

American Bar Association: Public Contract Law Section
Alabama State Procurement Rules and Regulations

Prepared by Peter D. LeJeune and Jesse S. Unkenholz
Balch & Bingham LLP
plejeune@balch.com and junkenholz@balch.com

I. Statutory Reference:

A. Procurement/Purchasing Statutes¹

State and local public contracts are governed by Title 41 of the Code of Alabama, Chapter 16 (*see* “Appendix A”).

Public works contracts are governed by Title 39 of the Code of Alabama, Chapters 1, 2, 3, 5, 6, and 7 (*see* “Appendix B”).

II. Regulations:

The Alabama Department of Finance, Purchasing Division’s rules related to vendors and competitive bidding are contained in Alabama Administrative Code Regulations 355-4-1-.01, *et seq.* and 355-5-1-.01, *et seq.*

The rules that apply to public construction and improvement projects assigned to the Alabama Building Commission by state law for its supervision and administration are contained in Alabama Administrative Code Regulation 170-X-5-.01, *et seq.*

The notification requirements of any public official or employee, or member of his or her family, or a business who enters into a contract to provide goods or services to be paid in whole or in part out of state, county, or municipal funds that has been awarded through a process of public notice and competitive bidding are contained in Alabama Administrative Code Regulation 340-X-5-.01, *et seq.*

III. Source Selection Techniques:

The Alabama Competitive Bid Law generally governs the bid process for goods and services and requires that contracts awarded through competitive bidding be awarded to the lowest responsible bidder. *See* Ala. Code §§ 41-16-20 and 41-16-50. The source selection techniques used generally follow those of the federal system. The procurement can be accomplished either through an ITB (Invitation to Bid), an RFP (Request for Proposals), or, in limited circumstances, sole source. The threshold for competitive bid is \$7,500 for state contracts and \$15,000 for certain state and local agencies. *Id.*

There are exceptions to the competitive bidding requirement, which are listed in Ala. Code §§

¹ Information compiled from Code of Alabama (1975) and *The State of Alabama Department of Examiners of Public Accounts: Alabama Competitive Bid Laws* (September 2008), available at: http://www.examiners.state.al.us/FormPub/Bid_Law.pdf.

41-16-21, 41-16-22 and 41-16-23 as well as § 41-16-51. These include certain departments or agencies whose principal business is honorariums from competitive bid laws, federal government purchases, and exemption from public advertisement in cases of emergencies affecting public health and safety.

The Public Works Law governs the bid process for contracts covering construction, repair, renovation, or maintenance of public buildings, structures, sewers, roads, bridges, etc. and requires that projects in excess of \$50,000 be awarded by sealed bid. There is a sole source exception. *See* Ala. Code § 39-2-2. Public works contracts must be awarded to the lowest responsible and responsive bidder. *See* Ala. Code § 39-2-6. However, if the awarding authority finds all bids to be 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 be done by force account. *Id.*

IV. Bid Protests and Contract Disputes:

A. Generally

The Alabama Code does not provide for a formal process for bid protests and contract disputes. There is, however, a protest process outlined in the Alabama Administrative Code for the Division of Purchasing within the Department of Finance. *See* Ala. Admin. Code r. 355-4-1-.04. The process requires that any bidder adversely affected by an intent to award a contract let by competitive bid file with the Director of Purchasing a notice of protest within five (5) calendar days after the notice of intent to award the contract. A formal written protest must then be filed within seven (7) days, excluding Saturday, Sunday, and State holidays, after the notice of protest is filed. Within 30 calendar days of submission of the protest, the Director of Purchasing will issue a written decision. If an adverse decision is issued, the bidder may seek relief in accordance with Ala. Code § 41-16-31. This section provides for potential injunctive relief:

Any taxpayer of the area within the jurisdiction of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of this article.

Ala. Code § 41-16-31.

