchaser or his or her representative by cashier's check, bank draft, certified check, U.S. currency, or notarized bank letter stating that the holder may purchase surplus property and also stating a maximum amount, at the time of acceptance of bid and award of contract, and the removal shall be not later than seven business days after the awarding of the contract and the time limit of seven days shall not be applicable to sales of standing timber.

(12) All proceeds from sales made pursuant to this section shall be paid into the State Treasury or other legally authorized depository to be credited to the proper fund as set out in subsection (c) of Section 41-16-122 prior to final distribution as set out in subdivision (16) of this section.

(13) No officer or employee of the State of Alabama or any of its departments, boards, bureaus, commissions, institutions, corporations, or agencies shall act as agent for any bidder and the officers or employees shall not be excluded from bidding on or purchasing state property at public sale or sealed bid.

(14) Any sale of tangible personal property or standing timber of the state made in violation of the terms of this article shall be null and void, and the person or persons responsible for the violation shall be subject to liquidated damages of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), which may be recovered for the State of Alabama by the Attorney General by civil action in the Circuit Court of Montgomery County. Any moneys recovered by the Attorney General under this section shall be equally divided between the office of the Attorney General and the State General Fund.

(15) The provisions of this article shall not apply to the sale of diseased, storm, or fire-damaged timber, to timber cut on rights-of-way or easements, or to the sale of timber cut for safety, maintenance, or construction purposes at any state park or state-owned public fishing lake under the jurisdiction of the Department of Conservation and Natural Resources. The timber may be sold or otherwise disposed of in a manner the Commissioner of Conservation and Natural Resources deems in the best interest of the state and no sale of diseased timber shall be made until the State Forester shall certify that the timber is diseased, and the certification shall be in written form and filed with the Director of Finance.

(16) Whenever any surplus property that was purchased with either earmarked state funds or restricted federal funds is sold by the division, the proceeds from the sale, less administrative expenses, shall be deposited to the credit of the specific fund of the state department, commission, or agency from which the original purchase of the property was made within 30 days from receipt of the proceeds. If the source of the original purchase of the property was a General Fund appropriation, then the sale proceeds, less any administrative fee, as set out in the rules authorized to be promulgated by the division, shall be credited to the account from which it was purchased. In no event shall the administrative fee exceed 30 percent of the gross sale price.

(17) All educational and eleemosynary institutions, not exempted in subdivision (1) of this section, governed by a board of trustees or other similar governing body, and the Department of Mental Health shall be governed by the provisions of this article.

(18) Violation of the provisions of this article shall constitute a Class B misdemeanor punishable as prescribed by law.

(19) Following the implementation of subdivisions (1) to (18), inclusive, the division shall have the authority to make available for sale to the general public such remaining unsold surplus property, as established by the division and set out in its published rules.

#### **Section 41-16-124. Effect of article upon status of division employees.**

All personnel, including those on personal service contracts, working within the Surplus Property Division of the Department of Economic and Community Affairs at the passage of this article shall, by virtue of this section, be considered to meet the requirements of the department in terms of education, training, and experience and shall automatically be placed within the state Merit System with permanent status with all the rights and privileges thereof and shall enjoy the same employment and retirement privileges and rights as the Legislature may determine from time to time or as may be otherwise determined by law or administrative rule or regulation according to the rules and regulations of the Personnel Department of the State of Alabama. All new future employees of the Surplus Property Division of the Department of Economic and Community Affairs shall be required to meet the requirements of the state Merit System.

All present employees of the Surplus Property Division of the Department of Economic and Community Affairs shall remain in their respective positions and continue to enjoy employment conditions including, but not limited to, salary range and advancement at a level no less than those enjoyed prior to the enactment of this article. However, nothing herein shall be construed to prevent or preclude the removal of an employee for cause in the manner provided by law.

#### **Section 41-16-125. State plan of operation for state agency for federal property assistance.**

The temporary state plan of operation for the state agency for federal property assistance which was approved by the Governor of Alabama on July 14, 1977, and accepted by the General Services Administration on September 14, 1977, shall become the permanent state plan of

operation; provided, however, the division shall have authority, with approval of the Governor, to revise said plan from time to time in accordance with regulations as established by the General Services Administration pursuant to Public Law 94-519 which governs the distribution of federal surplus property.

## **ARTICLE 7. GUARANTEED ENERGY COST SAVINGS CONTRACTS.**

**41-16-140.** Short title.

**41-16-141.** Definitions.

**41-16-142.** Energy cost savings measures authorized.

**41-16-143.** Request for proposals; meeting; public notice; guarantee required; bond; type, duration, funding, etc., of contract.

**41-16-144.** Construction of article.

### **Section 41-16-140. Short title.**

This article shall be known as the “Guaranteed Energy Cost Savings Act.”

### **Section 41-16-141. Definitions.**

For purposes of this article, the following terms shall have the following meanings:

(1) **ENERGY COST SAVINGS MEASURE.** A training program or new facility or existing facility alteration designed to reduce energy consumption or operating costs, or water and other natural resources consumption, and may include one or more of the following:

- a. Insulation and reduced air infiltration of the building structure including walls, ceilings, and roofs or systems within the building.
- b. Storm windows or doors, caulking or weather-stripping, multiglazed windows or doors, heat absorbing or heat reflective glazed and coated window or door systems, additional glazing, reductions in glass area, or other window and door system modifications that reduce energy consumption.
- c. Automated or computerized energy control systems, including computer software and technical data licenses.
- d. Heating, ventilating, or air conditioning system modifications or replacements.
- e. Replacement or modification of lighting fixtures to increase the energy efficiency of the lighting system without increasing the overall illumination of a facility, unless an increase in illumination is necessary to conform to the applicable state or local building code for the lighting system after the proposed modifications are made.
- f. Indoor air quality improvements.
- g. Energy recovery systems.
- h. Electric systems improvements.
- i. Life safety measures that provide long-term operating cost reductions.

- j. Building operation programs that reduce operating costs.
- k. Other energy-conservation-related improvements or equipment, including improvements or equipment related to renewable energy.
- l. Water and other natural resources conservation.

(2) GOVERNMENTAL UNIT. A state government agency, department, institution, college, university, technical school, legislative body, or other establishment or official of the Executive, Judicial, or Legislative Branches of the state authorized by law to enter into contracts, including all local political subdivisions such as counties, municipalities, or public school districts.

(3) GUARANTEED ENERGY COST SAVINGS CONTRACT. A contract for the implementation of one or more energy cost savings measures.

(4) OPERATIONAL COST SAVINGS. Expenses eliminated and future replacement expenditures avoided as a result of new equipment installed or services performed.

(5) QUALIFIED PROVIDER. A person or business experienced in the design, implementation, and installation of energy cost savings measures.

(6) REQUEST FOR PROPOSALS. A negotiated procurement that is announced through a public notice from a governmental unit which will administer the guaranteed energy cost savings contract requesting innovative solutions and proposals for energy conservation measures. The request for proposal shall include the following:

- a. The name and address of the governmental unit.
- b. The name, address, title, and phone number of a contact person.
- c. The date, time, and place where proposals must be received.
- d. The evaluation criteria for assessing the proposals.
- e. Any other stipulations and clarifications the governmental unit may require.

#### **Section 41-16-142. Energy cost savings measures authorized.**

(a) A governmental unit may enter into a guaranteed energy cost savings contract in order to reduce energy consumption or operating costs of government facilities in accordance with this article.

(b) All energy cost savings measures shall comply with current local, state, and federal construction and environmental codes and regulations. Notwithstanding anything to the contrary, a guaranteed energy cost savings contract does not include improvements or equipment that allow or cause water from any condensing, cooling, or industrial process or any system of nonpotable usage over which public water supply system officials do not have sanitary control, to be returned to the potable water supply.

#### **Section 41-16-143. Request for proposals; meeting; public notice; guarantee required; bond; type, duration, funding, etc., of contract.**

(a) Before entering into a guaranteed energy cost savings contract, a governmental unit shall submit a request for proposals. The governmental unit shall evaluate any proposal from a qualified provider and shall select the qualified provider that best meets the needs of the unit. After reviewing the proposals, the governmental unit may enter into a guaranteed energy cost savings contract with a qualified provider if it finds that the amount it would spend on the energy cost savings measures recommended in the proposal would not exceed the amount of energy or operational cost savings, or both, within the lesser of a 20-year period or the average useful life of the energy cost savings measures from the date installation is complete and has been accepted by the governmental unit, if the recommendations in the proposal are followed. The governmental unit shall analyze the following:

(1) The estimates of all costs of installation, modifications, or remodeling, including, without limitation, costs of a pre-installation energy audit or analysis, design, engineering, installation, maintenance, repairs, debt service, and post-installation project monitoring, data collection, and reporting, as well as whether energy consumed or the operating costs, or both, will be reduced.

(2) The qualifications of the provider.

(b) The governmental unit shall provide public notice of the meeting at which it proposes to award a guaranteed energy cost savings contract, of the names of the parties to the proposed contract, and of the purpose of the contract. The public notice shall be made at least 10 days prior to the meeting.

(c) The guaranteed energy cost savings contract shall include a written guarantee of the qualified provider that either the energy or operational cost savings, or both, will meet or exceed the costs of the energy cost savings measures within the lesser of 20 years or the average useful life of the energy cost savings measures. The qualified provider shall reimburse the governmental unit for any shortfall of guaranteed energy cost savings on an annual basis. The guaranteed energy cost savings contract may provide for payments over a period of time, not to exceed the lesser of 20 years or the average useful life of the energy cost savings measures.

(d) Notwithstanding any law to the contrary, before entering into a guaranteed energy cost savings contract, the governmental unit may require the qualified provider to file with the governmental unit a payment and performance bond relating to the installation of energy cost savings measures that is in an amount the governmental unit finds reasonable and necessary to protect its interests and that may also cover the value of the guaranteed savings on the contract and is conditioned on the faithful execution of the terms of the contract.

(e) A governmental unit, or several governmental units together, may enter into an installment payment contract or lease purchase agreement with a qualified provider or a third party financing company designated by the qualified provider, or both, for the purchase and installation of energy cost savings measures with a term not to exceed the lesser of 20 years or the average useful life

of the energy cost savings measures from the date the energy cost savings measures have been completed and accepted by the governmental unit.

(f) Guaranteed energy cost savings contracts, including installment payment contracts and lease purchase agreements financing the contracts, may extend beyond the fiscal year in which they become effective. The governmental unit may include in its annual budget and appropriations measures for each subsequent fiscal year any amounts payable under guaranteed energy savings contracts, including installment payment contracts and lease purchase agreements financing the contracts, during that fiscal year.

(g) A governmental unit may use a combination of funds designated for operating, capital expenditures, or other specially designated funds for any guaranteed energy cost savings contract including purchases using installment payment contracts or lease purchase agreements.

(h) State aid and other amounts appropriated for distribution to, or reimbursement to, a governmental unit may not be reduced as a result of energy cost savings realized from a guaranteed energy cost savings contract or a lease purchase agreement for the purchase and installation of energy cost savings measures.

**Section 41-16-144. Construction of article.**

The provisions of this article shall not be construed to alter or circumvent present law which requires education support personnel to work under the direct supervision, employment, and/or control of local boards of education.

## APPENDIX B

### PUBLIC WORKS LAW

#### Code of Alabama (1975), Title 39, Chapters 1 – 8

##### CHAPTER 1. GENERAL PROVISIONS

**39-1-1.** Bonds required of persons contracting for public works; commencement, etc., of actions upon bond by persons supplying labor, etc., to contractor; offer to accept judgment; notice of completion of project by contractor and final settlement; applicability.

