STATE OF ALABAMA

DEPARTMENT OF EXAMINERS OF PUBLIC ACCOUNTS

ALABAMA COMPETITIVE BID AND PUBLIC WORKS LAWS

DECEMBER 2014

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PREFACE

Mr. Ron Jones, Chief Examiner, Examiners of Public Accounts requested the Alabama Law Institute compile the Competitive Bid and Public Works Laws for Alabama in 2007. In 2008 and 2014 the book was revised to reflect changes to the law since 2007.

The Institute retained the services of Professor Jim Bryce from the University of Alabama, School of Law, to draft the 2007 and 2008 revisions. Professor Bryce has taught at the University of Alabama since 1978 and served as Alabama Deputy Finance Director from January 1999 to January 2003. The 2014 revision was overseen by Michael Hill of the Law Institute with help from Daniel Harris who served as a research assistant.

This handbook is written to assist those who must consult the Competitive Bid Law and Public Works Laws of Alabama.

The handbook is organized in two Parts: Part I – Contracts and Part II – Public Works. Each Part is organized: (1) a chapter of general introduction to the subject; (2) a chapter containing the applicable statutes; (3) a chapter summarizing the cases that have interpreted the statutes; and (4) a chapter containing brief summaries of the opinions issued by the Attorney General and the Department of the Examiners of Public Accounts. Part I also contains additional chapters concerning the competitive bidding laws governing boards of education.

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.

We wish to recognize both the assistance of law students

Kristin Osmer and Peter Jay, Alabama School of Law, for research and editing the first two editions, and Daniel Harris for research of this edition. Further appreciation is extended to Nancy Foster, for composing the first edition and Jill Colburn the second and current edition of this handbook.

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.

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.

Although the Alabama Law Institute is a state agency, no conclusions concerning the policies of the State of Alabama are drawn from this volume.

Othni J. Lathram
Director
Alabama Law Institute

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INTRODUCTION TO THE HANDBOOK

The Department of Examiners of Public Accounts was created by and is governed by Chapter 5 of Title 41, ALA. CODE (1975) (§§ 41-5-1 through 41-5-24). The cited statutes grant power to the Chief Examiner, who is allowed to delegate his powers to the officers and employees of the Office of the Examiner of Public Accounts. The policies and procedures for appointing the Chief Examiner provide: "The affairs of the department shall be administered by a Chief Examiner, whose actions shall be supervised and controlled by a Legislative Committee on Public Accounts." ALA. CODE § 41-5-3(a) (1975).

The Chief Examiner has the following authority and duties:

(1) Exercise general supervision of and make regulations for the government 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 officers and employees of the department, subject to the provisions of the Merit System Act and the rules and regulations issued pursuant thereto;
(5) Keep an accurate and complete record of all departmental proceedings, 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 the provisions of this chapter;
(8) Exercise any other power necessary to expedite the making of thorough and accurate audits of the accounts of all persons receiving or disbursing public funds;
(9) *Examine and audit the books, accounts and records of all state and county offices, officers, bureaus, boards, commissions, corporations, departments and agencies;*

> (10) Prepare, 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 state and county offices;
> (11) *Report to the Legislative Committee on Public Accounts and the Governor every expenditure or contract found to have been made in violation of law;*
> (12) Prepare, for use by the county boards of education, such bookkeeping, accounting and reporting systems, procedures, records and forms as may be necessary to the installation of a uniform system of accounting and reporting by the several county boards of education, install such bookkeeping, accounting and reporting systems in and for such county boards of education and exercise and maintain continuing supervision thereof; and
> (13) Prepare and furnish to the chairmen 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, said statement showing receipts, disbursements, outstanding indebtedness and securities owned of and by each of the several counties.
> ALA. CODE § 41-5-6 (1975) (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 Public Works Law and the Competitive Bid 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, sidewalls, 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." ALA. CODE § 39-2-1(6) (1975). 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 $50,000.00 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 (Ala. 1994).

Chapter 2 of the Public Works Law, ALA. CODE § 39-2-1 to 14 (1975), 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). ALA. CODE § 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 of the State of Alabama. The Competitive Bid Law is codified in ALA. CODE §§ 41-16-1 to 41-16-144 (1975). 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.

The following handbook will detail both the Public Works Law and the Competitive Bid Law of the State of Alabama. The information was first compiled and written in 2007 and was updated in 2008 and again in 2014. The amendments and interpretations contained herein are complete and accurate through September 2014. These laws are subject to amendment or repeal

any time the Legislature is in session. These laws are 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 website at http://alisondb.legislature.state.al.us/acas/ACASLoginfire.asp.

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CHAPTER 1

INTRODUCTION TO COMPETITIVE BID LAW

Three sections, ALA. CODE §§ 16-13B-1, 41-16-20, and 41-16-50 (1975), set out the requirement that purchases by governmental bodies in Alabama must comply with the Competitive Bid Law. Section 41-16-20(a) provides the general rule that purchases by state agencies are subject to the Competitive Bid Law:

> §41-16-20(a) Contracts for which competitive bidding required; award to preferred vendor.
>
> (a) With the exception of contracts for public works whose competitive bidding requirements are governed exclusively by Title 39, all contracts of whatever nature for labor, services, work, or for the purchase or lease of materials, equipment, supplies, or other personal property, involving fifteen thousand dollars ($15,000) or more, made by or on behalf of any state department, board, bureau, commission, committee, institution, corporation, authority, or office shall, except as otherwise provided in this article, be let by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.

Section 41-16-50 provides the general rule that purchases by local governments and their agencies are subject to the Competitive Bid Law. Section 41-16-50(a) provides that, with the exception of the contracts that fall under the public works provisions of Title 39,

> all expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars ($15,000) or more, and the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and

> contractually, bound under the terms of the lease, to pay a total amount of fifteen thousand dollars ($15,000) or more, made by or on behalf of any state trade school, state junior college, state college, or university under the supervision and control of the State Board of Education, the district boards of education of independent school districts, the county commissions, the governing bodies of the municipalities of the state, and the governing boards of instrumentalities of counties and municipalities, including waterworks boards, sewer boards, gas boards, and other like utility boards and commissions, except as hereinafter provided, shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.

Section 16-13B-1(a) provides the general rule that purchases by city and county boards of education are subject to the Competitive Bid Law:

> (a) This chapter shall apply to county boards of education and city boards of education, or any combination of city and county boards of education as herein provided for the competitive bidding of certain contracts. With the exception of contracts for public works whose competitive bidding requirements are governed exclusively by Title 39, all expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars ($15,000) or more, and the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually, bound under the terms of the lease, to pay a total amount of fifteen thousand dollars ($15,000) or more, made by or on behalf of any city or county board of education, except as hereinafter provided, shall be made under contractual agreement entered into by free and open

competitive bidding, on sealed bids, to the lowest responsible bidder.

While some of the provisions of Title 41 still apply to boards of education, the Legislature enacted Alabama Act 2009-760 in order "to remove the city and county boards of education from the competitive bid laws in Title 41 and provide substantially the same provisions in Title 16 . . . ." See Chapter 9 of this book for a full discussion of Title 16's provisions.

The general effect of these sections is that most goods and services needed by a government-funded agency must be obtained through the competitive bid process. There are, of course, 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 Laws is that the entire value of the transaction must equal or exceed $15,000. This amount was increased from $7,500 by the state legislature in 2012 for state government entities and in 2008 for local governmental entities. During the period the Competitive Bid Laws have been in effect, this amount has been increased several times, as follows: from the time the statute was written until 1977, the amount was $500; from 1977 to 1989, the amount was $2,000; from 1989 to 1994, the amount was $5,000; from 1994 to 2008 the amount was $7,500; in 2008 the amount for local government agencies was amended to $15,000, and in 2012 the amount for state government agencies was amended to $15,000, the current statutory minimum. The Legislature periodically examines proposals to increase the threshold. Up-to-date information on this and other legislative changes can be easily found at: http://alisondb.legislature.state.al.us/acas/ACASLoginMac.asp. 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 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 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 can never 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, 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 was changed in 2001 with respect to the services of attorneys and other professionals. Until then, the rule in section 41-16-21, "contracts for the securing of services of attorneys, physicians, architects, teachers, artists, appraisers, engineers or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part" were exempt from bidding requirements. Since 2001, contracts for the services of professionals are subject to restrictions. Attorneys must be hired from lists; the Attorney General hires attorneys for litigation from a list maintained by the Attorney general; other agencies hire attorneys for nonlitigation services from a list maintained by the Legal Advisor to the Governor. In neither situation is it necessary to hire the lowest bidder, but the fees must be negotiated to obtain the best representation for the funds expended. Physicians must be selected from a list maintained by the Alabama Medical Licensure Commission, with the proviso that any physician wishing to provide services to the state can be listed. Professional services of architects, landscape architects, engineers, land surveyors, geoscience, and other similar professionals shall be procured in accordance with competitive, qualification-based selection policies and procedures based on factors developed by the procuring state entity. Other professionals must be selected from lists maintained by the Division of Purchasing and must be bid. The procuring agency need not procure services from the lowest bidder, but must justify in writing any procurement of services at a fee more than 10 percent higher than the lowest bid. The above processes do not apply to the Legislature, the Alabama State Port Authority, or to

colleges and universities governed by a board of trustees, the Department of Postsecondary Education, or to the State Department of Education, subject to limited exceptions. The above processes do not apply to local governments or boards or agencies. ALA. CODE § 41-16-72 (1975).

Section 41-16-72 was again amended in 2013, to create a framework for procuring the services of an attorney on a contingent fee basis. Under ALA. CODE § 41-16-72(1)(f), the state is prohibited from entering into a contingency fee agreement unless the state makes a written determination that the representation is cost-effective and in the public interest. In making that written determination, the state must consider:

> (i) Whether there exists sufficient and appropriate legal and financial resources within the state to handle the matter without a contingency contract.
>
> (ii) The expected time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.
>
> (iii) The geographic area where the attorney services are to be provided.
>
> (iv) 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.

The statute prescribes maximum percentages that may be paid to the attorney, depending on the amount of the judgment, though the Governor may waive these limitations if the issue affects the public health, safety, convenience, or economic welfare of the state. A government attorney must retain complete control of the case, and the private attorney must keep detailed records.

In 2008, several noteworthy changes were made to the Competitive Bid Law as it applies to local governments and their agencies. In addition to raising the threshold for the applicability of the Competitive Bid Law from $7,500 to $15,000, the 2008 legislation changed the parameters for establishing a local

preference zone. Two of the options for the local preference zone remain the same: the boundaries of the awarding authority and the boundaries of the county in which the awarding authority is located. The third option was changed from the Standard Metropolitan Statistical Area (SMSA) to the Core Based Statistical Area (CBSA) in which the awarding authority is located. The term "Core Based Statistical Area" (CBSA) is a collective term for both metro and micro areas. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core. US Census Bureau Office of Management and Budget (OMB), http://www.census.gov/population/www/metro.

The second change in the Competitive Bid Law as applied to local governments and their agencies was authorization for awarding authorities to utilize a reverse auction process for contracts over $15,000 dollars to acquire items that are not available under the state purchasing program or to acquire items that are available under the state purchasing program at a lower price. In a reverse auction, anonymous sellers utilize the internet to offer to sell the specified items; the lowest offeror will be awarded the contract. The Department of Examiners of Public Accounts will provide procedures for the implementation of reverse auctions. ALA. CODE § 41-16-54(d).

The third change in the Competitive Bid Law as applied to local governments and their agencies was authorization, beginning January 1, 2009, for awarding authorities to take into account life cycle costs of purchased items. Life cycle cost includes not just purchase price but also sustaining costs such as maintenance and repairs. Life cycle costs can be used only if: (1) life cycle costs can be ascertained from industry recognized and accepted sources, and (2) the awarding authority includes notice in the invitation to bid that life cycle costs will be used in determining the contract award and specifies the industry recognized and accepted standards that will be used in making the determination of contract award. The Department of Examiners of Public Accounts will provide

procedures for the implementation of life cycle purchasing. ALA. CODE § 41-16-57(c).