However, according to the Alabama Supreme Court, § 41-16-31 does not confer upon an unsuccessful bidder a right to sue for monetary damages or recover bid preparation costs, *see Vinson Guard Serv., Inc. v. Ret. Sys. of Ala.*, 836 So. 2d 807, 810 (Ala. 2002), rather the remedy is limited to enjoining the execution of the contract. *See also Urban Sanitation Corp. v. Pell City*, 662 F.Supp. 1041, 1044 (D. Ala. 1986) (“[t]here is no indication in [§ 41-16-31], however, that an unsuccessful bidder has any right or expectancy to insist upon the award of a contract. To the contrary, the statute is carefully crafted to limit the remedy to ‘enjoin[ing] execution of any contract entered into in violation of the provisions of this article.’”).

Regardless, injunctive relief is rarely granted. *See Spring Hill Lighting & Supply Co. v. Square D Co.*, 662 So. 2d 1141, 1147 (Ala. 1995), (reviewing several state and federal applications of Alabama Bid Law and determining that, “[i]njunctive relief is seldom granted in actions alleging violations of the Competitive Bid Law”).²

B. Bid Protest Appeals

An unsuccessful bidder who seeks to enforce an injunction based upon Alabama Competitive Bid Law, but fails at the trial court level, may appeal to the Court of Appeals only if he has also requested a stay of the judgment. Otherwise, if the contract was awarded and performance is begun under the contract, the appeal will be deemed moot. *See Masonry Arts, Inc. v. Mobile County Comm’n*, 628 So. 2d 334 (Ala. 1993).

C. Suspension and Debarment

Neither the Alabama Code nor Alabama Administrative Code contains procedures or processes for debarment or suspension. However, there are various provisions within the Alabama Administrative Code that prohibit awarding contracts or entering agreements with debarred and/or suspended contractors. These provisions generally rely on the Federal list of debarred contractors or individual actions of state and local governmental bodies. *See e.g.*, Ala. Admin. Code rr. 305-0-2-.01; 335-6-14-.35; 335-7-13-.33; 335-15-7-.30.

V. Administrative and Judicial Review:

A. Administrative Review

The Alabama Taxpayers’ Bill of Rights and Uniform Revenue Procedures Act, Ala. Code § 40-2A-9, provides procedures that govern appeals to the Administrative Law Division. Generally, aggrieved parties must seek administrative review from the contracting agency and exhaust all available administrative remedies before seeking judicial review.³ While § 40-2A-9 is available, research has not revealed any cases involving public contracts where the provision has been utilized to appeal a contracts protest or dispute decision.

² *See also id.* at 1147-1148. *Compare Crest Constr. Corp. v. Shelby County Bd. of Educ.*, 612 So. 2d 425 (Ala. 1992); *Steeley v. Nolen*, 578 So. 2d 1278 (Ala. 1991); *Horne Wrecker Service, Inc. v. City of Florence*, 567 So. 2d 1285 (Ala. 1990); *Advance Tank & Constr. Co. v. Arab Water Works*, 910 F.2d 761 (11th Cir. 1990) (applying Alabama law); *Hosp. Systems, Inc. v. Hill Rom, Inc.*, 545 So. 2d 1324 (Ala. 1989); *McCord Contract Floors, Inc. v. City of Dothan*, 492 So. 2d 996 (Ala. 1986); *I F. Pate Contractors v. Mobile Airport Auth.*, 484 So. 2d 418 (Ala. 1986); *Mobile Dodge, Inc. v. Mobile County*, 442 So. 2d 56 (Ala. 1983); *Int’l Telecomm. Sys. v. State*, 359 So. 2d 364 (Ala. 1978); *White v. McDonald Ford Tractor Co.*, 287 Ala. 77, 248 So. 2d 121 (1971); *Townsend v. McCall*, 262 Ala. 554, 80 So. 2d 262 (1955); *Mitchell v. Walden Motor Co.*, 235 Ala. 34, 177 So. 151 (1937); and *Carson Cadillac Corp. v. City of Birmingham*, 232 Ala. 312, 167 So. 794 (1936), all denying injunctive relief, *with Kennedy v. City of Prichard*, 484 So. 2d 432 (Ala. 1986), and *Arrington v. Assoc. Gen. Contractors of America*, 403 So. 2d 893 (Ala. 1981), *cert. denied*, 455 U.S. 913 (1982), both granting injunctive relief. While it is appropriate to create a restrictive standard for interfering with the normal progress of government works, the statements in the cases discussed above indicating that the injunctive remedy is the only remedy for violation of the Competitive Bid Law were not intended to create a license for persons to commit fraud and other intentional torts.