**39-1-2.** Inspection of asphalt plant prerequisite to eligibility to bid on asphalt plant mix to be sold to state.

**39-1-3.** Reimbursement allowed for additional taxes incurred due to increase in tax rate during performance of contract.

**39-1-4.** Selection of surety company, etc.; approval of bonds, etc.

**39-1-5.** Applicability.

**Section 39-1-1. Bonds required of persons contracting for public works; commencement, etc., of actions upon bond by persons supplying labor, etc., to contractor; offer to accept judgment; notice of completion of project by contractor and final settlement; applicability.**

(a) Any person entering into a contract with an awarding authority in this state for the prosecution of any public works, before commencing the work, shall execute a performance bond, with penalty equal to 100 percent of the amount of the contract price. In addition, another bond, payable to the awarding authority 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 attorney fees incurred by successful claimants or plaintiffs in civil actions on the bond.

(b) Any person that has furnished labor, materials, or supplies for or in the prosecution of a public work and payment has not been made may institute a civil action upon the payment bond and have their rights and claims adjudicated in a civil action and judgment entered thereon. Notwithstanding the foregoing, 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 fee based on the result, together with interest on the claim from the date of the notice.

(c) Every person having a right of action on the last described bond as provided in this section, upon written application to the authority 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, shall 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.

(d) In the event a civil action is instituted on the payment bond, at any time more than 15 days before the 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 fees and costs incurred by the offeror after the making of 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.

(e) This section shall not require the taking of a bond to secure contracts in an amount less than one hundred thousand dollars (\$100,000).

(f)(1) The contractor, immediately after the completion of the contract, shall give notice of the completion by publishing the notice for a minimum of three weeks using one or more of the following methods:

- a. In a newspaper of general circulation in the county or counties in which the work, or some portion thereof, has been done.
- b. On a website that is maintained by a newspaper of general circulation in the county or counties in which the work, or some portion thereof, has been done.
- c. On a website utilized by the awarding authority for publishing notices.

(2) If no newspaper is published in the county in which the work was done, and if the awarding authority does not utilize a website for the purpose 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 awarding authority and the contractor.

(3) 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 or website owner and a printed copy of the notice published.

(4) 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.

(g) Subsection (f) shall not apply to contractors performing contracts of less than one hundred thousand dollars (\$100,000) in amount.

**Section 39-1-2. Inspection of asphalt plant prerequisite to eligibility to bid on asphalt plant mix to be sold to state.**

All persons, to be eligible to bid on asphalt plant mix to be sold to the State of Alabama, shall have the asphalt plants inspected and certified by the Department of Transportation. The certification shall be made by the Bureau of Materials and Tests and shall include a statement that the plant meets the requirements set forth in the current edition of the State of Alabama Department of Transportation standard specifications for highways and bridges.

**Section 39-1-3. Reimbursement allowed for additional taxes incurred due to increase in tax rate during performance of contract.**

Any contractor performing a public works contract in which any state, county, or municipal funds are utilized shall be allowed reimbursement for any additional severance, sales, or use taxes incurred by the contractor as a result of an increase in the rate of severance, sales, or use taxes imposed during the time of performance of the contract. Time of performance shall be the time the contractor submits the bid until completion of the contract.

**Section 39-1-4. Selection of surety company, etc.; approval of bonds, etc.**

(a) No officer or employee of an awarding authority and no person acting or purporting to act on behalf of such officer or employee of an awarding authority, except a public agency or authority created pursuant to agreement or compact with another state, shall, with respect to any public works contract, require the bidder to obtain or procure any surety bond or contract of insurance specified in connection with such contract or specified by any law, ordinance, or regulation from a particular surety company, insurance company, bonding company, agent, or broker. No officer, employee, person, firm, or corporation acting or purporting to act on behalf of any officer or employee of an awarding authority shall negotiate, make application, obtain, or procure any surety bond or contract of insurance, except contracts of insurance for builder's risk or owner's protective liability, which shall be obtained or procured by the bidder, contractor, or subcontractor, with the following exceptions:

(1) Contracts of insurance for builder's risk, all risk, or owner's protective liability;

(2) Contracts of insurance of any kind for any public works project involving an amount in excess of forty million dollars (\$40,000,000);

(3) Contracts of insurance of any kind obtained or procured by a single awarding authority for a group of public works projects involving an aggregate amount in excess of ninety million dollars (\$90,000,000) which are financed substantially by bond issues by the awarding authority or part of a programmatically related group of public works projects, and meeting all of the following criteria:

- a. All projects are located within the same county;
- b. All projects are located within 10 miles of each other;
- c. All projects are part of the same duly authorized annual capital development plan of the authority.

(b) The provisions of subsection (a) shall not prevent an officer or employee on behalf of an awarding authority from exercising the right to approve the form, sufficiency, or manner of execution of the surety bonds or contracts of insurance furnished by the surety company, insurance company, or bonding company selected by the bidder to underwrite surety bonds or contracts of insurance. The insurance company, bonding company, or surety company shall meet all requirements for such companies otherwise provided for by law.

(c) All provisions in any invitation for bids or in any of the contract documents in conflict with this section are declared to be void and unenforceable as contrary to the public policy of this state.

### **Section 39-1-5. Applicability.**

Notwithstanding any other laws to the contrary, this title shall control all public works contracts on the state, county, and municipal levels of government in the State of Alabama.

## **CHAPTER 2. LETTING, EXECUTION, AND ADMINISTRATION OF PUBLIC IMPROVEMENTS CONTRACTS BY STATE AGENCIES GENERALLY**

**39-2-1.** Definitions.

**39-2-2.** Advertisement for and Opening of Sealed Bids for Public Works Contracts; Violations; Exclusions; Emergency Actions; Sole Source Specification.

**39-2-3.** Fees to be Paid Department of Transportation for Proposals, Plans, and Specifications; Deposit for Bid Documents; Furnishing of Plans and Specifications to Building Exchanges, Etc.

**39-2-4.** Filing of Guaranties by Bidders; Prequalification Procedures and Criteria; Responsibility of Prequalified Bidders; Revocation of Prequalification; Rejection of Bidder.

**39-2-5.** Return of Proposal Guaranties to Bidders Generally; Disposition of Proposal Guaranty when Award Not Made Within 30 Days of Opening of Proposals.

**39-2-6.** Award of Contract; Additional Competitive Bids; Work Done by Force Account; Availability of Plans, Etc.; Use of Convict Labor; Assignment of Contract; Agreements, Etc., Among Bidders; Advance Disclosure; Life Cycle Costs.

**39-2-7.** Effect of Errors and Discrepancies of Prices in Bids.

**39-2-8.** Execution of Contracts and Furnishing of Performance Bonds, Etc., Generally by Bidders Awarded Contracts.

**39-2-9.** Approval of Bonds, Etc., and Completion of Execution of Contracts by Awarding Authorities.

**39-2-10.** Issuance of Proceed Orders by Awarding Authorities, Etc.

**39-2-11.** Proceedings upon Failure of Successful Bidders to Execute Contracts and Furnish Bonds, Etc.; Death of a Low Bidder; Effect of Failure of Awarding Authorities to Complete Execution of Contracts and Issue Proceed Orders; Withdrawal of Low Bid upon Discovery of Mistake.

**39-2-12.** Partial and Final Payments of Contractors by Awarding Authorities.

**39-2-13.** Promulgation of Rules and Regulations by Awarding Authorities.

**39-2-14.** Registration of Out-of-State Contractors Required; Deposit; Surety Bond.

### **Section 39-2-1. Definitions.**

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

(1) **AWARDING AUTHORITY.** Any governmental board, commission, agency, body, authority, instrumentality, department, or subdivision of the state, its counties and municipalities. This term includes, but shall not be limited to, the Department of Transportation, the Division of Real Property Management of the Department of Finance, the State Board of Education, and any other entity contracting for public works. This term shall exclude the State Docks Department and any entity exempted from the competitive bid laws of the state by statute.

(2) **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.

(3) **LIFE CYCLE COSTS.** The total cost of ownership over the extended life of a public works project, taking into consideration the costs of construction, operation, and maintenance, less any value obtained from salvage and quantifiable environmental benefits, or the sum of all recurring and one-time (non-recurring) costs over the full life span or a specified period of a good, service, structure, or system, including purchase price, installation costs, operating costs, maintenance and upgrade costs, and remaining (residual or salvage) value at the end of ownership or its useful life.

(4) **PERSON.** Natural persons, partnerships, limited liability companies, corporations, and other legal entities.

(5) **PUBLIC PROPERTY.** Real property which the state, county, municipality, or awarding authority thereof owns or has a contractual right to own or purchase, including easements, rights-of-way, or otherwise.

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

**Section 39-2-2. Advertisement for and opening of sealed bids for public works contracts; violations; exclusions; emergency actions; sole source specification.**

(a)(1) Before entering into any contract for a public works involving an amount in excess of one hundred thousand dollars (\$100,000), the awarding authority shall advertise for sealed bids, except as provided in subsection (j).

(2)a. If the awarding authority is the state or a county, or an instrumentality thereof, it shall advertise for sealed bids at least once each week for three consecutive weeks in a newspaper of general circulation in the county or counties in which the improvement or some part thereof, is to be made.

b. If the awarding authority is a municipality, or an instrumentality thereof, it shall advertise for sealed bids at least once in a newspaper of general circulation published in the municipality where the awarding authority is located. If no newspaper is published in the municipality, the awarding authority shall advertise by posting notice thereof on a bulletin board maintained outside the purchasing office and in any other manner and for the length of time as may be determined. In addition to bulletin board notice, sealed bids shall also be solicited by sending notice by mail to all persons who have filed a request in writing with the official designated by the awarding authority that they be listed for solicitation on bids for the public works contracts indicated in the request. If any person whose name is listed fails to respond to any solicitation for bids after the receipt of three such solicitations, the listing may be canceled.

(3) The advertisements shall briefly describe the improvement, state that plans and specifications for the improvement are on file for examination in a designated office of the awarding authority, state the procedure for obtaining plans and specifications, state the time and place in which bids shall be received and opened, and identify whether prequalification is required and where all written prequalification information is available for review.

(4) All bids shall be opened publicly at the advertised time and place.

(5) No public work, as defined in this chapter involving a sum in excess of one hundred thousand dollars (\$100,000) shall be split into parts involving sums of one hundred thousand dollars (\$100,000) or less for the purpose of evading the requirements of this section.

(b)(1) An awarding authority may let contracts for public works involving one hundred thousand dollars (\$100,000) or less with or without advertising or sealed bids.

(2) An awarding authority may enter into a contract for public works if an advertisement for sealed bids for the contract was submitted by the awarding authority to a newspaper and the newspaper only published the advertisement for two weeks if the authority can provide proof that it, in good faith, submitted the advertisement to the newspaper with instructions to publish the notice in accordance with the provisions of this section.

(c) All contracts for public works entered into in violation of this title shall be ~~null~~, void and violative of public policy. Anyone who willfully violates this article concerning public works shall be guilty of a Class C felony.

(d)(1) Excluded from the operation of this title shall be contracts with persons who shall perform only architectural, engineering, construction management, program management, or project management services in support of the public works and who shall not engage in actual construction, repair, renovation, or maintenance of the public works with their own forces, by contract, subcontract, purchase order, lease, or otherwise.