The fourth change in the Competitive Bid Law as applied to local governments and their agencies was elimination of the requirement that municipal awarding authorities and school board awarding authorities be located in the same county as a condition to entering into joint purchasing agreements. ALA. CODE § 41-16-50(b). The joint purchasing rules were further amended by providing that the awarding authorities that enter in to joint purchasing agreements can appoint joint bidding agents as well as joint purchasing agents.

The fifth change in the Competitive Bid Law as applied to local governments and their agencies is the authority to award to the second lowest bidder without a rebid in cases where the lowest bidder defaults and the terms and conditions applicable to the second lowest bidder are the same and the price is not higher than the second lowest bidder's original bid price. ALA. CODE § 41-16-57(a).

CHAPTER 2

COMPETITIVE BID LAW
(Title 41, Chapter 16 Code of Alabama (1975)

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.

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.

ARTICLE 2.

COMPETITIVE BIDDING ON PUBLIC CONTRACTS GENERALLY.

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.

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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.

Section 41-16-20. Contracts for which competitive bidding required; award to preferred vendor.

(a) With the exception of contracts for public works whose competitive bidding requirements are governed exclusively by Title 39, all contracts of whatever nature for labor, services, work, or for the purchase or lease of materials, equipment, supplies, other personal property or other nonprofessional services, involving fifteen thousand dollars ($15,000) or more, made by or on behalf of any state department, board, bureau, commission, committee, institution, corporation, authority, or office shall, except as otherwise provided in this article, be let by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.

(b) A "preferred vendor" shall be a person, firm, or corporation which is granted preference priority according to the following:

(1) PRIORITY #1. Produces or manufactures the product within the state.
(2) PRIORITY #2. Has an assembly plant or distribution

facility for the product within the state.

(3) 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.

(c) In the event a bid is received for the product or service from a person, firm, or corporation deemed to be a responsible bidder and a preferred vendor where any state higher education institution, department, board, bureau, commission, committee, institution, corporation, authority, or office is the awarding authority and the bid is no more than five percent greater than the bid of the lowest responsible bidder, the awarding authority may award the contract to the preferred vendor.

Section 41-16-21. Contracts for which competitive bidding not required generally.

(a) Competitive bids shall not be required for utility services where no competition exists or where rates are fixed by law or ordinance, and the competitive bidding requirements of this article shall not apply to: the purchase of insurance by the state; contracts for the securing of services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part; contracts of employment in the regular civil service of the state; tourist advertising by the State Bureau of Tourism and Travel authorized under § 41-7-4 or advertising of the state parks by the Department of Conservation and Natural Resources; purchases of alcoholic beverages only by the Alcoholic Beverage Control Board; purchases for any hospital or campus medical facility which has a total licensed bed capacity of no less than 800 beds on May 29, 1985, operated by any state department, except the Department of Mental Health and Mental Retardation, board, bureau, commission, committee, institution, upon approval of the governing board of the institution, corporation, authority or office; purchases by the State Department of Transportation of local materials from any property owners in the vicinity of a project on which the local materials shall be used or purchases and contracts

for repair of equipment used in the construction and maintenance of highways by the State Department of Transportation; 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 §§ 21-2-1 through 21-2-4; purchases of maps or photographs purchased from any federal agency; purchases of manuscripts, maps, books, pamphlets, or periodicals purchased for the use of any state library or any other library in the state supported in whole or in part by state funds; contractual services and purchases of commodities for which there is only one vendor or supplier; contractual services and purchases of personal property, which by their very nature are impossible of award by competitive bidding; barter transactions by the Department of Corrections; and purchases, contracts, or repairs by the Alabama State Port Authority when it is deemed by the Director of Alabama State Port Authority and the Secretary-Treasurer of the Alabama State Port Authority that the purchases, contracts, or repairs are impractical of award by competitive bidding due to the exigencies of time or interference with the flow of commerce. The Director of Alabama State Port Authority and the Secretary-Treasurer of the Alabama State Port Authority shall place a sworn statement in writing in the permanent file or records setting out the emergency or exigency relied upon and the necessity for negotiation instead of proceeding by competitive bidding in that particular instance, and the sworn statement shall be open to public inspection. A copy of the sworn statement shall be furnished forthwith to the Governor and Attorney General.

(b) All educational and eleemosynary institutions governed by a board of trustees or other similar governing body and the Alabama State Port Authority shall be exempt from this article which relate to the powers, duties, authority, restrictions, and limitations conferred or imposed upon the Department of Finance, Division ofPurchasing. The educational and eleemosynary institutions, the Alabama State Port Authority, and the other state agencies exempted from this article shall let by free and open competitive bidding on sealed bids to the lowest responsible bidder all contracts of whatever nature for labor, services or work or for the purchase or lease of materials, equipment, supplies, or other personal property involving fifteen thousand dollars ($15,000) or more. The institutions, departments, and agencies shall establish

and maintain purchasing facilities as may be necessary to carry out the intent and purpose of this article by complying with the requirements for competitive bidding in the operation and management of each institution, department, or agency.

(c) Contracts entered into in violation of this article shall be void.

(d) Nothing in this section shall be construed as repealing §§ 9-2-106 and 9-2-107.

Section 41-16-21.1. Joint purchasing agreements.

(a) In the event that utility services are no longer exempt from competitive bidding under this article, non-adjoining counties may not purchase utility services by joint agreement under authority granted by this section.

(b) The Division of Purchasing, Department of Finance, is hereby authorized to enter into joint purchasing agreements to purchase, lease, or lease-purchase child support services, materials, equipment, supplies, or other personal property which have been let by competitive bid or competitive solicitation process by any group or consortium of governmental entities within or without the State of Alabama upon a finding by the Purchasing Agent that such joint purchasing agreements are in the best interests of the State of Alabama. Joint purchasing agreements entered into by the Division of Purchasing may be utilized by any governmental entity subject to the requirements of Title 41, Chapter 16, Articles 2 or 3A. This subsection shall not apply to the purchase, lease, or lease-purchase of materials, equipment, supplies, or other personal property which can only be utilized in conjunction with a service or service contract, whether subject to competitive bidding under this article or not, for the materials, equipment, supplies, or other personal property that must remain in effect to utilize the materials, equipment, supplies, or other personal property.

Nothing in this subsection prohibits or limits public four-year institutions from entering into joint purchasing agreements to purchase, lease, or lease-purchase materials, equipment, supplies, other personal property and services which have been let by competitive bid or competitive solicitation process by any group or consortium of governmental entities or through a group purchasing organization within or without the State of Alabama upon a finding

by the institution that such purchasing agreements are in the best interests of the institution; provided, however, this sentence shall not permit agreements to purchase, lease, or lease-purchase wireless communications equipment or services through any group or consortium of governmental entities or through any group purchasing organization.

Section 41-16-21.2. Exemption of certain departments or agencies whose principal business is honorariums from competitive bid laws.

All laws to the contrary notwithstanding, any state department or agency whose principal business is honorariums is hereby exempted from the provisions of the state competitive bid laws on purchases and contracts for services made by such department or agency.

Section 41-16-22. Competitive bidding not required on purchases from federal government.

The state may without advertisement or receiving competitive bids purchase materials, equipment, supplies or other personal property from the United States government or any agency, division or instrumentality thereof when such purchase is deemed by the State Purchasing Agent to be in the best interest of the State of Alabama.

Section 41-16-23. Letting of contracts without public advertisement authorized in case of emergencies affecting public health, safety, etc.

In case of emergency affecting public health, safety or convenience, so declared in writing by the head of the institution or state agency involved, setting forth the nature of the danger to public health, safety or convenience involved in delay, contracts may be let to the extent necessary to meet the emergency without public advertisement. Such action and the reasons therefore shall immediately be made public by the awarding authority.

Section 41-16-24. Advertisement for and solicitation of bids; opening of bids; public inspection; reverse auction procedures; certain partial contracts void.

(a) (1) The Purchasing Agent shall advertise for sealed bids on all purchases in excess of the competitive bid limit as established in Section 41-16-20 by posting notice thereof on a bulletin board maintained outside the office door or by publication of notice thereof, one time, in a newspaper published in Montgomery County, Alabama, or in any other manner, for such lengths of time as the Purchasing Agent may determine. The Purchasing Agent shall also solicit sealed bids or bids to be submitted by reverse auction procedure by notifying all Alabama persons, firms, or corporations who have filed a request in writing that they be listed for solicitation on bids for the particular items set forth in the request and the other persons, firms, or corporations the Purchasing Agent deems necessary to insure competition. If any person, firm, or corporation whose name is listed fails to respond to any solicitation for bids after the receipt of three solicitations, the listing may be cancelled by the Purchasing Agent.

(2) A purchasing agent may enter into a contract for purchases if a newspaper to which an advertisement for purchases did not publish the advertisement if the Purchasing Agent 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.

(b) All bids, except as provided in subsection (d), shall be sealed when received, shall be opened in public at the hour stated in the notice, and all original bids together with all documents pertaining to the award of the contract shall be retained in accordance with a retention period established by the State Records Commission and shall be open to public inspection.

(c) If the purchase or contract will involve an amount of the competitive bid limit as established in Section 41-16-20 or less, the Purchasing Agent may make the purchases or contracts either upon the basis of sealed bids, reverse auction procedure, or in the open market.

(d) For purposes of this article, a reverse auction procedure

includes either of the following:

(1) A real-time bidding process usually lasting less than one hour and taking place at a previously scheduled time and Internet location, in which multiple anonymous suppliers submit bids to provide the designated goods or services.

(2) A bidding process usually lasting less than two weeks and taking place during a previously scheduled period and at a previously scheduled Internet location, in which multiple anonymous suppliers submit bids to provide the designated goods or services.

(e) No purchase or contract involving an amount in excess of the competitive bid limit as established in Section 41-16-20 shall be divided into parts involving amounts of the competitive bid limit as established in Section 41-16-20 or less for the purpose of avoiding the requirements of this article. All such partial contracts involving the competitive bid limit as established in Section 41-16-20 or less shall be void.

Section 41-16-25. Effect of agreements or collusion among bidders in restraint of competition; sworn statements as to agreements to accompany bids.

Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition by agreement to bid at a fixed price or to refrain from bidding or otherwise shall render the bids of such bidders void. Each bidder shall accompany his bid with a sworn statement that he has not been a party to such an agreement.

Section 41-16-26. Effect of advance disclosure of terms of bid.

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.

Section 41-16-27. Manner of awarding contracts generally; records; exemptions.

(a) When purchases are required to be made through competitive

bidding, award shall, except as provided in subsection (f), be made to the lowest responsible bidder taking into consideration the qualities of the commodities proposed to be supplied, their conformity with specifications, the purposes for which required, the terms of delivery, transportation charges and the dates of delivery provided, that the awarding authority may at any time within 30 days after the bids are opened negotiate and award the contract to anyone, provided he secures a price at least five percent under the low acceptable bid. The award of such a negotiated contract shall be subject to approval by the Director of Finance and the Governor, except in cases where the awarding authority is a two-year or four-year college or university governed by a board. The awarding authority or requisitioning agency shall have the right to reject any bid if the price is deemed excessive or quality of product inferior. Awards are final only after approval of the Purchasing Agent.

(b) The awarding authority may award multiple purchase contracts resulting from a single invitation-to-bid where the specifications of the items of personal property 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 provision, the awarding authority must 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 provision.

This subsection (b) shall not apply to contracts for the purchase or use of push to talk services, which shall be purchased through a separate competitive bid process.

(c) Each bid, with the name of the bidder, shall be entered on a record. Each record, with the successful bid indicated thereon and with the reasons for the award if not awarded to the lowest bidder

shall, after award of the order or contract, be open to public inspection.

(d) The Purchasing Agent in the purchase of or contract for personal property or contractual services shall give preference, provided there is no sacrifice or loss in price or quality, to commodities produced in Alabama or sold by Alabama persons, firms, or corporations.