³ Ala. Code § 41-22-20 (“A person who has exhausted all administrative remedies available within the agency, other than rehearing, and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.”).

B. Judicial Review

In Alabama, courts have generally granted deferential review of the agencies' decision making process. For example, the Alabama Supreme Court stated:

We think that State **authorities should have discretion in determining who is the lowest responsible bidder.** This discretion should not be interfered with by any court unless it is exercised arbitrarily or capriciously, or unless it is based upon a misconception of the law or upon ignorance through lack of inquiry or in violation of law or is the result of improper influence. . . .

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. 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.

White v. McDonald Ford Tractor Co., 248 So. 2d 121, 129 (1971) (emphasis added).

Historically, the Alabama Supreme Court has given the awarding agencies great discretion in contract disputes. In *Vinson Guard Serv., Inc. v. Ret. Sys. of Ala.*, 836 So. 2d 807, 811-12 (2002), the Alabama Supreme Court held that a trial court did not err in refusing to compel a state agency to award a contract for security services to a firm that entered a bid at the state agency's invitation when the agency's invitation to bid contained errors and the state agency sought to rebid the contract. The court also held that the firm that submitted the bid was not entitled to an injunction prohibiting the state agency from rebidding the contract. *Id.*

Prepared by:

Peter D. LeJeune

(205) 226-8774

Jesse S. Unkenholz

(205) 226-3455

Balch & Bingham LLP

1710 Sixth Avenue, North

Birmingham, Alabama 35203

Appendix A

TITLE 41

Article 1 GENERAL PROVISIONS

Sec.

- 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.

Article 2

COMPETITIVE BIDDING ON PUBLIC CONTRACTS GENERALLY

Sec.

- 41-16-20.** Contracts for which competitive bidding required; award to preferred vendor.
- 41-16-21.** Contracts for which competitive bidding not required generally.
- 41-16-21.1.** Joint purchasing agreements.
- 41-16-21.2.** Exemption of certain departments or agencies whose principal business is honorariums from competitive bid laws.
- 41-16-22.** Competitive bidding not required on purchases from federal government.
- 41-16-23.** Letting of contracts without public advertisement authorized in case of emergencies affecting public health, safety, etc.
- 41-16-24.** Advertisement for and solicitation of bids; opening of bids; public inspection; reverse auction procedures; certain partial contracts void.
- 41-16-25.** Effect of agreements or collusion among bidders in restraint of competition; sworn statements as to agreements to accompany bids.
- 41-16-26.** Effect of advance disclosure of terms of bid.
- 41-16-27.** Manner of awarding contracts generally; records; exemptions.
- 41-16-28.** Bond for faithful performance of contract to be required.
- 41-16-29.** Assignment of contracts.
- 41-16-30.** Conflicts of interest of purchasing agents, assistants, etc., generally; making of purchases or awarding of contracts in violation of article.

- 41-16-31.** Institution of actions to enjoin execution of contracts entered into in violation of article.
- 41-16-32.** Provisions of article cumulative; repeal of other provisions of law.

Article 3
COMPETITIVE BIDDING ON CONTRACTS OF CERTAIN STATE AND LOCAL
AGENCIES, ETC.

Sec.