(2) Excluded from operation of the bidding requirements in this title are 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 of heating or air conditioning units or systems as a part of a purchasing cooperative, and each of the following occur:

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

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

c. The entity entering into the contract for the purchase of the heating or air conditioning unit or system has been notified by the Department of Examiners of Public Accounts that the competitive bid process utilized by the cooperative program offering the goods complies with this subdivision.

d. Upon request, the vendor has provided the purchasing entity with a report of sales made under this subdivision during the previous 12-month period, to include a general description of the heating or air conditioning units and systems sold, the number of units sold per entity, and the purchase price of the units.

e. The exemption from the requirement to utilize sealed bids for the purchase of heating or air conditioning units or systems authorized by this section shall not serve to exempt any public works project from the remaining provisions of this article, including, but not limited to, design, installation, 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.

(e)(1) In case of an emergency for which a delay in remedying would cause immediate harm to a person or public property, contracts may be let to the extent necessary to meet the emergency without public advertisement or bidding.

(2) In case of an emergency affecting public health, safety, or convenience, as declared in writing by the awarding authority, 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 advertisement.

(3) Any action taken under subdivision (1) or (2), and the reasons for the action taken, shall immediately be made public by the awarding authority and published in writing.

(f) No awarding authority may specify in the plans and specifications for the improvement the use of materials, products, systems, or services by a sole source unless all of the following requirements are met:

(1) Except for contracts involving the construction, reconstruction, renovation, or replacement of public roads, bridges, and water and sewer facilities, the awarding authority can document to the satisfaction of the Division of Real Property Management of the Department of Finance, or in the case of an educational institution or state educational institution as provided pursuant to Sections 41-4-353 and 41-4-400, to the satisfaction of its governing board, that the sole source product, material, system, or service is of an indispensable nature for the improvement, that there are no other viable alternatives, and that only this particular product, material, system, or service fulfills the function for which it is needed.

(2) The sole source specification has been recommended by the architect or engineer of record as an indispensable item for which there is no other viable alternative.

(3) All information substantiating the use of a sole source specification, including the recommendation of the architect or engineer of record, shall be documented and made available for examination in the office of the awarding authority at the time of advertisement for sealed bids.

(g) In the event of a proposed public works project, acknowledged in writing by the Alabama Homeland Security Department as (1) having a direct impact on the security or safety of persons or facilities and (2) requiring confidential handling for the protection of such persons or facilities, contracts may be let without public advertisement but with the taking of informal bids otherwise consistent with the requirements of this title and the requirements of maintaining confidentiality. Records of bidding and award shall not be disclosed to the public, and shall remain confidential.

(h) If a pre-bid meeting is held, the pre-bid meeting shall be held at least seven days prior to the bid opening except when the project has been declared an emergency in accordance with subsection (e).

(i) 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.

(j) Notwithstanding subsection (a), 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 department website 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.

(k) For the purposes of this chapter, sealed bids may also be solicited and submitted through electronic means including, but not limited to, electrical, digital, magnetic, optical, electromagnetic, or any other similar technology, provided that the awarding authority adopts rules and policies to ensure that all electronic submissions are transmitted securely and bids remained sealed until bid opening.

(l)(1) Notwithstanding any other provision of law, any entity subject to this chapter that is an awarding authority of a contract for public works, by resolution or board action, may purchase materials or equipment pursuant to subdivisions (14), (16), (17), (18), or (19) of Section 41-16-51(a), even when those materials or equipment are otherwise part of the contract for public works subject to the requirements of this title.

(2) Except for those materials or equipment described in subdivision (1), the remaining portion of the public works project shall be subject to the requirements of this title, even if the remaining portion would involve an amount less than one hundred thousand dollars (\$100,000) as a result of the exclusion of the purchase of the materials or equipment as described in subdivision (1).

**Section 39-2-3. Fees to be paid Department of Transportation for proposals, plans and specifications; deposit for bid documents; furnishing of plans and specifications to building exchanges, etc.**

(a) For contracts let by the Department of Transportation, proposals may be obtained only upon payment of a fee, to be determined by the Department of Transportation, not in excess of five dollars (\$5). Plans and specifications may be obtained only upon payment of a fee, to be determined by the Department of Transportation, not to exceed the actual cost of printing such plans and specifications.

(b) For all other awarding authorities, an adequate number of sets of bid documents, as determined by the awarding authority, may be obtained by prime contractor bidders upon payment of a deposit for each set, which deposit shall not exceed twice the cost of printing, reproduction, handling, and distribution of each set. The deposit shall be refunded in full to each prime contractor bidder upon return of the documents in reusable condition within 10 days after bid opening. Additional sets for prime contractor bidders, subcontractors, vendors, or dealers may be obtained upon payment of the same deposit. The deposit shall be refunded less the cost of printing, reproduction, handling, and distribution, upon return of the documents in reusable condition within 10 days after bid opening. All refunds are due from the awarding authority within 20 days after bid opening.

(c) Building exchanges and similar agencies may be furnished plans and specifications without charge.

**Section 39-2-4. Filing of guaranties by bidders; prequalification procedures and criteria; responsibility of prequalified bidders; revocation of prequalification; rejection of bidder.**

(a) The bidder shall be required to file with his or her bid 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 such bonds in the State of Alabama, payable to the awarding authority for an amount not less than five percent of the awarding authority's estimated cost or of the contractor's bid, but in no event more than ten thousand dollars (\$10,000), except if the awarding authority is the Department of Transportation, then the bid guarantee shall not be more than fifty thousand dollars (\$50,000). The bid guaranties as provided in this section shall constitute all of the qualifications or guaranty to be required of contractors as prerequisites to bidding for public works, except as required by the State Licensing Board for General Contractors and the prequalification as required by the Department of Transportation, the Building Commission, or any other awarding authority.

(b) With the exception of the Department of Transportation which has prequalification procedures and criteria set forth by statute, any awarding authority that proposes to prequalify bidders shall establish written prequalification procedures and criteria that: (1) are 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, such publication to be accomplished by the methods specified in subsection (a) of Section 39-2-2; (2) are related to the purpose of the contract or contracts affected; (3) are related to contract requirements or the quality of the product or service in question; (4) are related to the responsibility, including the competency, experience, and financial ability, of a bidder; and (5) will permit reasonable competition at a level that serves the public interest. The prequalification publication may run concurrently with the publication required under subsection (a) of Section 39-2-2, provided it produces the above required advance notice.

(c) Within the bounds of good faith, the awarding authority retains the right to determine whether a contractor has met prequalification procedures and criteria.

(d) Any bidder who has prequalified pursuant to the requirements in subsection (b) shall be deemed responsible for purposes of award unless the prequalification is revoked by the awarding authority under the following procedures: (1) No later than five working days or the next regular meeting after the opening of bids, the awarding authority issues written notice to the bidder of its intent to revoke prequalification and the grounds therefor; (2) the bidder is then provided an opportunity to be heard before the awarding authority on the intended revocation; (3) the awarding authority 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.

(e) Nothing in this section shall preclude the rejection of a bidder determined not responsible nor the inclusion of criteria in the bid documents which would limit contract awards to responsible bidders where no prequalification procedure is employed by the awarding authority.

**Section 39-2-5. Return of proposal guaranties to bidders generally; disposition of proposal guaranty when award not made within 30 days of opening of proposals.**

All bid guaranties, 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 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 time for consideration of its bid, in which case the awarding authority 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.

**Section 39-2-6. Award of contract; additional competitive bids; work done by force account; availability of plans, etc.; use of convict labor; assignment of contract; agreements, etc., among bidders; advance disclosure; life cycle costs.**

(a) The contract shall be awarded to the lowest responsible and responsive bidder, unless the awarding authority finds that all the bids are unreasonable or that it is not in the interest of the awarding authority 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 shall not defeat responsiveness. The bidder to whom the award is made shall be notified by confirmed facsimile, electronic mail, or letter at the earliest possible date. If the successful bidder fails or refuses to sign the contract, to make bond as provided in this chapter or to provide evidence of insurance as required by the bid documents, the awarding authority 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 awarding authority may award the contract to the third lowest responsible and responsive bidder.

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

(c) With the exception of the Department of Transportation, when two or more bids are received, and all bids exceed available funding for the contract, the awarding authority may negotiate for the work with the lowest responsible bidder, provided that the awarding authority can document the shortage of funding, that time is of the essence, and that the negotiated changes are in the public interest and do not materially alter the scope and nature of the project.

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

(e) On any construction project on which the awarding authority has prepared plans and specifications, received bids, and has determined to do by force account or by negotiation, the awarding authority shall 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 and, upon completion of the project by an awarding authority, the final total costs together with an itemized list of cost of any and all changes made in the original plans and specifications shall also be made available for review by the Department of Examiners of Public Accounts. Furthermore, the above described information shall be made public by the awarding authority upon request. Upon the approval of the awarding authority, 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.

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

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

(h) 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 awarding authority on future lettings. 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 five thousand dollars (\$5,000) nor more than fifty thousand dollars (\$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.

(i) Any disclosure in advance of the terms of a bid submitted in response to an advertisement for bids shall render the proceedings void and require advertisement and award anew.

(j) The lowest responsible and responsive bidder on a public works project may be determined to be the bidder offering the lowest life cycle costs. The lowest responsible and responsive bidder

shall otherwise meet all of the conditions and specifications contained in the invitation to bid, except that a bidder may still be considered responsive if he or she responds with a bid using different construction materials than those specified in the invitation to bid if the materials' use would result in lower life cycle costs for the public works project. To utilize this provision to determine the lowest responsible and responsive bidder, the awarding authority must include a notice in the invitation to bid that the lowest responsible and responsive bidder may be determined by using life cycle costs, and must also include in the invitation to bid the criteria under which it shall evaluate the life cycle costs.

**Section 39-2-7. Effect of errors and discrepancies of prices in bids.**

In case of error in the extension of prices in bids, the unit price will govern. In case of discrepancy between the prices shown in the figures and in words, the words will govern.

**Section 39-2-8. Execution of contracts and furnishing of performance bonds, etc., generally by bidders awarded contracts.**

The bidder to whom the award is made shall, when required, enter into a written contract on the form included in the proposal, plans, and specifications, 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 subsection (a) of Section 39-1-1 and provide evidence of insurance as required by the bid documents within the period specified or, if no period is specified, within 15 days after the prescribed forms have been presented to him or her for signature. If extenuating circumstances prevail, the awarding authority may grant an extension in time not exceeding five days for the return of the contract, required bonds and required evidence of insurance.

**Section 39-2-9. Approval of bonds, etc., and completion of execution of contracts by awarding authorities.**

The awarding authority shall approve the contractor's bonds meeting the requirements of Section 39-2-8 and the contractor's evidence of insurance meeting the requirements of the bid documents, as well as complete the execution of the contract, within 20 days after their presentation by the contractor unless the successful contractor agrees in writing to a longer period.

**Section 39-2-10. Issuance of proceed orders by awarding authorities, etc.**

A proceed order shall be issued by the awarding authority within 15 days after final execution of the contract by the awarding authority, and execution by the Governor if his or her signature on the contract is required by law, unless both parties agree in writing to a stipulated extension in time for the issuance of a proceed order.

**Section 39-2-11. Proceedings upon failure of successful bidders to execute contracts and furnish bonds, etc.; death of a low bidder; effect of failure of awarding authorities to complete execution of contracts and issue proceed orders; withdrawal of low bid upon discovery of mistake.**

(a) Should the successful bidder or bidders to whom a contract is awarded fail to execute a contract and furnish acceptable contract securities and evidence of insurance as required by law within the period as set forth in Section 39-2-8, the awarding authority 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 for such default. Any sums so retained or recovered shall be the property of the awarding authority.

(b) In the event of the death of a low bidder between the date of the opening of bids and the 15 days following the date of award of contract as allowed in Section 39-2-8 for furnishing of contract securities and evidence of insurance, the awarding authority shall return the proposal guaranty intact to the estate of the deceased low bidder.