(e) (1) Contracts for the purchase of personal property or contractual services other than personal services shall be let by competitive bid for periods not greater than five years and current contracts existing on February 28, 2006, may be extended or renewed for an additional two years with a 90-day notice of such extension or renewal given to the Legislative Council, however, any contract that generates funds or will reduce annual costs by awarding the contract for a longer term than a period of three years which is let by or on behalf of a state two-year or four-year college or university may be let for periods not greater than 10 years. Any contract awarded pursuant to this section for terms of less than 10 years may be extended for a period not to exceed 10 years from the initial awarding of the contract provided that the terms of the contract shall not be altered or renegotiated during the period for which the contract is extended.

(2) For purchases of personal property made on or after January 1, 2010, in instances in which the awarding authority determines that the total cost of ownership over the expected life of the item or items, including acquisition costs plus sustaining costs, and including specifically life cycle costs, can be reasonably ascertained from industry recognized and accepted sources, the lowest responsible bid may be determined to be the bid offering the lowest life cycle costs and otherwise meeting all of the conditions and specifications contained in the invitation to bid. To utilize this provision to determine the lowest responsible bidder, the awarding authority must include a notice in the invitation to bid that the lowest responsible bid may be determined by using life cycle costs and identify the industry recognized and accepted sources that will be applicable to such an evaluation.

(3) Industry recognized and accepted sources may be

provided by rules adopted pursuant to the Alabama Administrative Procedure Act by the Green Fleets Review Committee if the review committee is established and enacted at the 2009 Regular Session. If the Green Fleets Review Committee is not enacted at the 2009 Regular Session, the Permanent Joint Legislative Committee on Energy Policy may adopt rules providing industry recognized and accepted sources, pursuant to the Alabama Administrative Procedure Act.

(f) Contracts for the purchase of services for receiving, processing, and paying claims for services rendered recipients of the Alabama Medicaid program authorized under Section 22-6-7 which are required to be competitively bid may be awarded to the bidder whose proposal is most advantageous to the state, taking into consideration cost factors, program suitability factors (technical factors) including understanding of program requirements, management plan, excellence of program design, key personnel, corporate or company resources and designated location, and other factors including financial condition and capability of the bidder, corporate experience and past performance and priority of the business to insure the contract awarded is the best for the purposes required. Each of these criteria shall be given relative weight value as designated in the invitation to bid, with price retaining the most significant weight. Responsiveness to the bid shall be scored for each designated criteria. If, for reasons cited above, the bid selected is not from the lowest bidding contractor, the Alabama Medicaid Agency shall present its reasons for not recommending award to the low bidder to the Medicaid Interim Committee. The committee shall evaluate the findings of the Alabama Medicaid Agency and must, by resolution, approve the action of the awarding authority before final awarding of any such contract. The committee shall also hear any valid appeals against the recommendation of the Alabama Medicaid Agency from the low bid contractor(s) whose bid was not selected.

(g) Notwithstanding the requirements under Sections 41-16-20, 41-16-21, and this section, contractual services and purchases of personal property regarding the athletic department, food services, and transit 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 deemed by the respective board that financial benefits will accrue to the institution, except that in the cases where an Alabama business entity as defined by this section is available to supply the product or service they will 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. However, the terms and conditions of any of the services or purchases which are contracted through negotiation without being competitively bid and the name and address of the recipient of such a contract shall be advertised in a newspaper of general circulation in the municipality in which the college or university is located once a week for two consecutive weeks commencing no later than 10 days after the date of the contract. For the purposes of this section, the term Alabama business entity shall mean any sole proprietorship, partnership, or corporation organized in the State of Alabama.

(h) (1) For purchases of motor vehicles by the state made on or after January 1, 2010, the lowest responsible bid may be determined to be a bid offering the lowest life cycle costs, if it is determined that the total cost of ownership over the expected life of a motor vehicle, including acquisition costs plus maintenance costs, including specifically life cycle costs, can be reasonably ascertained from industry recognized and accepted sources. The lowest responsible bid shall otherwise meet all of the conditions and specifications contained in the invitation to bid. To utilize this provision to determine the lowest responsible bidder, the state must include a notice in the invitation to bid that the lowest responsible bid may be determined by using life cycle costs and identify the industry recognized and accepted sources that will be applicable to such an evaluation.

(2) Industry recognized and accepted sources may be provided by rules adopted pursuant to the Alabama Administrative Procedure Act by the Green Fleets Review Committee if the review committee is established and enacted at the 2009 Regular Session. If the Green Fleets Review Committee is not enacted at the 2009 Regular Session, the Permanent Joint Legislative Committee on Energy Policy may adopt rules providing industry recognized and accepted sources pursuant to the Alabama

Administrative Procedure Act.

(i) When a single invitation-to-bid specifies a set of deliverables that would be capable of division into separate, independent contracts, the awarding authority, at its discretion, may award a secondary contract for any subset of such deliverables, not to exceed 20 percent of the original contract value, to any Alabama business certified under the Federal HUBZone program whose properly submitted responsible bid does not exceed five percent of the lowest responsible bid. In order to make a secondary award under this provision, the awarding authority shall include in the invitation-to-bid a notice that a secondary award may be made.

Section 41-16-28. Bond for faithful performance of contract to be required.

Bond in a responsible sum for faithful performance of the contract, with adequate surety, shall be required in an amount specified in the advertisement for bids.

Section 41-16-29. Assignment of contracts.

No contract awarded to the lowest responsible bidder shall be assignable by the successful bidder without written consent of the awarding authority and requisitioning agency, and in no event shall a contract be assigned to an unsuccessful bidder whose bid was rejected because he was not a responsible bidder.

Section 41-16-30. Conflicts of interest of purchasing agents, assistants, etc., generally; making of purchases or awarding of contracts in violation of article.

Neither the Purchasing Agent nor any assistant or employee of his shall be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for any personal property or contractual service, nor in any firm, partnership, association or corporation furnishing any such personal property or contractual services to the state government or to any of its departments, agencies or institutions. Neither the Purchasing Agent nor any assistant or employee of his shall accept or receive, directly or indirectly, from any person, firm, association

or corporation to whom any contract may be awarded, by rebate, gifts or otherwise, any money or thing of value whatsoever or any promise, obligation or contract for future reward or compensation, nor shall any person willfully make any purchase or award any contract in violation of the provisions of this article.

Any violation of this section shall be deemed a misdemeanor, and any person who violates this section shall, upon conviction, be imprisoned for not more than 12 months or fined not more than $500.00 or both. Upon conviction thereof, any such Purchasing Agent, assistant or employee of his or any person who willfully makes any purchase or awards any contract in violation of the provisions of this article shall be removed from office.

Section 41-16-31. Institution of actions to enjoin execution of contracts entered into in violation of article.

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.

Section 41-16-32. Provisions of article cumulative; repeal of other provisions of law.

This article shall be cumulative in its nature. All conflicting provisions of law are hereby expressly repealed; however, this article shall in no manner repeal any of the provisions of Chapter 36 of Title 16 of this code or Chapters 2 and 5 of Title 39 of this code or Article 5 of Chapter 4 of this title.

ARTICLE 3.

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

41-16-50. Contracts for which competitive bidding required generally.

41-16-51. Contracts for which competitive bidding not

required.

41-16-51.1 Municipal or county contracts for certain services exempt from competitive bid requirements.

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. Municipal or county contracts for certain services exempt from competitive bid requirements.

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 certain public offices or positions.

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.

Section 41-16-50. Contracts for which competitive bidding required.

(a) With the exception of contracts for public works whose competitive bidding requirements are governed exclusively by Title 39, all expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars ($15,000) or more, and the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually, bound under the terms of the lease, to pay a total amount of fifteen thousand dollars ($15,000) or more, made by or on behalf of any state trade school, state junior college, state college, or university under the supervision and control of the State Board of Education, the district boards of education of independent school districts, the county commissions, the governing bodies of the municipalities of the state, and the governing boards of instrumentalities of counties and municipalities, including waterworks boards, sewer boards, gas boards, and other like utility boards and commissions, except as hereinafter provided, shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder. Prior to advertising for bids for an item of personal property, where a county, a municipality, or an instrumentality thereof is the awarding authority, the awarding authority may establish a local preference zone consisting of either the legal boundaries or jurisdiction of the awarding authority, or the boundaries of the county in which the awarding authority is located, or the boundaries of the Core Based Statistical Area (CBSA) in which the awarding authority is located. If no such action is taken by the awarding authority, the boundaries of the local preference zone shall be deemed to be the same as the legal boundaries or jurisdiction of the awarding authority. 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 local preference zone where the county, a municipality, or an instrumentality thereof is the awarding authority, and the bid is no more than three percent greater than the bid of the lowest responsible bidder, the awarding authority may award the contract

to the resident responsible bidder. In the event only one bidder responds to the invitation to bid, the awarding authority may reject the bid and negotiate the purchase or contract, providing the negotiated price is lower than the bid price.

(b) The governing bodies of two or more contracting agencies, as enumerated in subsection (a), or the governing bodies of two or more counties, or the governing bodies of two or more city or county boards of education, may provide, by joint agreement, for the purchase of labor, services, or work, or for the purchase or lease of materials, equipment, supplies, or other personal property for use by their respective agencies. The agreement shall be entered into by similar ordinances, in the case of municipalities, or resolutions, in the case of other contracting agencies, adopted by each of the participating governing bodies, which shall set forth the categories of labor, services, or work, or for the purchase or lease of materials, equipment, supplies, or other personal property to be purchased, the manner of advertising for bids and the awarding of contracts, the method of payment by each participating contracting agency, and other matters deemed necessary to carry out the purposes of the agreement. Each contracting agency's share of expenditures for purchases under any agreement shall be appropriated and paid in the manner set forth in the agreement and in the same manner as for other expenses of the contracting agency. The contracting agencies entering into a joint agreement, as herein permitted, may designate a joint purchasing or bidding agent, and the agent shall comply with this article. Purchases, contracts, or agreements made pursuant to a joint purchasing or bidding agreement shall be subject to all terms and conditions of this article.

In the event that utility services are no longer exempt from competitive bidding under this article, non-adjoining counties may not purchase utility services by joint agreement under authority granted by this subsection.

(c) The awarding authority may require bidders to furnish a bid bond for a particular bid solicitation if the bonding requirement applies to all bidders, is included in the written bid specifications, and if bonding is available for the services, equipment, or materials.

Section 41-16-51. Contracts for which competitive bidding not required.

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

(1) The purchase of insurance.

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

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

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

(5) Contracts for fiscal or financial advice or services.

(6) 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.

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

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

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

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

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

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

(13) Contractual services and purchases of commodities for which there is only one vendor or supplier and contractual services and purchases of personal property which by their very nature are

impossible to award by competitive bidding.

(14) Purchases of dirt, sand, or gravel by a county governing body from in-county property owners in order to supply a county road or bridge project in which the materials will be used. The material shall be delivered to the project site by county employees and equipment used only on projects conducted exclusively by county employees.

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

(16) Subject to the limitations in this subdivision, purchases of goods made as a part of the purchasing cooperative sponsored by the National Association of Counties, its successor organization, or any other competitive bid nationwide cooperative purchasing program, or other national or regional governmental cooperative purchasing program. This subdivision shall not apply to goods for which a service or service contract, whether subject to competitive bidding under this article or not, is necessary to utilize the goods. Such purchases may only be made if all of the following occur:

a. The goods being purchased are available as a result of a competitive bid process conducted by a governmental entity and approved by the Alabama Department of Examiners of Public Accounts for each bid.

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

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

d. The entity purchasing goods under this subdivision 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.

(17) Purchase of goods or services, other than wireless communication services, whether voice or data, from vendors that have been awarded a current and valid Government Services

Administration contract. Any purchase made pursuant to this subdivision shall be under the same terms and conditions as provided in the Government Services Administration contract. Prices paid for such goods and services, other than wireless communication services, whether voice or data, may not exceed the amount provided in the Government Services Administration contract.