- 41-16-50.** Contracts for which competitive bidding required generally.
- 41-16-51.** Contracts for which competitive bidding not required generally.
- 41-16-51.1.** Municipal or county contracts for certain services exempt from competitive bid requirement.
- 41-16-52.** Expenditures for repair or lease of heavy-duty off-highway construction equipment may be made without regard to provisions of article.
- 41-16-53.** Letting of contracts without public advertisement authorized in case of emergencies affecting public health, safety, etc.
- 41-16-54.** Advertisement for and solicitation of bids; opening of bids; reverse auction procedures; public inspection; certain partial contracts void.
- 41-16-55.** Effect of agreements or collusion among bidders in restraint of competition; knowing participation in collusive agreement.
- 41-16-56.** Effect of advance disclosure of terms of bid.
- 41-16-57.** Awarding of contracts generally; preference to be given to Alabama commodities, firms, etc., in contracts for purchase of personal property or contractual services; when sole source may be specified; rejection of bids; records as to awarding of contract to be open to public inspection; maximum duration of contracts for purchase of personal property or contractual services.
- 41-16-58.** Bond for faithful performance of contract may be required.
- 41-16-59.** Assignment of contracts.
- 41-16-60.** Conflicts of interest of members or officers of governing bodies or instrumentalities of counties, municipalities and certain state and local institutions generally; making of purchases or awarding of contracts in violation of article.

- 41-16-61. Institution of actions to enjoin execution of contracts entered into in violation of article.
- 41-16-62. Provisions of article not applicable to certain municipal contracts.
- 41-16-63. Provisions of article cumulative.

Article 3A
COMPETITIVE BIDDING ON CONTRACTS FOR GOODS AND SERVICES

Sec.

- 41-16-70. Legislative findings.
- 41-16-71. Definitions.
- 41-16-72. Procurement of professional services.
- 41-16-73. Purchase of insurance.
- 41-16-74. Purchase from vendors with GSA contracts; purchase of utilities.
- 41-16-75. Sole source purchases.
- 41-16-76. Promulgation of rules and regulations.
- 41-16-77. Violations; void contracts; opportunity to compete; relation to other laws.
- 41-16-78. Exceptions.
- 41-16-79. Contracts under review by Contract Review Permanent Legislative Oversight Committee.

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

Sec.

- 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.

Article 4
SURETY BONDS OR INSURANCE UNDER PUBLIC BUILDING OR CONSTRUCTION CONTRACTS

Former Sec. 41-16-80 through 41-16-82. Repealed.

Article 5
CONTRACTS FOR SALE OF CERTAIN STATE PROPERTY

Sec.
41-16-100 through 41-16-109. Repealed.

Article 6
DISPOSITION OF SURPLUS PERSONAL PROPERTY OWNED BY STATE

- Sec.
- 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.

Article 7
GUARANTEED ENERGY COST SAVINGS CONTRACTS

- Sec.
- 41-16-410. 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.

Appendix B

Title 39

Chapter 1 GENERAL PROVISIONS

Sec.

- 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.

Chapter 2

LETTING, EXECUTION AND ADMINISTRATION OF PUBLIC IMPROVEMENTS CONTRACTS BY STATE AGENCIES GENERALLY

Sec.

- 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; proceedings when one bid or less is received at time stated in advertisement for bids; proceedings when all bids found unreasonable, etc.; availability of plans, etc.; use of convict labor; assignment of contract by successful bidder; agreements, etc., among bidders; penalties; advance disclosure.
- 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 generally.
- 39-2-13.** Promulgation of rules and regulations by awarding authorities.
- 39-2-14.** Registration of out-of-state contractors required; deposit; surety bond.

Chapter 3

USE OF DOMESTIC PRODUCTS AND RESIDENT WORKMEN FOR PUBLIC WORKS, IMPROVEMENTS, ETC.

Sec.

- 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 and 39-3-3.** Repealed by Acts 1997, No. 97-225, p. 348, Section 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.

Chapter 5

ACTIONS OR PROCEEDINGS UPON PUBLIC WORKS OR IMPROVEMENTS CONTRACTS IMPROPERLY LET OR EXECUTED

Sec.

- 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.

Chapter 6
CONSTRUCTION OF PUBLIC BUILDINGS WITH RADIOACTIVE FALLOUT PROTECTION

Sec.

- 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.

Chapter 7
IMPROVEMENT AUTHORITIES

Sec.

- 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.