(c) Failure by the awarding authority to complete the execution of a contract and to issue a proceed order as required in Sections 39-2-9 and 39-2-10 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.

(d) Except for contracts let by the Department of Transportation, 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 seek withdrawal of 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 awarding authority shall permit withdrawal without forfeiture. The decision of the awarding authority shall be made within 10 days after receipt of the low bidder's evidence or by the next regular meeting of the awarding authority. 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 for letting.

#### **Section 39-2-12. Partial and final payments of contractors by awarding authorities.**

(a) As used in this section the following words shall have the meanings ascribed to them as follows:

(1) **CONTRACTOR.** Any natural person, partnership, company, firm, corporation, association, limited liability company, cooperative, or other legal entity licensed by the Alabama State Licensing Board for General Contractors.

(2) **NONRESIDENT CONTRACTOR.** A contractor which is neither a. organized and existing under the laws of the State of Alabama, nor b. maintains its principal place of business in the State of Alabama. A nonresident contractor which has maintained a permanent branch office

within the State of Alabama for at least five continuous years shall not thereafter be deemed to be a nonresident contractor so long as the contractor continues to maintain a branch office within Alabama.

(3) RETAINAGE. 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.

(b) (1) Unless otherwise provided in the specifications, partial payments shall be made as the work progresses at the end of each calendar month, but in no case later than 35 days after the acceptance by the awarding authority that the estimate and terms of the contract providing for partial payments have been fulfilled. The contract between the contractor and the awarding authority shall designate a person to review the progress of completed work and to review documents submitted by the contractor as provided in this section. Except as otherwise provided for the Department of Transportation, the designated person, within 10 days, shall review the submission and respond in writing to accept or forward, as provided in this subsection, a request for payment. For contracts involving the Department of Transportation, the time frame for review and response shall be 20 days. In the event of an error in the submission or a dispute regarding compliance with the provisions of the contract, the error or dispute shall be disclosed in writing to the contractor within 10 days and, after corrective actions are taken, the invoice may be resubmitted and shall be addressed as provided in this section; provided that for contracts involving the Department of Transportation, the time frame for review and response shall be 20 days. In the absence of error or dispute, the awarding authority shall proceed within 10 days as follows for payment of the invoice:

a. For contracts subject to subsection (1), the awarding authority shall forward the request for payment to the entity or agency that is the source of funding to be used by the contractor.

b. For contracts not subject to subsection (1), the payment shall be made by the contracting agency in accordance with the payment requirements and deadlines established in this section.

(2) 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. If the amount due by the awarding authority is not in dispute and the amount payable is not paid within the above 35-day period, the contractor to whom payment is due shall also be entitled to interest from the awarding authority at the rate assessed for underpayment of taxes under Section 40-1-44(a), on the unpaid balance due. Any agreement to increase the 35-day period for payment after the execution of the contract is not enforceable. Interest payments shall not be due on payments made after the 35-day period because of administrative or processing delays at the close of the fiscal year or delays resulting from official and announced closures by the awarding authority. The provisions in this subsection shall not apply to contracts administered by the Alabama Building Commission, regardless of the source of the funds to be utilized to fulfill the awarding authority's obligation under the contract.

(c) In making the partial payments, there shall be retained 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, and after 50 percent completion has been accomplished, no further retainage shall be withheld. The retainage as set out above shall be held until final completion and acceptance of all work covered by the contract unless the escrow or deposit arrangement described in subsections (f) and (g) is utilized. Provided, however, no retainage shall be withheld on contracts entered into by the Alabama Department of Transportation for the construction or maintenance of public highways, bridges, or roads.

(d) In addition to other requirements, a nonresident contractor shall satisfy the awarding authority 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. When maintenance periods are included in the contract covering highways and bridges or similar structures, the periods shall be considered a component part of the contract. On completion and acceptance of each separate building, public work, or other division of the 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. Nothing in this section shall be interpreted to require the awarding authority to make full payment on an item of work when the item of work is an integral part of a complete improvement.

(e) In lieu of the retained amounts provided for in subsection (c) of this section, the awarding authority may provide in the specifications or contracts an alternate procedure for the maintenance of an escrow account as provided in subsection (f) or the depositing of security as provided in subsection (g).

(f) An escrow account, established pursuant to an escrow agreement, shall be entered into only on the following conditions:

(1) If the contractor shall have entered into more than one construction contract allowing for the maintenance of escrow accounts, the contractor may elect to combine the amounts held in lieu of retainage under each contract into one or more escrow accounts or may elect to establish a separate escrow account for each contract.

(2) Only state or national banks chartered within the State of Alabama or savings and loan associations domiciled in the State of Alabama may serve as an escrow agent.

(3) The escrow agent must limit the investment of funds held in escrow in lieu of retained amounts provided for in subsection (c) of this section to savings accounts, certificates of deposit or similar time deposit investments (which may, at the election of the contractor, be in an amount in excess of the maximum dollar amount of coverage by the Federal Deposit Insurance Corporation, the Federal Savings & Loan Insurance Corporation, or other similar agency), U.S. Treasury Bonds, U.S. Treasury Notes, U.S. Treasury Certificates of Indebtedness, U.S. Treasury Bills, bonds or notes of the State of Alabama or bonds of any political subdivision of the State of Alabama.

(4) As interest on all investments held in escrow becomes due, it shall be collected by the escrow agent and paid to the contractor.

(5) The escrow agent shall periodically acknowledge to the awarding authority and contractor the amount and value of the escrow account held by the escrow agent, and any additions to the escrow account by the awarding authority shall be reported immediately to the contractor. Withdrawals from the escrow account shall only be made subject to the written approval of the awarding authority.

(6) Upon default or overpayment, as determined by the awarding authority, of any contract or contracts subject to this procedure, and upon the written demand of the awarding authority, the escrow agent shall within 10 days deliver a cashier's check to the awarding authority in the amount of the escrow account balance (subject to the redemption value of such investments at the time of disbursement) relating to the contract or contracts in default.

(7) The escrow account may be terminated upon completion and acceptance of the contract or contracts as provided in subsections (c) and (i) of this section.

(8) All fees and expenses of the escrow agent shall be paid by the contractor to the escrow agent and if not paid shall constitute a lien on the interest accruing to the escrow account and shall be paid therefrom.

(9) The escrow account shall constitute a specific pledge to the awarding authority, and the contractor shall not, except to his or her surety, otherwise assign, pledge, discount, sell, or transfer his or her interest in the escrow account, the funds in which shall not be subject to levy, garnishment, attachment, or any other process whatsoever.

(10) The form of the escrow agreement and provisions thereof in compliance herewith, as well as such other provisions as the awarding authority shall from time to time prescribe, shall be subject to written approval of the awarding authority. The approval of the escrow agreement by the awarding authority shall authorize the escrow agent to accept appointment in such capacity.

(11) The awarding authority shall not be liable to the contractor or his or her surety for the failure of the escrow agent to perform under the escrow agreement, or for the failure of any financial institution to honor investments issued by it which are held in the escrow account.

(g) The contractor may withdraw the whole or any part of the retainage upon deposit of securities only in accordance with the following procedures:

(1) The contractor shall deposit with the State Treasurer or the municipal or county official holding funds belonging to the contractor, the following readily negotiable security or any combination thereof in an amount at least equal to the amount withdrawn, the security shall be accepted at the time of deposit at market value but not in excess of par value:

a. U.S. Treasury Bonds, U.S. Treasury Notes, U.S. Treasury Certificates of Indebtedness, or U.S. Treasury Bills.

- b. Bonds or notes of the State of Alabama.
- c. Bonds of any political subdivision of the State of Alabama.
- d. Certificates of deposit issued by the Federal Deposit Insurance Corporation insured banks located in the State of Alabama. The certificates shall be negotiable and only in an amount not in excess of the maximum dollar amount of coverage by the Federal Deposit Insurance Corporation.
- e. Certificates of deposit issued by savings and loan associations located in the State of Alabama, the accounts of which are insured by the Federal Deposit Insurance Corporation or the accounts of which are insured by a company approved by the state Savings and Loan Board and the certificates shall be made payable with accrued interest on demand. Any certificate from any of the savings and loan associations referred to in this paragraph shall not be for an amount in excess of the maximum dollar amount of coverage of the Federal Deposit Insurance Corporation.

(2) The agency or department of the state having jurisdiction over any public works contract shall notify the State Treasurer of the amount of the deposit required and shall also notify the State Treasurer when to release the deposit.

(3) The architect or engineer representing any municipality or county or the chair of any board, commission, or agency of any municipality or county shall notify the municipal or county official of the amount of deposit required and shall also notify the municipal or county official when to release the deposit.

(4) At the time of deposit of any security, the security may be endorsed and shall be accompanied by a conditional assignment to the public body designated as owner in the contract document, which assignment shall empower the State Treasurer, or the municipal or county official to negotiate the security at any time to the extent necessary to cause the fulfilling of the contract.

(5) Any interest or income due on any security deposited shall be paid to the contractor. If the deposit is in the form of coupon bonds, the coupons, as they respectively become due, shall be delivered to the contractor.

(6) In the event the contractor defaults in the performance of the contract or any portion of the contract, the securities deposited by the contractor in lieu of retainage and all interest, income, and coupons accruing on the securities, after default, may be sold by the state or any agency or department of the state, any municipality or county, or any board, commission, or agency of the municipality or county and the proceeds of the sale shall be used as if the proceeds represented the retainage provided for under the contract.

(h) All material and work covered by partial payments made shall become the sole property of the awarding authority, but the contractor shall not be relieved 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.

(i)(1) 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. Upon proof of advertisement, the prescribed terms of payment shall not be amended after the terms and specifications have been published.

(2) Such payment shall become due and owing 35 days after all the requirements of subdivision (1) are fulfilled, and any agreement to increase the 35-day period for payment after the execution of the contract is not enforceable. If the amount payable is not paid as required, interest on the amount shall be due and owing to the contractor. 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. The interest rate for payments shall be the legal amount currently assessed for under payment of taxes under Section 40-1-44 (a).

(3) Except as may be prohibited by Article I, Section 14 of the Constitution of Alabama of 1901, a contractor or awarding authority may file a civil action against the party contractually obligated for the payment or repayment claimed to recover the amount due plus the interest accrued in accordance with this chapter. In addition to the payment of any amounts due plus interest, if applicable, the court shall award the prevailing party reasonable attorneys' fees, court costs, and reasonable expenses. This provision shall not apply to contracts administered by the Alabama Building Commission, regardless of the source of the funds to be utilized to fulfill the awarding authority's obligation under the contract.

(j) If the Department of Transportation or a county awarding authority shall determine that there has been overpayment to a contractor on a contract award pursuant to this chapter, the Department of Transportation or the county awarding authority shall provide written notice of the overpayment to the contractor and the contractor shall remit the overpayment to the Department of Transportation or the county awarding authority within 60 days of receipt of the demand. If the contractor fails to remit payment in full of the overpayment within 60 days of receipt of demand, the contractor shall be disqualified from bidding as a prime contractor or from performing work as a subcontractor on any future Department of Transportation contract or county contract for the construction or maintenance of public highways, bridges, or roads until the overpayment is made. The Department of Transportation or county awarding authority shall also be entitled to interest

from the contractor at the rate assessed for under payment of taxes under Section 40-1-44 (a) beginning on the 61st day after the contractor's receipt of demand.

(k) The contract between the awarding authority and contractor shall contain provisions outlining the source of sufficient funds to be utilized to fulfill the awarding authority's obligations under the contract, including whether the funds are held by the awarding authority at the time of the execution of the contract or whether the funds will become available at a date following the execution of the contract.

(l) 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 of this chapter 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 and the requirement shall be enforceable as provided herein.