(b) This article shall not apply to:

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

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

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

(4) The purchase, lease, or other acquisition of machinery, equipment, supplies, and other personal property or services by a medical clinic board organized under Sections 11-58-1 to 11-58-14, inclusive.

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

(6) Contracts for the purchase, lease, sale, construction, installation, acquisition, improvement, enlargement, or extension of any plant, building, structure, or other facility or any machinery, equipment, furniture, or furnishings therefor designed or intended for lease or sale for industrial development, other than public utilities, under Sections 11-54-80 to 11-54-99, inclusive, or Sections 11-54-20 to 11-54-28, inclusive, or any other statute or amendment to the Constitution of Alabama authorizing the

construction of plants or other facilities for industrial development or for the construction and equipment of buildings for public building authorities under Sections 11-56-1 to 11-56-22, inclusive.

(7) The purchase of equipment, supplies, or materials needed, used, and consumed in the normal and routine operation of any waterworks system, sanitary sewer system, gas system, or electric system, or any two or more thereof, that are owned by municipalities, counties, or public corporations, boards, or authorities that are agencies, departments, or instrumentalities of municipalities or counties and no part of the operating expenses of which system or systems have, during the then current fiscal year, been paid from revenues derived from taxes or from appropriations of the state, a county, or a municipality.

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

(c) The state trade schools, state junior colleges, state colleges, and universities under the supervision and control of the State Board of Education, the district boards of education of independent school districts, the county commissions, and the governing bodies of the municipalities of the state shall establish and maintain such purchasing facilities and procedures as may be necessary to carry out the intent and purpose of this article by complying with the requirements for competitive bidding in the operation and management of each state trade school, state junior college, state college, or university under the supervision and control of the State Board of Education, the district boards of education of independent school districts, the county commissions, and the governing bodies of the municipalities of the state and the governing boards of instrumentalities of counties and municipalities, including waterworks boards, sewer boards, gas boards, and other like utility boards and commissions.

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

Section 41-16-51.1. Municipal or county contracts for certain services exempt from competitive bid requirements.

Notwithstanding any other laws to the contrary, when it is necessary for a county or an incorporated municipality to enter into a public contract for the provision of services or for the provision of primarily services even though the contract may include the furnishing of ancillary products or ancillary goods which would otherwise be required to be let by competitive bid, the county or municipality may, without soliciting and obtaining competitive bids, contract with a vendor or provider for the services at a price which does not exceed the price which the state has established through the competitive bid process for the same services under the same terms and conditions and provided it pertains to a current and active bid on a non-statewide agency contract. The mere delivery of products or goods, or the performance of a common, non-specialized service with relation to goods or products shall not make a purchase or contract qualify for the bid exemption hereunder. If a county or incorporated municipality desires to purchase under this bid exception procedure, the purchase must be approved by a majority vote of its governing body at a public meeting thereof.

Section 41-16-52. Expenditures for repair or lease of heavy-duty off-highway construction equipment may be made without regard to provisions of article.

(a) All expenditures of funds of whatever nature for repair parts and repair of heavy duty off-highway construction equipment and of all vehicles with a gross vehicle weight rating of 25,000 pounds or greater, including machinery used for grading, drainage, road construction and compaction for the exclusive use of county and municipal, highway, street and sanitation departments, involving not more than $15,000 made by or on behalf of any county commissions and the governing bodies of the municipalities of the state, and the governing bodies of instrumentalities, including waterworks boards, sewer boards, gas boards, and other like utility boards and commissions, shall be made, at the option of said governing boards, bodies, instrumentalities and commissions, without regard to the provisions of this article. The foregoing exemption from the provisions of this article shall apply to each incident of repair as to any such repair parts, equipment, vehicles

or machinery. The amount of such exempted expenditure shall not be construed to be an aggregate of all such expenditures per fiscal year as to any individual vehicle or piece of equipment or machinery.

(b) The option provided by subsection (a) of this section may be exercised by said governing boards, bodies, instrumentalities and commissions by specific reference to this section on any and all purchase orders and purchase commitments executed by said governing boards, bodies, instrumentalities and commissions; provided, however said option shall not be exercised by any employee, agent or servant unless done so after having received official prior approval of the respective governing board, body, instrumentality or commission or unless exercised pursuant to a formal policy adopted by such governing board, body, instrumentality or commission setting out conditions and restrictions under which such option shall be exercised.

(c) All expenditures of funds of whatever nature for the leasing of heavy duty off-highway construction equipment and all vehicles with a gross vehicle weight rating of 25,000 pounds or greater, including machinery for grading, drainage, road construction and compaction for exclusive use of county and municipalities, highway, street and sanitation departments, involving a monthly rental of not more than $5,000.00 per month per vehicle or piece of equipment or machinery but not to exceed $15,000.00 per month for all such vehicles and pieces of equipment made by or on behalf of any county commissions and the governing boards of municipalities of the state and the governing bodies of instrumentalities, including waterworks boards, sewer boards, gas boards and other like utility boards and commissions shall be made, at the option of the said governing boards, bodies, instrumentalities and commissions, without regard to the provisions of this article.

Section 41-16-53. Letting of contracts without public advertisement authorized in case of emergencies affecting public health, safety, etc.

In case of emergency affecting public health, safety or convenience, so declared in writing by the awarding authority,

setting forth the nature of the danger to public health, safety or convenience involved in delay, contracts may be let to the extent necessary to meet the emergency without public advertisement. Such action and the reasons therefor shall immediately be made public by the awarding authority.

Section 41-16-54. Advertisement for and solicitation of bids; opening of bids; reverse auction procedures; public inspection; certain partial contracts void.

(a) (1) All proposed purchases in excess of fifteen thousand dollars ($15,000) shall be advertised by posting notice thereof on a bulletin board maintained outside the purchasing office and in any other manner and for any length of time as may be determined. Sealed bids or bids to be submitted by a reverse auction procedure shall also be solicited by sending notice by mail or other electronic means to all persons, firms, or corporations who have filed a request in writing that they be listed for solicitation on bids for the particular items that are set forth in the request. If any person, firm, or corporation whose name is listed fails to respond to any solicitation for bids after the receipt of three solicitations, the listing may be cancelled.

(2) If a governing body mandates that advertisement for bids shall be published in a newspaper, the contract for purchase shall be awarded if the newspaper to which the advertisement was submitted did not publish the advertisement if the governing body 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.

(b) Except as provided in subsection (d), all bids shall be sealed when received and shall be opened in public at the hour stated in the notice.

(c) If the purchase or contract will involve an amount of fifteen thousand dollars ($15,000) or less, the purchases or contracts may be made upon the basis of sealed bids, a joint purchasing agreement, a reverse auction procedure, or in the open market.

(d) Beginning January 1, 2009, the awarding authority may make purchases or contracts involving an amount of fifteen thousand

dollars ($15,000) or more through a reverse auction procedure; provided, however, that a reverse auction shall only be allowed where the item to be purchased at a reverse auction is either not at the time available on the state purchasing program under the same terms and conditions or, if available, the lowest price offered in the reverse auction is equal to or less than the price for which the item is available on the state purchasing program under the same terms and conditions. All of the purchases shall be subject to audit by the Examiners of Public Accounts. For purposes of this article, a reverse auction procedure includes either of the following:

(1) A real-time bidding process usually lasting less than one hour and taking place at a previously scheduled time and Internet location, in which multiple anonymous suppliers submit bids to provide the designated goods or services.

(2) a. A bidding process usually lasting less than two weeks and taking place during a previously scheduled period and at a previously scheduled Internet location, in which multiple anonymous suppliers submit bids to provide the designated goods or services.

b. No later than November 30, 2008, the Department of Examiners of Public Accounts shall establish procedures for the use of reverse auction, which shall be distributed to all contracting agencies and shall be used in conducting any audits of the purchasing agency.

(e) All original bids together with all documents pertaining to the award of the contract shall be retained in accordance with a retention period of at least seven years established by the Local Government Records Commission and shall be open to public inspection.

(f) No purchase or contract involving professional services shall be subject to the requirements of this article and no purchase or contract involving an amount in excess of fifteen thousand dollars ($15,000) shall be divided into parts involving amounts of fifteen thousand dollars ($15,000) or less for the purpose of avoiding the requirements of this article. All such partial contracts involving fifteen thousand dollars ($15,000) or less shall be void.

(g) This section shall be applicable to education purchases made pursuant to Chapter 13B of Title 16.

Section 41-16-55. Effect of agreements or collusion among bidders in restraint of competition; knowing participation in collusive agreement.

Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition, by agreement, to bid at a fixed price or to refrain from bidding or otherwise shall render the bids of such bidders void and shall cause such bidders to be disqualified from submitting further bids to the awarding authority on future purchases.

Whoever knowingly participates in a collusive agreement in violation of this section involving a bid or bids of fifteen thousand dollars ($15,000) and under shall be guilty of a Class A misdemeanor and, upon conviction, shall be punished as prescribed by law.

Whoever knowingly and intentionally participates in a collusive agreement in violation of this section involving a bid or bids of over fifteen thousand dollars ($15,000) shall be guilty of a Class C felony, and upon conviction shall be punished as prescribed by law.

Section 41-16-56. Effect of advance disclosure of terms of bid.

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.

Section 41-16-57. Municipal or county contracts for certain services exempt from competitive bid requirements.

(a) When purchases are required to be made through competitive bidding, awards shall be made to the lowest responsible bidder taking into consideration the qualities of the commodities proposed to be supplied, their conformity with specifications, the purposes for which required, the terms of delivery, transportation charges, and the dates of delivery. If at any

time after the award has been made the lowest responsible bidder notifies the awarding authority in writing that the bidder will no longer comply with the terms of the award to provide the goods or services to the awarding authority under the terms and conditions of the original award, or the awarding authority documents that the lowest responsible bidder defaults under the terms of the original award, the awarding authority may terminate the award to the defaulting bidder and make an award to the second lowest responsible bidder for the remainder of the award period without rebidding, provided the award to the second lowest responsible bidder is in all respects made under the terms and conditions contained in the original bid specifications and is for the same or a lower price than the bid originally submitted to the awarding authority by the second lowest responsible bidder.

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

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

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

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

(c) (1) Beginning January 1, 2009, for purchases of personal property, including on or after June 9, 2011, goods which are, or are to become, fixtures, in instances where the awarding authority determines that the total cost of ownership over the expected life of the item or items, including acquisition costs plus sustaining costs or life cycle costs, can be reasonably ascertained from industry recognized and accepted sources, the lowest responsible bid may be determined to be the bid offering the lowest life cycle costs and otherwise meeting all of the conditions and specifications contained in the invitation to bid. To utilize this subdivision to determine the lowest responsible bidder, the awarding authority shall include a notice in the invitation to bid that the lowest responsible bid may be determined by using life cycle costs and identify the industry recognized and accepted sources that will be applicable to such an evaluation.

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

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

(e) Each record, with the successful bid indicated thereon, and with the reasons for the award if not awarded to the lowest bidder, shall, after award of the order or contract, be open to public inspection.

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

other lease-purchase contracts shall be let for periods not greater than 10 years.

Section 41-16-58. Bond for faithful performance of contract may be required.

Bond in a responsible sum for faithful performance of the contract, with adequate surety, may be required in an amount specified in the advertisement for bids.

Section 41-16-59. Assignment of contracts.

No contract awarded to the lowest responsible 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 was not a responsible bidder.

Section 41-16-60. Conflicts of interest of members or officers of certain public offices or positions.

Members and officers of the city and county boards of education and the district boards of education of independent school districts may be financially interested in or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for any personal property or contractual service under either of the following conditions:

(1) The contract or agreement under which the financial interest arises was created prior to the election or appointment of the individual to the position he or she holds.

(2) The individual holding the position does not participate in, by discussion or by vote, the decision-making process which creates the financial or personal beneficial interest.