(m) In the event of a conflict between the provisions of this section and the provisions of any other section of the Code of Alabama 1975, or any agency's or department's rules, regulations, or manuals, this section shall govern.

(n) The provisions of this section shall not apply to any state agency established pursuant to Chapter 1 of Title 33.

(o) The payment provisions of this section shall not apply to contracts entered into by governmental entities as a result of response and recovery to any of the conditions described in Section 31-9-2(a) or as a result of any other disaster event.

(p) The provisions set forth in this section shall apply to all payments, partial or otherwise.

### **Section 39-2-13. Promulgation of rules and regulations by awarding authorities.**

For the purpose of carrying into effect the terms of this chapter and insuring to the state and its political subdivisions the award of all contracts to responsible and responsive bidders, the awarding authority may prepare and promulgate rules and regulations it deems proper, but not inconsistent with the terms of this chapter.

### **Section 39-2-14. Registration of out-of-state contractors required; deposit; surety bond.**

(a) Every nonresident contractor, as defined in Section 39-2-12 shall register with the Department of Revenue prior to engaging in the performance of a contract in this state. At the time of registration the contractor shall deposit with the Department of Revenue five per centum of the amount such contractor is to receive for the performance of the contract which shall be held within a "contractors use tax fund" pending the completion of the contract, the determination of the taxes due this state and other governmental bodies, and the payment of same. In lieu of such deposit the contractor may provide a corporate surety bond to be approved by the Commissioner of Revenue

as to form, sufficiency, value, amount, stability, and other features necessary to provide a guarantee of payment of the taxes due this state and other governmental bodies.

(b) In addition, within 30 days after registration, the contractor shall file a statement with the Department of Revenue itemizing the machinery, materials, supplies, and equipment that he has or will have on hand at the time he begins the fulfillment of the contract where such tangible personal property has been brought, shipped, or transported from outside the State of Alabama upon which neither the use taxes or ad valorem taxes have been paid and shall pay the tax due thereon at the time of filing and thereafter shall report and pay the tax as required by the Commissioner of Revenue.

(c) Upon payment of the said taxes due, as required hereby, the deposit or the surety bond required herein shall be returned forthwith to the out-of-state contractor posting same.

(d) The Commissioner of Revenue shall have authority to promulgate rules and regulations to carry out the provisions of this section.

**CHAPTER 3.**  
**USE OF DOMESTIC PRODUCTS AND RESIDENT**  
**WORKMEN FOR PUBLIC WORKS, IMPROVEMENTS,**  
**ETC.**

**39-3-1.** Contracts for Public Works Project Financed Entirely by State or Subdivisions Thereof to Provide for Use of Domestic Products if Available, Etc.; Penalty.

**39-3-2.** Contractors, Etc., Engaged in Construction of Public Building, Improvements or Works for State or Political Subdivisions Thereof to Employ Only Workmen and Laborers Actually Residing Within State for Two Years Preceding Employment; Procedure when Said Workmen or Laborers Not Available; Applicability of Provisions of Section. Repealed by Acts 1997, NO. 97-225, P. 348, § 4, Effective April 22, 1997.

**39-3-3.** Penalties for Violation of Section 39-3-2; Reliance by Employers upon Certificates of Sheriffs, Etc., as to Residence of Workmen or Laborers. Repealed by Acts 1997, NO. 97-225, P. 348, § 4, Effective April 22, 1997.

**39-3-4.** Contractors for Public Works Project Financed Entirely by State or Subdivisions Thereof to Use Steel Produced in United States; Penalty.

**39-3-5.** Preference to Resident Contractors in Letting of Certain Public Contracts.

**Section 39-3-1. Contracts for public works project financed entirely by state or subdivisions thereof to provide for use of domestic products if available, etc.; penalty.**

(a) The awarding authority contracting for a public works project to be financed entirely by the State of Alabama or any political subdivision of the state, shall stipulate or cause to be stipulated in the contract a provision whereby the person, firm, or corporation undertaking the project agrees to use in the execution of the contract materials, supplies, and products manufactured, mined, processed, or otherwise produced in the United States or its territories, if the same are available at reasonable and competitive prices and are not contrary to any sole source specification implemented under subsection (f) of Section 39-2-2.

(b) In the event the contractor breaches the agreement to use domestic products, and domestic products are not used, there shall be a downward adjustment in the contract price equal to any realized savings or benefits to the contractor.

**Sections 39-3-2 and 39-3-3.**

Repealed by Acts 1997, No. 97-225, p. 348, § 4, effective April 22, 1997.

**Section 39-3-4. Contractors for public works project financed entirely by state or subdivisions thereof to use steel produced in United States; penalty.**

(a) Any contractor for a public works project, financed entirely by the State of Alabama or any political subdivision thereof, within this state shall use iron or steel produced within the United States when specifications in the construction contract require the use of iron or steel and do not limit its supply to a sole source under subsection (f) of Section 39-2-2. If the awarding authority decides that the procurement of domestic iron or steel products becomes impractical as a result of a national emergency, national strike, or other cause, the awarding authority shall waive the above restriction.

(b) In the event the contractor violates the domestic iron or steel requirements of subsection (a), and domestic iron or steel is not used, there shall be a downward adjustment in the contract price equal to any realized savings or benefits to the contractor.

**Section 39-3-5. Preference to resident contractors in letting of certain public contracts.**

(a) In the letting of public contracts in which any state, county, or municipal funds are utilized, except those contracts funded in whole or in part with funds received from a federal agency, preference shall be given to resident contractors, and a nonresident bidder domiciled in a state having laws granting preference to local contractors shall be awarded Alabama public contracts only on the same basis as the nonresident bidder's state awards contracts to Alabama contractors bidding under similar circumstances; and resident contractors in Alabama, as defined in Section 39-2-12, be they corporate, individuals, or partnerships, are to be granted preference over nonresidents in awarding of contracts in the same manner and to the same extent as provided by the laws of the state of domicile of the nonresident.

(b) A summary of this law shall be made a part of the advertised specifications of all projects affected by this law.

**CHAPTER 4.  
MINIMUM WAGES UNDER PUBLIC WORKS  
CONTRACTS**

**39-4-1.** Repealed by Acts 1979, NO. 79-122, P. 154, Effective May 19, 1980.

**39-4-18.** Repealed by Acts 1979, NO. 79-122, P. 154, Effective May 19, 1980. § 39-4-18.

**CHAPTER 5.**  
**ACTIONS OR PROCEEDINGS UPON PUBLIC WORKS**  
**OR IMPROVEMENTS CONTRACTS IMPROPERLY LET**  
**OR EXECUTED**

**39-5-1.** Contracts let in violation of law unenforceable; certificate of compliance; rebuttable presumption of compliance.

**39-5-2.** Issuance of false or fraudulent certificate of compliance.

**39-5-3.** Actions to recover funds received under such contracts.

**39-5-4.** Actions to enjoin letting or execution of such contracts or payment of public funds thereunder.

**39-5-5.** Persons entering into contracts for public works presumed to have notice of title.

**39-5-6.** Provisions of title mandatory; construction and application of title.

**Section 39-5-1. Contracts let in violation of law unenforceable; certificate of compliance; rebuttable presumption of compliance.**

(a) No civil action shall be brought or maintained by a contractor in any court in this state to require any awarding authority 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 this title or any other provision of law.

(b) The awarding authority shall, prior to the execution of final contracts and bonds, certify that the contract to be awarded is let in compliance with this title and all other applicable provisions of law; and, only for purposes of a civil action as referenced in subsection (a), the issuance of the certificate by the awarding authority shall constitute a presumption that the contract was let in accordance with the laws. 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.

**Section 39-5-2. Issuance of false or fraudulent certificate of compliance.**

Any awarding authority or its agents issuing a willfully false or fraudulent certificate as required by Section 39-5-1 shall be guilty of a felony and, on conviction thereof, shall be fined not less than five thousand dollars (\$5,000) nor more than fifty thousand dollars (\$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.

**Section 39-5-3. Actions to recover funds received under such contracts.**

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 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 shall be commenced within three years of final settlement of the contract.

**Section 39-5-4. Actions to enjoin letting or execution of such contracts or payment of public funds there-under.**

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.

**Section 39-5-5. Persons entering into contracts for public works presumed to have notice of title.**

All persons or parties entering into contracts or agreements with an awarding authority for the construction of a public work shall be conclusively presumed to have notice of the provisions of this title.

**Section 39-5-6. Provisions of title mandatory; construction and application of title.**

The provisions of this title are mandatory, and shall be construed to require strict competitive bidding on contracts for public works. The courts shall not invoke or apply any principle 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.

**CHAPTER 6.**  
**CONSTRUCTION OF PUBLIC BUILDINGS WITH**  
**RADIOACTIVE FALLOUT PROTECTION.**

**39-6-1.** Radioactive fallout protection to be incorporated in planning and construction of certain state funded public buildings or structures; powers and duties of State Building Commission as to certification of planning or construction of same and granting of exemptions from provisions of section.

**39-6-2.** Requirement of radioactive fallout protection in new public buildings or structures and additions by municipal governing bodies and county commissions; provisions of section cumulative.

**Section 39-6-1. Radioactive fallout protection to be incorporated in planning and construction of certain state funded public buildings or structures; powers and duties of State Building Commission as to certification of planning or construction of same and granting of exemptions from provisions of section.**

(a) Wherever used in this section, unless a different meaning clearly appears in the context, the following terms shall be given the following respective interpretations:

(1) PUBLIC BUILDING or STRUCTURE. All buildings constructed for any department, agency, board, commission, council or authority of the State of Alabama, including public school buildings or structures and public buildings or structures of universities and colleges, including any additions to existing buildings or structures.

(2) STATE BUILDING COMMISSION. The building commission of 1945.

(3) RADIOACTIVE FALLOUT PROTECTION. The minimum space and fallout protection criteria recommended by the Office of Civil Defense, United States Department of Defense or its successor organization.

(b) No person, officer, official, board, commission, agency, council or authority shall cause to be planned or constructed any publicly owned building or structure in the State of Alabama costing more than \$50,000.00, wherein the use of state funds are involved, including public school buildings and structures and including public buildings and structures of colleges and universities, without incorporating or causing to be incorporated in such building or structure protection from radioactive fallout for at least its normal anticipated occupancy. Such protection shall meet or exceed the minimum space and fallout protection criteria recommended by the Office of Civil Defense, United States Department of Defense, at the time of the beginning of planning of said building.

(c) It shall be the duty of the State Building Commission to certify that all public buildings or structures have been planned or are being constructed with radioactive fallout protection sufficient to comply with the provisions of this section. All public buildings and structures shall have incorporated in the architectural plans provisions for radioactive fallout protection and shall be so constructed, unless such requirement would create an additional net cost in the construction of such building or structure so as to make the provision of radioactive fallout protection economically impracticable or other factors make unnecessary or impracticable the incorporation of such radioactive fallout protection.

Any person, official, board, commission, council, agency or authority desiring an exemption from the requirements of this section with regard to any public building or structure may apply to the State Building Commission for an exemption from the requirements of the provisions of this section and the State Building Commission may grant such exemption if concurred in by the Alabama Director of Emergency Management and the Governor. In making a determination on the question of whether the requirement of radioactive fallout protection is economically impracticable, the State Building Commission shall grant an exemption in any case where application is made therefor if the cost of inclusion of radioactive fallout protection would create an additional net cost in the cost of such public building or structure in excess of the percentages of the estimated costs of such public building or structure as follows:

- (1) Four percent for costs of \$50,000.00 to \$500,000.00.
- (2) Three percent for costs of \$500,001.00 to \$1,500,000.00.
- (3) Two percent for costs exceeding \$1,500,001.00.