Section 41-16-61. Institution of actions to enjoin execution of contracts entered into in violation of article.

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.

Section 41-16-62. Provisions of article not applicable to certain municipal contracts.

The provisions of this article shall not be applicable to any contracts made by a municipality pursuant to the provisions of Act No. 4 adopted at the 1956 Second Special Session of the Legislature of Alabama, as amended, which relates to the promotion of trade by inducing commercial enterprises to locate in the state and which confers on municipalities having a population not exceeding 100,000 inhabitants, according to the last or any subsequent federal census, powers with respect to the acquisition, leasing and financing of projects suitable for use by certain commercial enterprises.

Section 41-16-63. Provisions of article cumulative.

This article shall be cumulative in its nature.

ARTICLE 3A.

COMPETITIVE BIDDING ON CONTRACTS FOR GOODS AND SERVICES.

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. Purchases 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.

Section 41-16-70. Legislative findings.

The Legislature finds and declares that the best interests of the taxpayers of Alabama are served when competition exists in the procurement of goods and services by state departments, boards, commissions, authorities, and instrumentalities of state government. Competitive bid requirements ensure that all citizens have the opportunity to compete for government procurements and it is imperative that officials charged with expending public funds conduct competitive processes which are open to all interested and qualified persons and businesses. In order to ensure fair and open competition in the procurement of goods and services, this article shall be liberally construed.

Section 41-16-71. Definitions.

The following terms as used in this article shall have the following meanings:

(1) GSA CONTRACT. A contract for goods or services established by the General Services Administration of the United States Government or its successor agency.

(2) PROFESSIONAL SERVICES. The services of physicians, architects, engineers, attorneys, and other individuals, or business entities offering the services of such 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. Questions of whether a required service is a professional service under this article or a service subject to the requirements of Section 41-16-20 shall be determined by the Director of Finance with the advice of the Attorney General.

(3) SOLE SOURCE. The provision of goods or a service

where only one person or business entity can provide the required goods or service.

Section 41-16-72. Procurement of professional services.

Any other provision of law notwithstanding, the procurement of professional services by any agency, department, board, bureau, commission, authority, public corporation, or instrumentality of the State of Alabama shall be conducted through the following selection process:

(1) a. Except as otherwise provided herein, attorneys retained to represent the state in litigation shall be appointed by the Attorney General in consultation with the Governor from a listing of attorneys maintained by the Attorney General. All attorneys interested in representing the State of Alabama may apply and shall be included on the listing. 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 of Alabama 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 as defined in subparagraph f.1. of subdivision (1), may be established by executive order of the Governor. Nothing in this article and nothing in Chapter 15 of Title 36 modifies or repeals the exclusive authority of the governing boards of the public institutions of higher education or public pension funds to direct and control litigation involving their respective universities or public pension fund and to employ and retain legal counsel of their own choice, consistent with their broad powers of management and control set forth in Chapters 47-56 of Title 16 and in the constitution, Chapter 25 of Title 16, and Chapter 27 of Title 36, respectively. Provided further, nothing in this article modifies or repeals the authority of the Attorney General to direct and control litigation involving the state or any agency, department, or instrumentality of the state, or the authority of the Governor to appear in civil cases in which the state is interested.

b. Attorneys retained by any state purchasing entity to

render nonlitigation legal services shall be selected by such entity from a listing 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 listing. 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 such state entity shall receive the best representation for the funds paid. Fees for such services shall be negotiated by the state entity requiring the services and shall be subject to the review and approval of the Governor or the Director of Finance when so designated by the Governor.

c. This article shall not apply to the appointment by a court of attorneys or experts.

d. This article shall not apply to the retention of experts by the state for the purposes of litigation, or avoidance of litigation.

e. Nothing in this article shall be construed as altering or amending the Governor's authority to retain attorneys pursuant to Section 36-13-2, however, the Governor shall select such attorneys from three proposals received from attorneys included on the listing maintained by the Attorney General.

f. 1. For the purposes of this paragraph, the following terms shall have the following meanings:

(i) 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.

(ii) 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 contingency fee contract.

2. The state 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:

(i) Whether there exists sufficient and appropriate legal and financial resources within the state to handle the matter without a contingency contract.

(ii) The expected time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.

(iii) The geographic area where the attorney services are to be provided.

(iv) 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.

3. The state may not enter into a contingency fee contract that provides for the private attorney 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:

(i) Twenty-two percent of any recovery of up to ten million dollars ($10,000,000); plus

(ii) Twenty percent of any portion of such recovery between ten million dollars ($10,000,000) and twenty-five million dollars ($25,000,000); plus

(iii) Sixteen percent of any portion of such recovery between twenty-five million dollars ($25,000,000) and fifty million dollars ($50,000,000); plus

(iv) Twelve percent of any portion of such recovery between fifty million dollars ($50,000,000) and seventy-five million dollars ($75,000,000); plus

(v) Eight percent of any portion of such recovery between seventy-five million dollars ($75,000,000) and one hundred million dollars ($100,000,000); plus

(vi) Seven and one-tenth (7.1) percent of any

portion of such recovery exceeding one hundred million dollars ($100,000,000).

(vii) The aggregate fee paid to contingency fee counsel shall not exceed seventy-five million dollars ($75,000,000) per action.

4. All litigation expenses incurred by the private attorney 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 of Alabama exists that justifies that the contingency fee limitations set forth in subparagraph 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. The state may not enter into a contract for contingency fee attorney services unless all of the following requirements are met throughout the contract period and any extensions thereof:

(i) A government attorney or attorneys retains complete control over the course and conduct of the case.

(ii) A government attorney with supervisory authority is personally involved in overseeing the litigation.

(iii) A government attorney or attorneys retains veto power over any decisions made by a private attorney.

(iv) After giving reasonable notice to the contingency fee counsel, any defendant that is the subject of the litigation may contact the lead government attorney or attorneys directly unless directed to do otherwise by the lead government attorney for the litigation matter. Contingency fee counsel shall have the right to participate in such discussions with the lead government attorney or attorneys unless, after consultation with contingency fee counsel, the lead government attorney agrees to such discussions without contingency fee counsel being present.

(v) A government attorney with supervisory authority for the case shall attend all settlement

conferences.

(vi) Decisions regarding settlement of the case shall be reserved exclusively to the discretion of the government attorney or attorneys 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 contracted private attorney and the state, including, without limitation, the requirements listed in subparagraph 6.

8. Copies of any executed contingency fee contract and the contracting agency's written determination to enter into a contingency fee contract with the private attorney and any payment of any contingency fees shall be posted online pursuant to Section 41-4-65(b).

9. Any private attorney under contract to provide services to the state on a contingency fee basis, from the inception of the 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 private attorney shall make all the records available for inspection and copying upon request by the Governor, Attorney General, or contracting agency. In addition, the private attorney shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the contract in increments not greater than 1/10 of an hour and shall promptly provide these records to the Governor, Attorney General, or contracting agency, upon request.

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 contingent fee contract within thirty days of receipt thereof unless ordered to do otherwise by a court with jurisdiction over the litigation subject to the contingency contract.

(2) 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. All physicians interested in providing medical services to the State of Alabama may apply and shall be included on the listing.

(3) Professional services of architects, landscape architects, engineers, land surveyors, geoscience, and other similar professionals 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. Notice of need for professional services shall be widely disseminated to the professional community in a full and open manner. Procuring state entities shall evaluate such professionals that respond to the notice of need based on such state entity's qualification-based selection process criteria. Any such 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 such professional. Where the Alabama Building Commission has set a fee schedule for the professional services sought, fees shall not exceed the schedule without approval of the Director of the Alabama Building Commission and the Governor.

(4) The Director of Finance, through the Division of Purchasing of the Department of Finance, shall establish and maintain lists of professional service providers, other than those specifically named in this section, which may be required from time to time by any state agency, department, board, bureau, commission, authority, public corporation, or instrumentality. When such professional services are needed, the purchasing state entity shall solicit

proposals from the professional service providers desiring to receive requests for proposals. The purchasing state entity shall select the professional service provider that best meets the needs of the purchasing entity as expressed in the request for proposals. Price shall be taken into consideration. In the event the fees paid to the selected professional service provider exceed by 10 percent the professional service fee offered by the lowest qualified proposal, the reasons for selecting a professional service provider must be stated in writing, signed by the director of the purchasing state entity, and made a part of the selection record.

(5) Contracts for professional services shall be limited only to that portion of a contract relating to the professional service provided. Goods purchased by the state in conjunction with the contract for professional services shall be purchased pursuant to Section 41-16-20.

(6) Should an emergency affecting the public health, safety, convenience, or the economic welfare of the State of Alabama so declared in writing under oath to the Governor and the Attorney General by the state entity requiring the professional services arise, the professional services required to alleviate the emergency situation may be procured from any qualified professional service provider without following the process or procedure required by this article.

(7) The process set forth herein for the selection of professional service providers shall not apply to the Legislature, the Alabama State Port Authority, or to colleges and universities governed by a board of trustees or by the Department of Postsecondary Education. The State Department of Education shall not be subject to the provisions of this article, requiring the process set forth herein for the selection of professional service providers, except for the future acquisition of professional services in support of computer technology on a statewide basis which exceeds the amount of expenditures set forth within this chapter. However, if a state agency or department is able to provide the necessary computer networking services, then the services shall be provided by the agency or department without being contracted to an outside provider. In the event the State Department of Education has intervened into the financial operations of a local board of

education, the State Department of Education shall follow the provisions of law applicable to local boards of education for services related to the local board of education subject to intervention. The Alabama Medicaid Agency shall not be subject to the provisions of this article requiring the process set forth herein for 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.

(8) Under any contract letting process in this section, all requests for proposals from any state entity purchasing professional services shall be sent to all professional service providers regardless of race that have notified the state of their interest in receiving state business.

(9) Under any contract letting process in this section, all lists containing professional service providers and contractors for contracts under the provisions of this article shall seek the racial and ethnic diversity of the state.

Section 41-16-73. Purchase of insurance.

The purchase of insurance shall be pursuant to a competitive qualification based process developed by the Department of Finance. The Alabama State Port Authority shall be exempt from this section.

Section 41-16-74. Purchase from vendors with GSA contracts; purchase of utilities.

All goods and services purchased under the provisions of this article must be competitively bid or procured as provided for in this article. However, goods and services may be purchased from vendors that have been awarded a current and valid GSA contract. Prices paid for such goods and services may not exceed the lowest competitively bid price for these goods or services. In contracting for the purchase of utilities, the Director of Finance may not purchase services if the price exceeds the price in an existing state contract. The Director of Finance may require any additional terms and conditions determined to be necessary.

Section 41-16-75. Sole source purchases.

State entities seeking to purchase goods or services from a sole source vendor may do so only upon the approval of the Department of Finance, through the Division of Purchasing, unless the purchasing state entity is authorized by law to conduct its own purchasing activities. Approval for sole source purchases shall be given only if the purchasing state entity establishes that no other goods or service can meet its needs and that no other vendor offers substantially equivalent goods or service that can accomplish the purpose for which the goods or service is required. The Director of Finance may require information from either the purchasing entity or the vendor seeking to be declared a sole source that is deemed necessary to meet the requirements of this provision.

Section 41-16-76. Promulgation of rules and regulations.

The Director of Finance, through the Division of Purchasing, may promulgate rules or regulations necessary for the implementation of this article. The rules and regulations shall be issued in accordance with the Alabama Administrative Procedure Act. Nothing in this article shall be construed as giving purchasing authority to any state agency, department, board, bureau, commission, authority, public corporation, or instrumentality that does not otherwise have the purchasing authority.

Section 41-16-77. Violations; void contracts; opportunity to compete; relation to other laws.

(a) Any person who willfully or intentionally violates this article shall be subject to a civil penalty of not less than five hundred dollars ($500) and not to exceed five thousand dollars ($5,000) to be deposited into the State General Fund.

(b) Any contract entered into in violation of the provisions of this article shall be void. All persons or business entities doing business with the State of Alabama are presumed to understand all laws and regulations governing the purchase of goods and services by the State of Alabama.

(c) All state entities shall implement policies and procedures to ensure that the opportunity to compete for state contracts and business is open to qualified individuals and firms representing the racial, ethnic, and cultural diversity of the state.

(d) Nothing in this article shall be construed to repeal or supersede the enabling laws of professional licensing boards or commissions listed in Title 34, and any contracts lawfully entered into by such boards or commissions shall not be construed to violate any of the provisions of this article.

Section 41-16-78. Exceptions.

(a) This article shall not apply to any entity that does not receive state funds.

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

(c) This article shall not apply to any county or municipality, or any board, public corporation, authority, public utility district, or other entity created by any county or municipality, or to the Alabama Municipal Electric Authority created pursuant to the provisions of Section 11-50A-1, et seq., nor shall it apply to any local school board, the State Department of Education, or other entity covered under Section 41-16-50, et seq., except as herein provided for future support of computer technology or any educational and eleemosynary institutions governed by a board of trustees or other similar governing body, nor shall it apply to any statewide non-profit water and wastewater utility association.

(d) This article shall not apply to any state authority, board, or other entity with respect to contracts related to the issuance of debt which is to be repaid from sources other than state funds.

41-16-79. Contracts under review by Contract Review Permanent Legislative Oversight Committee.

All contracts which are subject to the requirements of Section 29-2-41 shall remain subject to that section and shall first be reviewed by the Contract Review Permanent Legislative Oversight

Committee.

Editor's Note: Former Sections 41-16-80 through 82, dealing with surety bonds or insurance under public building or construction contracts, was repealed in 1997. The following provisions, enacted in 2001, were assigned some of the same section numbers of the Code of Alabama (1975).

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.

SURETY BONDS OR INSURANCE UNDER PUBLIC BUILDING OR CONSTRUCTION CONTRACTS.

Sections 41-16-80 through 41-16-82. Repealed by Acts 1997, No.

97-225, p. 348, § 4.

CONTRACTS FOR SALE OF CERTAIN STATE PROPERTY.

Sections 41-16-100 through 41-16-109. Repealed by Acts 1984, No. 84-249, p.392, § 9, effective October 1, 1984.

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 depositary 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.

CHAPTER 3

CASES INTERPRETING

COMPETITIVE BID LAW

ARTICLE 1.

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 2.

Case Summaries

In reading the following opinions, it is important to note that the statutory threshold for compliance has changed over the years. Once again, the threshold amounts were: 2012-present: $15,000 for state agencies, 2008 – present: $15,000 for local government agencies; 1994-2008 for local agencies, 1994 – 2012 for state agencies: $7,500; 1989 – 1994: $5000; 1977 – 1989: $2000; and pre-1977: $500.

1. 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.

2. 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.

3. 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.

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

i. 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.

ii. Summary judgment was granted to Priceville, since the courts found that the contract was 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.

iii. 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).

a. 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.

b. Ex Parte Ballew's holding that the doctrine of estoppel could not preclude the town's defense of noncompliance with the 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.

5. Anderson v. Fayette County Board of Education, 738 So. 2d 854 (Ala. 1999)

In 1996 the Fayette County Board of Education 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 and turned over to Trane the job of making and keeping the board's facility's heating and air conditioning systems efficient. The Alabama Supreme Court held that the contract between the board and Trane was exempt from the Competitive Bid Law. It concluded that Trane's "personality" was a major part of the contract, stating: "the language of the PACT, as quoted above, 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. ALA. CODE § 41-16-51(a)(3)". The court, after listing the activities Trane would

undertake through its professional staff, concluded that the board purchased more than just equipment.

6. 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.

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

i. The practice of requesting alternative bids is consistent with the Alabama Competitive Bid Law.

ii. 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.

8. 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 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.

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

i. 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).

ii. 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.

iii. 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.

10. 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. Court held that the award of an exclusive franchise must be made in compliance with the Alabama Competitive Bid Law.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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 rendered 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.

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

i. 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:

a. Goods or service offered must be unique;

b. Uniqueness must be substantially related to intended purpose, use, and performance of goods or service sought; and

c. 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.

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

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

i. A debtor in bankruptcy does not lose his rights as a taxpayer, so he has standing to bring action under the Competitive Bid Law.

ii. 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.

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

i. 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:

a. a decision process tainted by improper influence or fraud, or

b. gross negligence.

ii. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

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

i. 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."

ii. 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."

iii. 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.

25. 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.

26. 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.

27. 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.

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

i. 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).

ii. The intent in passing the Competitive Bid Law is to get the best quality equipment (or public construction) at the lowest possible price.

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

i. Competitive Bid Law does not require that the lowest bid be accepted.

ii. 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.

30. 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.

31. City of Montgomery v. Brendle Fire Equipment, Inc., 291 Ala. 216, 279 So. 2d 480 (1973)

Title 55, Section 508 [now codified as ALA. CODE § 41-16-60 (1975)] was not intended to prohibit the City of Montgomery from receiving bids from any member of the Board of Commissioners of the Housing Authority of the City of Montgomery or from any entity in which a member would have an interest or an ownership. It was intended to prohibit bidding by a member that has an interest and will be involved in making the decision as to who will be awarded the contract.

32. White v. McDonald Ford Tractor Co., 287 Ala. 77, 248 So. 2d 121 (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, 280 Ala. 637, 197 So. 2d 428 (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, 266 Ala. 154, 94 So. 2d 872 (1957)

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

35. Townsend v. McCall, 262 Ala. 554, 80 So. 2d 262 (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., 260 Ala. 384, 71 So. 2d 39 (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., 235 Ala. 34, 177 So. 151

(1937)

i. 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.

ii. 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, 234 Ala. 168, 174 So. 507 (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, 232 Ala. 312, 167 So. 794 (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, 217 Ala. 201, 115 So. 239 (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, 135 Ala. 187, 33 So. 678 (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 4

TRANSACTIONS THAT MUST COMPLY WITH THE COMPETITIVE BID LAW

ARTICLE 1.

Governmental Entities

A. State Agencies

1. 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. Honorable Jackie Graham Director, State Personnel Department Montgomery, 09-27-07, AG 2007-141.

2. 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.

3. 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.

4. 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.

5. Contract between county and Alabama Correctional Industries not in violation of ALA. CODE § 39-1-1 et seq., § 41-16-20 and § 41-16-50 et seq. (1975). Hon. Julie S. Moody, Attorney, Covington County Commission, 6-5-1997, AG 97-00202.

6. 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 Ala. Code § 41-16-21.2 (1975).

7. If the contemplated purchase of a UNIX operating system will merely upgrade the current system, it need not be bid. If the purchase will replace the present system, the purchase must be bid. Hon. James Stivers, Mental Health, 7-20-92, EPA.

8. A state prison system is not excluded as a participant in the State bidding procedure, and if they are the lowest responsible bidder, they are to be considered for the award of contract. Hon. John H. Young, Medicaid, 4-29-88, EPA.

9. Pursuant to §§ 41-16-20 and 41-16-50 of the Competitive Bid Law, service or maintenance contracts for computers must be bid. Hon. H. L. Barnett, Finance, 5-30-88, EPA

10. The purchase of firewood is a competitive bid item. Hon. Joe McNees, ADECA, 8-1-86, EPA.

11. State or its agencies must purchase or lease telecommunications equipment by competitive bids under Ala. Code § 41-16-20 et seq. (1975), 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.

12. Expenditures made from District Attorney's or Solicitor's Funds are subject to the State Competitive Bid Law. District Attorneys are state officers and purchases made by them must be in compliance with ALA. CODE § 41-16-20. Hon. Chris N. Galanos, Mobile County, 2-22-84, EPA.

B. <u>County Agencies</u>

1. In seeking a vendor to provide an inmate telephone system for the county jail, the contract must be competitively bid. Publishing a

request for proposal reciting the various minimum requirements is insufficient to satisfy the Competitive Bid Law. While a request for proposal could function similarly to a competitive bid, using it to negotiate with responding vendors is not permitted. Hon. William E. Shinn, Jr., County Attorney, 12-06-12, AG 2013-012.

2. A volunteer fire department is subject to the Competitive Bid and Public Works Laws. The business records of a volunteer fire department are subject to disclosure under the Open Records Law, except when specific records or portions thereof can be demonstrated by the department to fall within a recognized exception. The records must be maintained according to guidelines of the State Records Commission. A volunteer fire association is not subject to the Competitive Bid, Public Works, or Open Records Laws. Hon. Ryan Robertson, Cleburne County Judge of Probate, 12-12-11, AG 2012-016.

3. A coroner may take bids from funeral homes and contract to transport and store bodies until they can be transported to the state forensics laboratory. Hon. Prince Darius Chestnut, Greene County Attorney, 07-23-09, AG 2009-093.

4. There is no statutory authority for a county commission to sell fuel. Hon. Jay M. Ross, Attorney, Mobile County Commission, 01-28-09, AG 2009-034.

5. The Morgan County Commission, and its division known as the Morgan County Environmental Services ("MCES"), has the authority to enter into a contract with Seth Ballew for the purchase of the assets and service contracts owned by Seth Ballew's waste collection business. This purchase, however, is subject to the requirements of the Competitive Bid Law. The MCES must submit its proposed purchase of 160 used dumpsters and waste collection service contracts to the competitive bidding process. Honorable William E. Shinn, Jr., County Attorney, 12-27-07, AG 2008-027.

6. The Huntsville-Madison County Marina and Port Authority is a public corporation subject to the Competitive Bid Law. If the Port authority engages in a public works project, and the project is paid either in whole or in part, with public funds, then that transaction is subject to the Public Works Law. Hon. Jada R. Leo, Secretary

Treasurer, Huntsville-Madison County Marina and Port Authority, 1-19-05, AG 2005-045.

7. A payment by the Cherokee County Commission to a nonprofit ambulance service for emergency services must be bid if the payment is more than $7500 annually. Hon. Phillip W. Jordan, Probate Judge, Cherokee County Probate Judge's Office, 12-10-01, AG 2002-086. However, this opinion was overruled by the opinion issued to Hon. Joe Rex Sport, Mayor, City of Luverne, 2-29-12, AG 2012-040. That opinion concluded that a contract between the City of Luverne and a nonprofit rescue squad is not subject to the Competitive Bid Law.

8. If the proposed contract between the county commission and the computer services company is an exclusive franchise, it must be competitively bid. Hon. Adrian T. Johns, Judge of Probate, Baldwin County Probate Judge's Office, 3-29-01, AG 2001-135.

9. A contract for the installation, service, and operation of pay telephones in a county jail must be competitively bid. Signing bonuses are legal, but must be paid to the county and not to an individual person. Hon. William E. Shinn, Jr., Morgan County Attorney, 8-23-00, AG 2000-219.

10. The purchase by the Morgan County Commission of a new imaging system for the probate office must be competitively bid if the cost of the system exceeds $7500. The request for proposals must include any hardware that is being purchased, and may also have to include the accompanying software if it is not custom software. Custom software need not be competitively bid. Hon. William E. Shinn, Jr., Morgan County Attorney, 7-12-99, AG 99-00245.

11. If engineering services are incidental to the purchase of equipment, the purchase of the equipment is subject to the Competitive Bid Law. Hon. E. Allen Doss, Jr., Attorney at Law, 8-29-95, AG 95-00303.

12. The purchase or lease of voting machines is not exempt from the Competitive Bid Law. The purchase of ballots and supplies for elections are exempt from the Competitive Bid Law. The

management of county employees and county equipment is within the discretion of the county commission in the absence of constitutional or statutory prohibitions. Hon. Hobson Manasco, Jr., Winston County Commission, 5-6-94, AG 94-00187. This opinion, to the extent it conflicts, has been modified by the opinion issued to Thomas T. Gallion, III, Attorney, Montgomery County Commission, 9-23-05, AG 2005-197. That opinion concluded that the purchase of a voting system and related professional services does not have to be competitively bid if the professional services provided by the vendor are inextricably intertwined with that particular voting system.