**Section 39-6-2. Requirement of radioactive fallout protection in new public buildings or structures and additions by municipal governing bodies and county commissions; provisions of section cumulative.**

(a) Each municipal governing body and county commission in this state, may, by ordinance or resolution, require that all new public buildings or structures hereafter planned or constructed and any additions to existing buildings or structures hereafter planned or constructed be so planned and constructed that fallout protection from radioactivity for at least the normal anticipated occupancy will be provided. Said municipal governing body or county commission may require that such radioactive fallout protection meet the minimum space and fallout protection criteria recommended by the Office of Civil Defense, United States Department of Defense, at the time of the beginning of the planning of such building or structure. In no case, however, shall a requirement be made if the cost of inclusion of radioactive fallout protection in such building or structure would create an additional net cost in the cost of any such building or structure in excess of the percentages of the estimated costs of such building or structure as follows:

- (1) Four percent for costs of \$50,000.00 to \$500,000.00.
- (2) Three percent for costs of \$500,001.00 to \$1,500,000.00.
- (3) Two percent for costs exceeding \$1,500,001.00.

(b) The provisions of this section are in addition to any other powers and authorities heretofore conferred upon municipal and county governing bodies relating to regulations to buildings and structures and the provisions of this section are cumulative thereto.

**CHAPTER 7.  
IMPROVEMENT AUTHORITIES.**

**39-7-1.** Definitions.

**39-7-2.** Authorization for Incorporation Generally.

**39-7-3.** Filing of Petition for Election as to Incorporation.

**39-7-4.** Form and Verification of Petition.

**39-7-5.** Summary Proceedings for Review, Etc., of Sufficiency of Petition.

**39-7-6.** Publication of Notice of Filing of Petition and of Question to be Submitted to Voters at Election.

**39-7-7.** Submission of Question Proposed by Petition to Voters at General Election.

**39-7-8.** Holding of Special Election for Submission of Question to Voters; Provisions of Law Governing Conduct of Such Elections; Payment of Expenses of Elections.

**39-7-9.** Contents and Form of Election Ballot.

**39-7-10.** Adoption of Resolution Setting Forth Question Submitted and Votes Cast; Declaration of Incorporation of Improvement Authority.

**39-7-11.** When Authority Deemed Incorporated; Transmission of Certified Copy of Resolution, Etc., to Secretary of State; Secretary of State to Furnish Statement of Names, Etc., of Authorities Incorporated to Department of Finance; Publication of Statement and Effect Thereof.

**39-7-12.** Authority to be Public Corporation; Exercise of Powers of Authority.

**39-7-13.** Purpose and Powers of Authority Generally; Sale, Transfer and Conveyance of Entire Water System to Public Corporation Authorized to Conduct Business of Water Distribution System.

**39-7-14.** Board of Trustees of Authority — Composition; Appointment, Removal and Terms of Office of Members; Vacancies.

**39-7-15.** Board of Trustees of Authority — Members Not to Hold Public Office Under Municipality.

**39-7-16.** Board of Trustees of Authority — Organization Meeting; Selection of Officers.

**39-7-17.** Board of Trustees of Authority — Compensation; Delegation of Powers and Duties to Employees, Etc.

**39-7-18.** Board of Trustees of Authority — Powers Generally.

**39-7-19.** Transfer of Supervision, Possession, Control, Etc., of Property, Rights, Books, Papers, Etc., of Plant or System Owned by Municipality to Authority Generally; Continuation in Effect of Provisions of Law as to Powers and Duties of Municipal Officers and Employees.

**39-7-20.** Transfer of Municipal Officers and Employees to Authority.

**39-7-21.** Obligations of Contracts of Municipality Not to be Impaired; Payment of Notes, Bonds or Other Obligations Issued by Municipality; Assumption of Municipal Contracts as to Plant or System by Authority.

**39-7-22.** Powers Generally; Consent of Department of Finance Required for Issuance or Sale of Bonds or Other Evidence of Indebtedness by Authority.

**39-7-23.** Authorization for Issuance of Bonds by Authority; Terms, Denominations, Sale, Redemption, Etc., of Bonds; Issuance of Interim Receipts, Certificates, Etc.

**39-7-24.** Liability on Bonds and Other Obligations of Authority.

**39-7-25.** Rights and Remedies of Bondholders.

**39-7-26.** Pledge as to Alteration, Impairment, Etc., of Certain Rights and Powers of Authorities and Rights and Remedies of Bondholders by State.

**39-7-27.** Disposition of Moneys of Authority.

**39-7-28.** Examinations of Accounts and Books of Authority; Copy of Examination to be Furnished to Board of Trustees; Publication of Statement and Analysis of Financial Standing of Authority; Special Audit and Examination of Books and Accounts of Authority.

**39-7-29.** Authorization and Procedure for Enlarging of Services Furnished by Authority.

**39-7-30.** Authorization and Procedure for Diminishing of Services Furnished by Authority.

**39-7-31.** Limitation as to Number of Special Elections for Incorporating Authority or Enlarging or Diminishing Services Furnished by Authority.

**39-7-32.** Furnishing of Services Outside Boundaries of Municipality by Authority.

**39-7-33.** Purpose of Chapter; Chapter Exclusive as to Franchises, Licenses, Permits, Etc., for Authorities.

**39-7-34.** Provisions of Chapter Exclusive as to Matters Covered by Chapter.

## **Section 39-7-1. Definitions.**

When used in this chapter, the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise:

(1) **AUTHORITY.** A corporation created pursuant to this chapter.

(2) MUNICIPALITY. Any city or town incorporated under the laws of the State of Alabama and the inhabitants of an area containing not less than 250 qualified electors outside of an unincorporated city or town who shall become incorporated pursuant to the provisions of this chapter.

(3) TERRITORY. The geographical area coterminous with the boundaries of a municipality.

(4) GOVERNING BODY. The body or board, by whatsoever name it may be known, having charge of the finances of a municipality.

(5) SERVICES. Any one or more or all of the following: water, sewerage, telephone, gas or electric heat, light, or power services, commodities or facilities.

(6) ENTERPRISE. The business, undertaking or enterprise of furnishing services.

### **Section 39-7-2. Authorization for incorporation generally.**

The citizens of any city or town in the State of Alabama or the citizens of any area in the State of Alabama containing as many as 250 qualified electors may be incorporated as an authority under this chapter.

### **Section 39-7-3. Filing of petition for election as to incorporation.**

A petition, in the form and executed as provided in Sections 39-7-4 and 39-7-5 may be presented by filing the same with the clerk of the city or town, and when the petition is signed by inhabitants of an area with 250 qualified electors it may be presented to the probate judge of the county in which the electors reside. It shall be signed by qualified electors in the territory by a number of at least equal to five percent of the total number of qualified electors in said territory.

### **Section 39-7-4. Form and verification of petition.**

(a) The petition shall be in substantially the following form: "To the (herein insert the name of governing body) of the City (or Town) or to the Probate Judge of ..... County. We, the undersigned, qualified electors of the area embraced within the city or town or of the following described area ..... respectfully petition that there be submitted to a vote of the qualified electors in said area the following question: 'Shall the citizens of said city or town or the citizens of said described area (describing it) be incorporated by the name of the Improvement Authority of (here insert name of city or town, or area) for the purpose of engaging in the enterprise of furnishing to such city, town or area and its inhabitants or to the inhabitants of such area described for public and private uses the following services:

.....

.....

.....

(Signatures of electors)

.....

.....

.....  
(Residences by street and number)  
.....  
.....  
.....  
.”

(b) One of the persons who presents and files the petition shall make an affidavit that the signatures on the petition are genuine signatures and that the persons who signed their names thereto are qualified electors according to the published poll list.

**Section 39-7-6. Publication of notice of filing of petition and of question to be submitted to voters at election.**

The clerk or probate judge shall give notice of the submission of the question by causing notice of the filing of the petition and the question to be submitted to be published at least once on the same day of each week for three consecutive weeks in a newspaper of general circulation in the territory.

**Section 39-7-7. Submission of question proposed by petition to voters at general election.**

If the petition shall have been filed with the clerk or probate judge or, in case a summary proceeding has been instituted, a final order thereon has been made in favor of the sufficiency of the petition not more than 60 days and not less than 30 days prior to a general city or town or county election, the body of the city or town to which such petition is directed or the probate judge of the county in which the unincorporated area is located shall cause the question proposed by the petition to be duly submitted to a vote of the electors of the territory at such general election.

**Section 39-7-8. Holding of special election for submission of question to voters; provisions of law governing conduct of such elections; payment of expenses of elections.**

If a petition shall not have been filed or, in case a summary proceeding has been instituted, a final order thereon has not been made in favor of the sufficiency of the petition so as to permit the question to be submitted at a general election within the provisions of Section 39-7-7, the body to which such petition is directed shall at its next regular meeting succeeding the presentation of the petition or, in case a summary proceeding has been instituted, succeeding the date of a final order thereon in favor of the sufficiency of the petition or the probate judge of the county in which the unincorporated area is located shall designate a day for the holding of a special election to ascertain the will of the electors regarding the question, which day shall not be less than 30 days nor more than 40 days from the date of such regular meeting.

The provisions of the election laws covering the registration of voters, equipment of polling places, furnishing of supplies, appointment of election officers, voting and canvassing of returns, at a general election shall apply to such election.

The governing body of such city or town or the governing body of the county in which the unincorporated area is located is hereby authorized to appropriate and expend from moneys raised by taxation for the necessary expense of such special election.

**Section 39-7-9. Contents and form of election ballot.**

The question set forth in the petition shall be printed on the ballot. At the left of the question there shall be printed two voting squares, with the word "Yes" for voting for the question at the right of one square and the word "No" for voting against the question at the right of the other square.

**Section 39-7-10. Adoption of resolution setting forth question submitted and votes cast; declaration of incorporation of improvement authority.**

At the regular meeting of the governing body of the municipality next succeeding the completion of the canvass and the statement and proclamation of result, such governing body shall adopt a resolution setting forth the question submitted at the election, the number of votes cast for the question and the number of votes cast against the question. If the number of votes cast for the question exceeds the number of votes cast against the question at such election, such resolution shall further declare that the citizens of the State of Alabama who are inhabitants of the territory, the boundaries of which are coterminous with the boundaries of such municipality, are incorporated as the "Improvement Authority of ....."

**Section 39-7-11. When authority deemed incorporated; transmission of certified copy of resolution, etc., to Secretary of State; Secretary of State to furnish statement of names, etc., of authorities incorporated to Department of Finance; publication of statement and effect thereof.**

The citizens of the State of Alabama who are inhabitants of such territory shall become and be an incorporated authority under this chapter from and after the date of adoption of the resolution of the governing body of such municipality declaring that such citizens are incorporated as the "Improvement Authority of ....."

Within five days after the adoption of such resolution by the governing body, the clerk or probate judge shall transmit a certified copy thereof together with a complete record of all proceedings had in regard to the incorporation of such authority, to the Office of the Secretary of State of the State of Alabama where it shall be filed as a public record. It shall be the duty of the Secretary of State to furnish to the Department of Finance on October 1 of each year the names of the authorities which have been incorporated pursuant to this chapter with a statement of the date of the resolution declaring the incorporation of such authority. Such statement shall be published by the Department of Finance in its annual report under a separate and appropriate heading and such statement, so published, shall be conclusive evidence of such incorporation.

**Section 39-7-12. Authority to be public corporation; exercise of powers of authority.**

(a) Each authority incorporated under this chapter shall be a public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate, with power of perpetual succession.