13. A contract for housekeeping services that will exceed $5000 is subject to the Competitive Bid Law. Hon. Clyde Sellers, Jefferson County, 9-29-93, EPA.

14. Question of mandatory participation in county solid waste service may be on the ballot in a primary election. Municipalities may provide services outside corporate limits with consent of county, with different rates. Agreement between county and municipalities not subject to competitive bidding. Contracts are subject to competitive bidding unless price is unaffected, terms not substantially changed, and existing contract contains renewal clause. Hon. Robert Wilson, Attorney, DeKalb County Commission, 8-20-93, AG 93-00310.

15. The acquisition of new or additional telecommunications equipment must be by competitive bid. The replacement of old equipment with new equipment must be bid if there is more than one vendor for such equipment. Hon. W. Hardy McCollum, Tuscaloosa County, 8-18-93, EPA.

16. The purchase of cellular and telecommunications equipment is subject to the bid law. Acquisition of long distance telephone service is not subject to the bid law. Hon. Owen Drake, Jefferson County, 7-28-93, EPA.

17. The purchase of compatible computer system equipment is not subject to competitive bids. If there is only one source from which the computer system may be purchased, then the purchase may be made without taking competitive bids. The purchase of software

that is available from more than one vendor is subject to the bid law unless the awarding authority can document a professional exemption under ALA. CODE § 41-16-51(a)(3) (1975). Hon. Eddie Ambrose, Lee County, 8-6-92, EPA.

18. Replacement of defective thermostats, repair of an air dryer, installation of a new air conditioning unit, rebuilding of defective controllers and calibration of this equipment with existing systems in place, are contractual services subject to the Competitive Bid Law. Professional engineering services, scientific monitoring and implementation of a utility cost containment program are exempt from bidding pursuant to ALA. CODE § 41-16-51(a)(3) (1975). Hon. Will C. Chapman, Escambia County and Community College, 2-25-92, EPA.

19. Whether testing services contract falls under Competitive Bid Law depends upon nature of services. If bid, testing service contract specifications may include requirement that testing services be located close enough to city in which testing will occur to make testing results valid and meaningful. Hon. Sidney Fomby, Jr., Mayor, City of Lincoln, 10-28-91, AG 92-00044.

20. If the county commission is reasonably aware that it will need $5000 or more of chert, top soil or fill material, then these materials must be obtained in compliance with the bid law. Patrick H. Tate, Esq., DeKalb County, 11-11-91, EPA.

21. Purchase of new hardware equipment must be through the bid process. Acquisition of a software program dealing with different languages may or may not be subject to the bid law. Hon. James F. Watson, Dale County, 7-2-91, EPA.

22. Purchase of compatible system hardware equipment is not subject to the bid law. Purchase of identical software for programs already in place is not subject to the bid law unless there is more than one vendor for that identical program. Purchase of new software that costs more than $5000 is subject to the bid law. Hon. Thad Morgan, Superintendent, Enterprise City Schools, 5-30-91, AG 91-00282.

23. Water authority created pursuant to ALA. CODE §§ 11-88-1 et

seq. (1975) subject to bid law for all purchases except the purchase of equipment, supplies or materials needed, used, and consumed in normal and routine operation. Hon. D. B. Dawson, Sand Mountain Water Authority, 2-1-91, AG 91-00159.

24. In addressing the question of whether exclusive franchises granted by county commissions for the collection and disposal of solid waste are subject to the Competitive Bid Law, the Alabama Supreme Court seemed to hold in Kennedy v. City of Prichard, 484 So. 2d 432 (Ala. 1986) that concession type contracts should be bid. Hon. William E. Shinn, Morgan County, 11-28-90, EPA.

25. Gas district is subject to Competitive Bid Law. Hon. Thurman E. Murphree, Chairman, Cullman-Jefferson Counties Gas District, 9-5-90, AG 90-00372.

26. It is the current position of the Attorney General and this Department that the purchase of software that is available from more than one vendor is subject to the bid law unless the awarding authority can document a professional exemption under ALA. CODE § 41-16-51(a)(3) (1975). Hon. James Davis, Shelby County, 12-27-89, EPA.

27. The Huntsville-Madison County Airport Authority is subject to the Alabama Competitive Bid Law. Hon. Luther H. Roberts, Madison County, 8-8-89, EPA.

28. Costs for a needed DNA SCAN may be paid for from the District Attorney's Fund. If the costs exceed $2000 and the tests are secured from the private sector, the Competitive Bid Law must be complied with. Hon. Douglas A. Valeska, Houston County, 8-15-88, EPA.

29. Public hospitals are subject to the Competitive Bid Law only for the purpose of construction, expansion, or alteration of the hospital plant. Hon. Duane Brookhart, Bullock Co., 1-13-88, EPA.

30. The Walker County Commission may appropriate funds to the Walker Co. Ass'n of Volunteer Fire Fighters to establish a countywide radio system. Such purchase will be subject to the Bid Law and the Association may take the bids. Hon. Grady Perry,

Walker County, 4-2-87, EPA.

31. If computer equipment is available from several vendors, the bid law must be complied with. Hon. James G. Sasser, Dale County and Tax Collector, 12-17-86, EPA.

32. County may not renew a waste disposal contract which increases price without competitive bidding. Hon. Hardy McCollum, Judge of Probate and Chairman, Tuscaloosa County Commission, 5-23-86, AG 86-00252.

33. Communications district boards established pursuant to ALA. CODE § 11-98-1 et seq. (1975), must comply with the Competitive Bid Law. Hon. Arnold Teks, Attorney, Lauderdale County Emergency Management Communications District, 10-25-85, AG 86-00028.

34. Limestone County Water Authority must comply with the competitive bid provisions in seeking a contract for construction work for over $3000. Hon. Jerry Batts, Attorney, Limestone County Water Authority, 10-7-85, AG 86-00003.

35. Water, Sewer and Fire Protection Authority organized pursuant to ALA. CODE § 11-88-1 (1975) is, in general, subject to the provisions of the Competitive Bid Law, ALA. CODE §§ 41-16-50 et seq. in awarding construction contracts. Hon. W. Henry Allen, Judge of Probate, Lamar County, 7-1-85, AG 85-00415.

36. Whether materials testing services fall under the Competitive Bid Law depends on whether those services include consultation, planning or other subjective determinations. Hon. Bob McKee, Member, House of Representatives, 2-7-85, AG 85-00193.

37. If city enters into a contract for wrecker service, and it is anticipated that the contract will involve more than $2000, the Competitive Bid Laws should be followed. Hon. Mac Parsons, State Senator, 17th District, 8-28-84, AG 84-00427.

38. County commission must comply with Alabama Competitive Bid Law in awarding contract for solid waste and garbage collection and disposal if amount of contract exceeds $2000. Hon.

W. B. Cooper, Chairman, Baldwin County Commission, 5-30-83, AG 83-00345.

39. County owned waterworks board must comply with Alabama Competitive Bid Law in awarding contract for management and maintenance if amount of contract exceeds $2000. Hon. Charles Thompson, Chairman, Colbert County Commission, 3-7-83, AG 83-00216.

C. <u>Municipal Agencies</u>

1. The Colbert County E-911 Board should honor a request made by resolution from the City of Muscle Shoals to dispatch, within the corporate limits of Muscle Shoals, the ambulance service provider that the municipality requests to be dispatched. Any private ambulance service provider that is selected by the municipality as the exclusive provider within the municipality must be selected in compliance with the Competitive Bid Law. Hon. David H. Bradford, Mayor, City of Muscle Shoals, 08-14-12, AG 2012-077.

2. An E-911 Board expending a federal grant for improvements to a fire department's emergency communications system is subject to the competitive bid law, as the contract relates to the expenditure of funds for labor and purchases of materials under Ala. Code § 41-16-50. Although the E-911 Board will provide matching funds for a federal grant to a volunteer fire department, compliance with the Competitive Bid Law in the purchase of equipment using grant funds remains the responsibility of the fire department. Hon. Broox G. Garrett, Jr., Attorney, Brewton/Escambia County Emergency Communications District, 06-25-12, AG 2012-066.

3. 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.

4. The transfer of land by a commercial development authority to a private person, firm, or corporation, originally acquired from the state and transferred to the authority through one or more transactions between governmental entities, is subject to the competitive bid requirements of the Land Sales Act, except if transferred for the purpose of promoting the economic and industrial development of the county or municipality or for the purpose of constructing, developing, equipping, and operating industrial, commercial, research, or service facilities. Hon. Lowell Barron, Member, Alabama State Senate, 10-22-08, AG 2009-009.

5. The Huntsville-Madison County Marina and Port Authority is a public corporation subject to the Competitive Bid Law. If the Port authority engages in a public works project, and the project is paid either in whole or in part, with public funds, then that transaction is subject to the Public Works Law. Hon. Jada R. Leo, Secretary Treasurer, Huntsville-Madison County Port Authority, 1-19-05, AG 2005-045.

6. Competitive bidding is required for substitutable similar items when the aggregate amount of said purchases exceeds $7,500.00, even automotive parts. No purchase or contract involving an amount in excess of $7,500 shall be divided into parts to avoid the Competitive Bid Law. When a purchasing municipality determines that the purchase will exceed $7,500.00, procurement of the items must be made through the competitive bid process. Hon. Iva Nelson, City Clerk/Treasurer City of Gadsden, 3-11-03, AG 2003-098.

7. The West Alabama Mental Health Board is a public corporation subject to the Competitive Bid Law and Public Works Law. Hon. H. A. Lloyd, Attorney, West Alabama Mental Health Board, 10-30-02. AG 2003-017.

8. The Warrior River Water Authority, created pursuant to ALA.CODE § 11-88-1 et seq. (1975) is generally subject to the Competitive Bid Law. 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 Warrior River Water Authority. Hon. V. Edward Freeman, II, Attorney, Warrior River Water Authority, 12-19-01, AG 2002-97.

9. Because a mini-excavator trackhoe is not a "purchase of equipment, supplies, or materials needed, used, and consumed in the normal and routine operation of any [utilities] . . . system . . . owned by municipalities," this purchase must be competitively bid. Hon. Tom Wolfe, Manager, The Utilities Board of the City of Atmore, 12-6-01, AG 2002-082.

10. The purchase of lights by a municipality for a ballpark is a purchase of equipment and subject to the Competitive Bid Law if the cost is $7,500 or more. If the purchase of lights is included in a contract for the construction or renovation of the ballpark, it is subject to the Public Works Law. Hon. Phil Crigler, Member, House of Representatives, 2-28-00, AG 2000-099.

11. Public Educational Building Authorities (PEBA) are instrumentalities of municipalities, and therefore are subject to the Competitive Bid Law found in ALA. CODE § 41-16-50(a) (1975). Hon Frank D. McPhillips, Esq., Maynard, Cooper & Gale, P.C., 12-8-95, EPA.

12. The City of Ardmore Water and Sewer Board is subject to the Alabama Competitive Bid Law and the repairs should have been bid. Hon. Genny Best, Limestone County, 1-15-93, EPA.

13. All purchases of water works authority must be made in accordance with bid law except those purchases exempted from the bid law by ALA. CODE § 41-16-51(b)(7) (1975), such as equipment, supplies, or materials needed, used, and consumed in normal and routine operations. Hon. Robert T. McWhorter, Jr., Morgan County, 8-28-92, AG 92-00387.

14. The printing of municipal code and supplements are subject to Competitive Bid Law. If total costs of supplements exceed $5,000 in fiscal year, competitive bid process must be utilized. The Code of Alabama 1975 is subject to its own statutory scheme for recodification and printing. Hon. Martha A. Elrod, City Clerk, City of Gadsden, 5-8-90, AG 90-00272.