(b) The power of each authority shall be vested in and exercised by a majority of the members of the board of trustees of the improvement authority in office.

**Section 39-7-13. Purpose and powers of authority generally; sale, transfer and conveyance of entire water system to public corporation authorized to conduct business of water distribution system.**

(a) An authority shall be incorporated for the purpose of conducting and developing the enterprise in which it may engage in such manner that the services afforded by such enterprise shall be available for public uses and to all inhabitants of the municipality and the surrounding area for domestic and industrial uses at the lowest cost consistent with sound economy and prudent management. Every authority incorporated under this chapter is hereby vested with all powers necessary and requisite for the accomplishment of such purpose for which such authority is incorporated capable of being delegated by the Legislature of the State of Alabama. The authority shall have the power to acquire, construct, reconstruct, extend, improve and maintain and operate any plant, works, system, facilities or properties together with all parts thereof and appurtenances thereto used or useful for the generation, production, transmission and distribution of electric energy, natural or artificial gas or mixtures thereof, for obtaining a water supply and the storage and distribution of water, for the collection, disposal and treatment of sewage, telephone system and service and generally for the conduct and development of the enterprise. No enumeration of particular powers granted by this section shall be construed to impair any general grant of power contained in this section or to limit any such grant to a power or powers of the same class or classes as those so enumerated. The authority is empowered to do all acts necessary, proper or convenient in the exercise of the powers granted under this chapter.

(b) In addition to all other powers, the authority shall have and may exercise the power to sell, transfer and convey to any public corporation having authority to carry on the business of a water distribution system, including those organized under Division 1, Article 6, Chapter 50, Subtitle 2 of Title 11, its entire water system, including all of its property and assets, real, personal and mixed, for such consideration and upon such terms and conditions as may be agreed upon by and between the authority and such purchaser; provided, that the consideration therefor shall include and require, among others, the assumption by such purchaser of the outstanding and unpaid bonded indebtedness, if any, of the authority and shall include an agreement by such purchaser to supply water to the authority's then existing water customers under the purchaser's rules and regulations applicable and which may thereafter be or become applicable to the purchaser's system as a whole.

**Section 39-7-14. Board of trustees of authority -- Composition; appointment, removal and terms of office of members; vacancies.**

(a) Each improvement authority shall have a board of trustees consisting of not more than five members that are qualified electors residing in the area serviced by the authority.

(b) When the authority is composed of an incorporated city or town, the trustees shall be appointed by the governing body of the city or town. When the authority is composed in whole or in part of the inhabitants of an unincorporated area, the governing body of the county in which the area is composed appoints the trustees. In the event the unincorporated area is composed of parts of different counties, the Governor of the state shall appoint the board. All vacancies on the board shall be filled by the proper authority designated in this section. The first appointment of the members of the board shall be made not later than 30 days after the improvement authority becomes an incorporation as provided for in this chapter.

(c) The term of the office of the members of the board shall be one, two, and three years respectively dating from January 1 of the year in which the appointments are made. Thereafter the terms of office of the members are for three years. Members shall hold office until their successors are appointed and qualify. An appointment to fill a vacancy shall be for the unexpired term.

(d) The appointing authority may remove any member within the term for which he or she shall have been appointed, after giving a copy of the charges against the member and an opportunity to be heard in his or her defense. The action of the appointing authority shall be final and nonreviewable.

**Section 39-7-15. Board of trustees of authority -- Members not to hold public office under municipality.**

The members of the board shall not hold any public office under the municipality.

**Section 39-7-16. Board of trustees of authority -- Organization meeting; selection of officers.**

Promptly after their appointment the members of the board shall meet to organize. At such meeting and at the first meeting in each year thereafter, the members of the board shall choose from their number a president and a secretary.

**Section 39-7-17. Board of trustees of authority -- Compensation; delegation of powers and duties to employees, etc.**

Each member of the board shall receive for his or her services compensation in an amount to be fixed by the board. The compensation to the members of the board shall be paid monthly from money received by the authority from its operations. The members of the board shall be entitled to reimbursement for all expenses incurred in connection with performance of their duties. The board may delegate to one or more of its members or to its agents and employees such powers and duties as it may deem proper.

**Section 39-7-18. Board of trustees of authority -- Powers generally.**

The board of trustees shall have power to do all things necessary or convenient in conducting and developing the enterprise, including but not limited to the following powers:

- (1) To adopt and amend bylaws for the management and regulation of its affairs and the enterprise in which it is engaged;
- (2) To use, with the consent of the municipality, the agents, employees or facilities of such municipality and to provide for payment of the agreed proportion of the cost therefor;
- (3) To appoint officers, agents and employees and to fix their compensation;
- (4) To inquire into any matter relating to the affairs of the authority, to compel by subpoena the attendance of witnesses and the production of books and papers material to any such inquiry, to administer oaths to witnesses and to examine witnesses and such books and papers;
- (5) To appoint an advisory board to assist in the formation of proper policies in respect of the enterprise; and,
- (6) To execute instruments.

**Section 39-7-19. Transfer of supervision, possession, control, etc., of property, rights, books, papers, etc., of plant or system owned by municipality to authority generally; continuation in effect of provisions of law as to powers and duties of municipal officers and employees.**

Jurisdiction, supervision, possession and control of all property, real and personal, tangible and intangible, together with all easements, water rights and other rights therein and all other adjuncts, including books, papers and records, pertaining to any plant or system owned, managed, supervised, possessed and controlled by a municipality for the purpose of furnishing any services named in the petition pursuant to which an authority is incorporated shall devolve and are hereby conferred and imposed upon such authority.

The provisions of any laws regulating the exercise of the powers and the performance of the duties of officers and employees of such municipality shall continue in full force and effect until the board of trustees of such authority by its bylaws confers such powers upon its officers, agents or employees or imposes such duties upon its officers, agents or employees.

**Section 39-7-20. Transfer of municipal officers and employees to authority.**

Officers and employees of any board, commission or department in or of the municipality may be transferred to the authority and shall be eligible for such transfer and appointment without examination to offices and positions under such authority. The transfer and appointment of such officers and employees shall be made in accordance with the provisions of any agreement which may be entered into between the governing body of such municipality and the board of trustees of such authority.

**Section 39-7-21. Obligations of contracts of municipality not to be impaired; payment of notes, bonds or other obligations issued by municipality; assumption of municipal contracts as to plant or system by authority.**

The obligations of contracts of the municipality shall not be impaired by this chapter.

Moneys to provide for the payment of notes, bonds or other obligations issued by the municipality in relation to any plant or system, the management, supervision, possession and control of which shall devolve upon such authority, shall be raised, collected and paid for by such municipality as though this chapter had not been enacted; except, that in the event such notes, bonds or other obligations constitute a charge, lien or other encumbrance upon the revenue of such plant or system, the duty to raise, collect and apply such revenues to the payment of such notes, bonds or other obligations shall rest upon such authority rather than upon the municipality and such notes, bonds or other obligations shall remain a charge, lien or other encumbrance upon such revenues.

All contracts of such municipality in relation to any such plant or system shall be assumed by such authority and the terms and conditions to be performed on the part of such municipality shall be complied with and performed by the board of trustees of such authority and the benefits of such contracts shall inure to the benefit of such authority.

**Section 39-7-22. Powers generally; consent of Department of Finance required for issuance or sale of bonds or other evidence of indebtedness by authority.**

(a) Subject only to the Constitution of the State of Alabama, each authority incorporated under this chapter shall have power:

(1) To sue and be sued;

(2) To have a seal and alter the same at pleasure;

(3) To acquire, by purchase, gift, devise, lease or exercise of the power of eminent domain or other mode of acquisition, hold and dispose of property real and personal, tangible and intangible, and interests therein in its own name, subject to mortgages or other liens or otherwise, and to pay therefor in cash or on credit and to secure and procure payment of all or any part of the purchase price thereof on such terms and conditions as it shall determine;

(4) To make and enter into contracts, indentures of trust, leases and bonds;

(5) To borrow money and to issue negotiable bonds and provide for the rights of the holders thereof;

(6) To refund any bonds theretofore issued by it by the issuance of refunding bonds to a principal amount not in excess of the principal amount of bonds to be refunded, any premium required in order to redeem or retire the bonds to be refunded and any interest accrued or to accrue on such bonds to the date of their redemption or retirement;

(7) To issue bonds for the combined purpose of so refunding any bonds theretofore issued by it and paying all or any part of the costs of constructing and acquiring any one or more enterprises or any improvements, extensions or enlargements thereto;

(8) To fix, maintain and collect rates and charges for any services;

(9) To pledge all or any part of its revenues;

(10) To make such covenants, in connection with the issuance of bonds or in order to secure the payment of bonds, that a private business corporation can make under the general laws of the state, notwithstanding that such covenants may operate as limitations on the exercise of any of the powers granted by this chapter;

(11) To enter on any lands, waters and premises for the purpose of making surveys, soundings and examinations;

(12) To pay to the municipality the whole or any part of the amount necessary to be raised by taxation by such municipality in order to pay, when due, notes, bonds or other obligations issued by such municipality in relation to any plant or system, the management, supervision, control and possession of which is transferred pursuant to this chapter from such municipality to such authority;

(13) To perform any and all acts and do any and all things by contract or contracts or under, through or by means of its own officers, agents and employees;

(14) To purchase, produce or otherwise secure water, gas and electric energy; and

(15) To exercise all powers of eminent domain now or hereafter conferred on municipalities in this state.

(b) No bonds or other evidence of indebtedness of an authority incorporated under this chapter shall be issued or sold until consent to the issuance and sale thereof shall have been given by the Department of Finance of Alabama, to be evidenced by resolution or order under seal of such body granting such consent. Such consent shall be granted only after a public hearing and after a petition requesting such consent has been duly filed by such authority with the Department of Finance more than five days before such public hearing. Such petition shall specify the plan or program of the authority and the uses to which it is proposed to put the proceeds of such issue and such other matters as are necessary fully to advise such Department of Finance of the nature of the enterprise and said petition shall include such other information as may be required by the rules of the Department of Finance. The Department of Finance shall grant such consent only after it finds that such issue or sale serves some public need and is in the public interest. It shall be unlawful for the authority to use the proceeds of any such issue or sale contrary to the plan and purposes presented to the Department of Finance in obtaining its consent thereto.

**Section 39-7-23. Authorization for issuance of bonds by authority; terms, denominations, sale, redemption, etc., of bonds; issuance of interim receipts, certificates, etc.**

Bonds of an authority shall be authorized by resolution of the board of trustees of such authority and may be issued in one or more series, may bear such date or dates, mature at such time or times not exceeding 40 years from their respective dates, bear interest at such rate or rates, payable

semiannually, be in such denominations, be in such form, either coupon or registered, be executed in such manner, be payable in such medium of payment, at such place or places, be subject to such terms of redemption, with or without premium, and be subject to being declared or becoming due before the maturity date thereof as such resolution or resolutions may provide. Said bonds may be issued for money or property, either at public or private sale, and for such price or prices as such authority shall determine. Pending the preparation or execution of definitive bonds, interim receipts or certificates or temporary bonds may be delivered to the purchaser or purchasers of said bonds. Said bonds may, with the consent of the holder thereof, be purchased by such authority out of any funds available for such purpose, and all bonds so purchased shall be cancelled. Said bonds shall be construed to constitute negotiable instruments even though payable from a specified source.

#### **Section 39-7-24. Liability on bonds and other obligations of authority.**

The bonds and other obligations of an authority incorporated under this chapter shall not be a debt of the State of Alabama nor a debt of the municipality and neither the state nor the municipality shall be liable in any way whatsoever thereon nor may the holder of any such bonds or obligations compel the levy of any taxes for its payment. Said bonds shall not be payable out of any funds other than those of the authority issuing the same and each bond shall contain a recital to that effect. Neither the members of the board of trustees nor any person executing said bonds shall be liable personally on said bonds by reason of the issuance thereof.

#### **Section 39-7-25. Rights and remedies of bondholders.**

In addition to all other rights and all other remedies any holder or holders of any bond or bonds of any authority incorporated under this chapter, including a trustee for bondholders, shall have, subject to any contractual limitations binding upon such bondholder or holders or trustee, and subject to the prior or superior rights of others the following rights:

- (1) To institute a civil action on the bonds;
- (2) To enforce his rights by mandamus or other civil action or proceeding against such authority and the board of trustees of such authority, including the right to require such authority and such board of trustees to fix and collect rates and charges adequate to carry out any agreement as to or pledge of the revenues produced by such rates or charges and to require such authority and such board to carry out any other covenants and agreements with such bondholder and to perform its and their duties under this chapter;
- (3) To require such authority by civil action to account as if it were the trustee of an express trust for such bondholder;
- (4) To enjoin by civil action any acts or things which may be unlawful or a violation of the rights of such bondholder; and
- (5) To obtain by civil action or proceeding in any court of competent jurisdiction in the event of a default by the authority in the payment when due of his or their bond or bonds or interest thereon,

which default shall have continued for a period in excess of 120 days, the appointment of a receiver of the enterprise in which the authority is engaged or any part or parts thereof, who may enter and take possession of such enterprise or any part or parts thereof, including all lands, property rights, easements and other adjuncts of the enterprise in which the authority shall have been engaged. Such receiver may engage in such enterprise, furnish the service or services thereof, operate and maintain the system and fix and collect and receive all revenues thereafter arising therefrom in the same manner as such authority itself might do and shall deposit all such moneys in a separate account or accounts and apply the same in accordance with the obligations of such authority as the court shall direct.

**Section 39-7-26. Pledge as to alteration, impairment, etc., of certain rights and powers of authorities and rights and remedies of bondholders by state.**

The State of Alabama does hereby pledge to and agree with the holders of bonds issued by an authority pursuant to this chapter that the state will not limit or alter the rights and powers hereby vested in an authority incorporated under this chapter to fix and collect such rates and charges as may be necessary or advisable in order to produce sufficient revenue to meet all the expenses of maintenance and operation and to fulfill the terms of any agreements made with the holders of such bonds or in any way impair the rights and remedies of the holders of such bonds, until such bonds together with interest thereon and interest on any unpaid installments of interest, and all costs and expenses in connection with any civil actions or proceedings by or on behalf of such bondholders are fully paid and discharged.

**Section 39-7-27. Disposition of moneys of authority.**

All moneys of an authority incorporated under this chapter from whatever source derived shall be paid to the treasurer of such authority and deposited by said treasurer in a depository designated by the board of trustees of such authority. The treasurer shall not commingle said moneys with any other moneys. Said moneys shall be deposited in a separate bank account or accounts. The moneys in said accounts shall be paid out on check or warrant of the treasurer of said authority on requisition of the board of trustees or of such other person or persons as the authority may authorize to make such requisitions. All deposits of such money shall, if required by such treasurer or by the board of trustees of the authority, be secured by obligations of the United States or of the State of Alabama of a market value equal at all times to the amount of the deposit and all banks and trust companies are authorized to give such security for such deposits. The treasurer of such authority shall be liable for a proper accounting of the moneys of the authority. This section shall not be construed as limiting the power of the authority to agree as to the custody and disposition of moneys or revenues for the security of its bonds; provided, that the moneys of the authority shall not be entrusted to any person, firm or corporation unless adequate security for its protection shall be given.

**Section 39-7-28. Examinations of accounts and books of authority; copy of examination to be furnished to board of trustees; publication of statement and analysis of financial standing of authority; special audit and examination of books and accounts of authority.**

The municipality or, in case of an unincorporated area in one county, the county governing body or, in an unincorporated area in two or more counties, the Governor of Alabama, are hereby authorized and empowered from time to time to examine the accounts and books of such authority, including its receipts, disbursements, contracts, leases, sinking funds, investments and any other matters relating to its financial standing. Such examination shall be made at least once in every year and a copy of such examination shall be furnished the board of trustees of such authority, together with a copy of any recommendations made that the examiner may deem advisable.

A condensed statement and analysis of the financial standing and condition of the said authority shall be published in a newspaper circulating in the territory of the authority.

Upon request of a trustee or trustees of any bondholders, the Governor of Alabama shall have a special audit and examination of the accounts and the books of such authority made at the expense of the authority.

**Section 39-7-29. Authorization and procedure for enlarging of services furnished by authority.**

The authority shall not include in an enterprise in which it is engaged the furnishing of any services not named in the petition provided for by this chapter unless the furnishing of such additional services shall be submitted to and approved by the electors of the territory of such authority. If the board of trustees of such authority shall by resolution determine to submit the question of furnishing such additional services or if a petition requesting the submission of such a question in the general form and executed as provided for petitions for the submission to vote on the question of incorporating an authority under this chapter shall be filed with the secretary of the board of trustees of the authority, such question shall be submitted for the approval of such electors at a special election in the territory to be held not less than 60 days after the adoption of such resolution or the filing of such petition or at the next general election in the municipality if the same is held not less than 60 days after such adoption or filing.

The mode or method of procedure for the submission of such question, the publication of notice therefor, the conduct thereof, the canvassing of votes thereat and the proclamation of result shall conform as nearly as may be reasonable with the mode or method of procedure for the submission of the question of the incorporation of such authority at an election as provided in this chapter, except that the board of trustees of each authority shall act in the place and stead of the governing body and the secretary of the board of trustees shall act in the place and stead of the clerk of the municipality. If the number of votes cast in favor of the furnishing of such additional services exceeds the number of votes cast against the furnishing of such additional services at such election, the authority shall within a reasonable time furnish such additional services.

The provisions of this chapter relative to the jurisdiction of the authority and the transfer of property, powers and duties to the authority after the incorporation thereof shall apply to the enlargement of the services thereof in like manner and to the same extent as such provisions apply to the services furnished by the authority by virtue of the petition for incorporation.

**Section 39-7-30. Authorization and procedure for diminishing of services furnished by authority.**

The services of the authority shall not be diminished so as to exclude from an enterprise in which the authority is engaged the furnishing of any services unless and until all bonds of the authority and interest thereon issued by the authority pursuant to this chapter shall have been finally paid and discharged, except with the consent of the holders of 75 percent in amount of such bonds then outstanding secured in whole or in part by a pledge of revenues derived from the furnishing of the services to be excluded. Thereafter, such services may be diminished and the mode or method of procedure for the diminishing of such services shall conform as nearly as may be reasonable to the provisions of this chapter relative to the manner of enlarging the services of such authority.

**Section 39-7-31. Limitation as to number of special elections for incorporating authority or enlarging or diminishing services furnished by authority.**

Not more than one special election shall be held in any territory upon the question of enlarging or diminishing services and not more than two special elections upon the question of incorporating an authority in any calendar year.

**Section 39-7-32. Furnishing of services outside boundaries of municipality by authority.**

No improvement authority incorporated under this chapter shall furnish any service to the inhabitants of a city or town other than the municipality, except with the consent of the governing body of such city or town. Except as provided in this section, the authority may furnish services for public and private uses in the area within 25 miles from the boundaries of its territory.

**Section 39-7-33. Purpose of chapter; chapter exclusive as to franchises, licenses, permits, etc., for authorities.**

(a) This chapter is intended to aid the state in the execution of its duties by providing appropriate and independent instrumentalities of the state with full and adequate power to fulfill their functions.

(b) Except as otherwise expressly provided in this chapter, it shall not be necessary for any improvement authority incorporated under this chapter to obtain, prior to engaging in an enterprise of furnishing a service or acquiring, constructing, reconstructing, improving or extending a plant system, any certificate of convenience or necessity, franchise, license, permit or any other authorization from any board, bureau, commission, department or other like agency of the state or any county, city or town of the state.

**Section 39-7-34. Provisions of chapter exclusive as to matters covered by chapter.**

Any authority incorporated under this chapter insofar as the subject matter of this chapter is concerned shall be governed exclusively by the provisions of this chapter.

## CHAPTER 8.

### FAIR AND OPEN COMPETITION IN GOVERNMENTAL CONSTRUCTION ACT.

**39-8-1.** Short Title.

**39-8-2.** Legislative Findings.

**39-8-3.** Definitions.

**39-8-4.** Certain Contract Terms Prohibited.

**39-8-5.** Certain Awards Prohibited.

**39-8-6.** Use of Certain Terms in Documents.

**39-8-7.** Exemptions.

**39-8-8.** Applicability of Chapter.

#### **Section 39-8-1. Short title.**

This chapter shall be known and may be cited as the Fair and Open Competition in Governmental Construction Act.

#### **Section 39-8-2. Legislative findings.**

The Legislature finds and declares that this chapter shall do all of the following:

- (1) Provide for the efficient procurement of goods and services by governmental units.
- (2) Promote the economical, nondiscriminatory, and efficient administration and completion of state and state-funded or state-assisted construction projects.
- (3) Provide for fair and open competition for construction contracts, grants, tax abatements, and tax credits awarded by governmental units.
- (4) Prohibit requirements for certain terms in construction contracts awarded by governmental units or supported through grants and tax subsidies and abatements by governmental units.
- (5) Prohibit expenditure of public funds under certain conditions.
- (6) Prohibit certain terms in procurement documents for certain expenditures by governmental units involving public facilities.
- (7) Provide powers and duties for certain public officers, employees, and contractors.

#### **Section 39-8-3. Definitions.**

As used in this chapter, the following words shall have the following meanings:

- (1) PUBLIC AGENCY. 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.

(2) PUBLIC IMPROVEMENT. Any beneficial or valuable change or addition, betterment, enhancement, or amelioration of or upon any real property, or interest therein, belonging to a public agency intended to enhance its value, beauty, or utility or to adapt it to new or further purposes. The term does not include the direct purchase of materials, equipment, or supplies by a public agency, or any personal property.

#### **Section 39-8-4. Certain contract terms prohibited.**

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:

(1) 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.

(2) 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.

#### **Section 39-8-5. Certain awards prohibited.**

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 described in Section 39-8-4 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.

#### **Section 39-8-6. Use of certain terms in documents.**

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 39-8-4 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.

#### **Section 39-8-7. Exemptions.**

The head of a public agency may exempt a particular project, contract, subcontract, grant, tax abatement, or tax credit from the requirements of Section 39-8-4 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 section 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.

**Section 39-8-8. Applicability of chapter.**

(a) The requirements of this chapter shall not apply to public construction contracts executed before June 1, 2014.

(b) This chapter does not do any of the following:

(1) Prohibit employers or other parties from entering into agreements or engaging in any other activity protected by the National Labor Relations Act, 29 U.S.C. Sections 151 to 169.

(2) Interfere with labor relations of parties that are left unregulated under the National Labor Relations Act, 29 U.S.C. Sections 151 to 169.

(3) Prohibit a public agency from awarding a public contract, grant, tax abatement, or tax credit to a private owner, bidder, contractor, or subcontractor who enters into or who is a party to an agreement with a collective bargaining organization, if being or becoming a party or adhering to an agreement with a collective bargaining organization is not a condition for award of the public contract, grant, tax abatement, or tax credit, and if the public agency does not discriminate against a private owner, bidder, contractor, or subcontractor in the awarding of that grant, tax abatement, or tax credit based upon the status as being or becoming, or the willingness or refusal to become, a party to an agreement with a collective bargaining organization.