15. The preparation of the recodification of a municipal code is not subject to the Competitive Bid Law. The printing of such recodification is subject to the Competitive Bid Law. The choosing of an update service for the municipal code of Jacksonville is subject to the Competitive Bid Law. Hon. John B. Nisbet, Jr., City Clerk, City of Gadsden, 8-28-89, AG 89-00411.

16. The Huntsville-Madison County Airport Authority is subject to the Alabama Competitive Bid Law. Hon. Luther H. Roberts, Madison County, 8-8-89, EPA.

17. The Water Works Board of the City of Attalla cannot enter into a new agreement with a drilling company whereby the drilling company will continue to drill for water without letting the contract under the competitive bid process. Hon. Clarence F. Rhea, Attorney at Law, 6-8-89, AG 89-00293.

18. Mobile County Law Enforcement and Firefighters Pension Fund is an instrumentality of the county and is subject to the provisions of the Competitive Bid Law, § 41-16-50. Hon. Beth Marietta, Member, House of Representatives, 5-5-89, AG 89-00276.

19. Purchase of used police cars by Town of Hackleburg must be made by competitive bid if cost involves $3000 or more. Hon. Waymon Cochran, Mayor, Town of Hackleburg, 2-17-89, AG 89-00185.

20. The purchase of gasoline in quantities that will exceed $3,000 is subject to the Competitive Bid Law. An escalation clause may help to effect delivery of commodities and it is suggested that you provide such an arrangement in your bidding procedures inasmuch as delivery is of greater concern in emergency situations. Hon. Roy Driver, Birmingham-Jefferson Transit Authority, 8-16-88, EPA.

21. Purchase of new or used automobiles by City of Leeds must be made by competitive bid if cost involves $3,000 or more. Hon. Jack K. Courson, Mayor, City of Leeds, 6-10-88, AG 88-00314.

22. The purchase of a component building by the Town of Goldville for use as a City Hall falls within ALA. CODE § 41-16-50

(1975), and is subject to the Competitive Bid Law. Hon. Mack Clayton, Mayor, Town of Goldville, 12-24-86, AG 87-00079.

23. Municipalities must advertise for bids and make purchases under ALA. CODE § 41-16-50 et seq. (1975), only when amount involved is $3,000 or more. Hon. H. E. Swearingen, Mayor, Town of Pine Hill, 8-6-85, AG 85-00461.

24. Water, Sewer and Fire Protection Authority organized pursuant to ALA. CODE § 11-88-1 (1975) is, in general, subject to the provisions of the Competitive Bid Law §§ 41-16-50 et seq. in awarding construction contracts. Hon. W. Henry Allen, Judge of Probate, Lamar County, 7-1-85, AG 85-00415.

25. Public Park and Recreation Board of the City of Mobile is subject to the Competitive Bid Law §§ 41-16-50 et seq. Hon. Norman J. Gale, Jr., Attorney, Mobile Park and Recreation Board, 4-17-84, AG 84-00247. However, this opinion was modified by an opinion issued to Hon. Norman J. Gale, Jr., Attorney, Mobile Park and Recreation Board, 11-1-1984, AG 85-00054, which found that corporations organized pursuant to Ala. Code §§ 11-60-1, et seq. (as is the Mobile Park and Recreation Board) are exempt from competitive bid law.

ARTICLE 2.

Educational Entities

A. Higher Education

1. Food service contracts for educational institutions are subject to the Competitive Bid Law. Hon. Samuel W. Jackson, Jr., UAB, 9-21-95, EPA.

2. Contracts awarded by an educational building authority or its agent, organized under ALA. CODE §§ 16-17-1 et seq. (1975), are not exempt from the requirements of the Alabama Competitive Bid Law. Hon. Ward McFarland, Chairman, Educational Building Authority of the City of Tuscaloosa, 5-10-95, AG 95-00213.

3. If the purchase price of the bus which Auburn University wants to buy is $5,000.00 or more, such purchase must be made pursuant

to CODE OF ALA. § 41-16-20. Hon. Jacqulyn F. Palmer, Colleges and Universities-Auburn University, 4-8-92, EPA.

4. The securing of typesetting is subject to the Competitive Bid Law. Ms. Candace Townley, Colleges, 11-13-86, EPA.

5. The City of Mobile must comply with the Competitive Bid Law in awarding a contract for the maintenance and care of Magnolia Cemetery if the amount exceeds $3000. Hon. Richard L. Smith, City Clerk, City of Mobile, 8-18-86, AG 86-003251986-325.

6. Securing of janitorial services is subject to the Competitive Bid Law and contracts should be let for periods not greater than one year. Hon. Guy D. Holcomb, Colleges and Universities, 10-15-85, EPA.

7. The purchase of books and periodicals by a state library is exempt from the State Competitive Bid Laws under ALA. CODE § 41-16-21(a) (1975); however, the purchase of furnishings is subject to the State Bid Laws. Hon. James O. Williams, Chancellor, Auburn University at Montgomery, 8-20-85, AG 85-00477.

8. Since there are several vendors capable of producing holograms, the University should solicit bids for this purchase. Travel trips sponsored by the Continuing Education Department of the University are incapable of being competitively bid. Ms. Patricia Moore, Colleges and Universities, 6-19-85, EPA.

B. Post Secondary Education

1. Food service contracts for educational institutions are subject to the Competitive Bid Law. Hon. Samuel W. Jackson, Jr., UAB, 9-21-95, EPA.

2. Contracts awarded by an educational building authority or its agent, organized under ALA. CODE §§ 16-17-1 et seq. (1975) are not exempt from the requirements of the Alabama Competitive Bid Law. Hon. Ward McFarland, Chairman, Educational Building Authority of the City of Tuscaloosa, 5-10-95, AG 95-00213.

3. Replacement of defective thermostats, repair of an air dryer, installation of a new air conditioning unit, rebuilding of defective controllers and calibration of this equipment with existing systems in place, are contractual services subject to the Competitive Bid Law. Professional engineering services, scientific monitoring and implementation of a utility cost containment program are exempt from bidding pursuant to CODE OF ALA. § 41-16-51(a)(3) (1975). Hon. Will C. Chapman, Escambia County and Community College, 2-25-92, EPA.

4. Janitorial / maintenance / ground operations service must be let by contract pursuant to the Competitive Bid Law. However, Lurleen B. Wallace State Junior College may enter into a contract with Marriott, Inc., to perform a survey of the janitorial / maintenance / ground operation. Hon. Seth Hammett, Covington County, Lurleen B. Wallace State Junior College, 11-8-91, EPA.

5. The securing of typesetting is subject to the Competitive Bid Law. Ms. Candace Townley, Colleges, 11-13-86, EPA.

6. State junior college must purchase telecommunications equipment by competitive bids under ALA. CODE §§ 41-16-50 et seq. (1975), as last amended, if not purchased pursuant to a master contract already bid. Dr. George R. McCormick, President, Jefferson Davis Junior College, 6-10-85, AG 85-00381.

C. <u>K-12</u>

1. The purchase of a multifunctional device is subject to a purchase by competitive bid by educational institutions if the device is going to actually be used for printing, scanning, emailing, faxing, etc. in addition to copying. Hon. Stephanie Walker, President, Brewton City Board of Education, 4-14-05, AG 2005-107.

2. The contract providing a scoreboard to the Talladega County Board of Education by private corporations in return for the granting of an exclusive concessions contract must be competitively bid. Hon. Thomas M. Little, Attorney, Talladega County Board of Education, 4-1-99, AG 99-00158.

3. Food service contracts for educational institutions are subject to the Competitive Bid Law. Hon. Samuel W. Jackson, Jr., UAB, 9-21-95, EPA.

4. Contracts awarded by an educational building authority or its agent, organized under ALA. CODE §§ 16-17-1 et seq. (1975) are not exempt from the requirements of the Alabama Competitive Bid Law. Hon. Ward McFarland, Chairman, Educational Building Authority of Tuscaloosa, 5-10-95, AG 95-00213.

5. The law requires that like items of equipment, materials or nonperishable food products which cost more than $5000 in the aggregate must be bid. While the Examiners as a matter of policy do not criticize boards of education for failure to take competitive bids on perishable food items such as bread and milk, boards may establish their own requirements if they choose to seek bids and require a bid bond. In like manner, boards of education may decide to forego requiring a bid bond when purchasing perishable food items. Hon. Talmadge Miles, Macon Co., 7-2-93, EPA.

6. The acquisition of new or additional telecommunications equipment by the County Board of Education must be by competitive bid. Hon. Thomas H. Frazier, Baldwin County, 10-18-91, EPA.

7. Purchase of computer equipment, although designed specifically for a person with limited vision, must be pursuant to the Competitive Bid Law when there is more than one vendor for this equipment. Hon. Manuel Russo, Education, 8-25-87, EPA.

8. The local boards of education should solicit bids for playground equipment and act as the awarding authority. Hon. Jerry Milner, Chambers County, 3-4-86, EPA.

9. Expenditures by individual schools of moneys raised at athletic events, snack bars, and other non-tax sources need not comply with state competitive bid law. Expenditures of federal funds in the school lunchroom program must comply with the Competitive Bid Law. Hon. J. Murray King, Superintendent, Covington County Schools, 9-16-81 AG 81-00584.

10. A county school board must comply with the Competitive Bid Law when contracting with a company or individual for a number of man hours to renovate various school facilities. Dr. James J. Benson, 3-14-77, EPA.

CHAPTER 5

EXEMPTIONS FROM THE COMPETITIVE BID LAW

ARTICLE 1.

Introduction

Although most transactions involving goods or services for $15,000 or greater made by government agencies are subject to the Competitive Bid Law, a few statutory exemptions exist. The Legislature recognized that there would be certain situations in which the competitive bidding process would not be the most feasible, for whatever reasons, and therefore established exemptions for certain transactions.

Exemptions can be divided into two categories, first, exemption by the kind of property or services being acquired, and, second, exemption by the type of entity. The statute does not separately list these two kinds of exemptions, as illustrated by the primary source of exemptions for state agencies appearing in ALA. CODE § 41-16-21 (1975). This statute provides that competitive bids shall not be required for utility services where there is no competition or where the rates are fixed by law or ordinance. This statute goes on to provide a list of other transactions that are similarly excluded from the process:

> The purchase of insurance by the state; contracts for the securing of services of attorneys, physicians, architects, teachers, artists, appraisers, engineers, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part; contracts of employment in the regular civil service of the state; purchases of alcoholic beverages only by the Alcoholic Beverage Control Board; purchases and contracts for repair of equipment used in the construction and maintenance of highways by the State Department of Transportation; 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 through 21-2-4; purchases of maps or photographs purchased from any federal agency; contractual services and purchases of personal property, which by their very nature are impossible of award by competitive bidding; barter transactions by the Department of Corrections; and purchases, contracts, or repairs by the Alabama State Port Authority when it is deemed by the Director of the Alabama State Port Authority and the Secretary-Treasurer of the Alabama State Port Authority that the purchases, contracts, or repairs are impractical of award by competitive bidding due to the exigencies of time or interference with the flow of commerce . . .
> ALA. CODE § 41-16-21(a) (1975).

Yet another exemption is codified in ALA. CODE § 41-16-21.2 (1975). This section provides that any state department or agency whose principal business is "honorariums" is also exempted from the provisions of the bid laws. Id. (The Merriam-Webster dictionary defines "honorarium" as "a payment for a service (as making a speech) on which custom or propriety forbids a price to be set.") ALA. CODE § 41-16-22 (1975) notes that state agencies can purchase "materials, equipment, supplies, or other personal property from the United States government or any agency, division, or instrumentality thereof when such purchase is deemed by the State Purchasing Agent to be in the best interest of the State of Alabama." Id.

In 2001, an important exemption was enacted allowing state agencies to purchase goods and services without bidding from vendors holding current contracts from the federal General Services Administration as long as the prices do not exceed the lowest competitively bid price for the goods or services. ALA. CODE § 41-16-74 (1975).

Much like ALA. CODE § 41-16-21 (1975) provides exemptions for state agencies, ALA. CODE § 41-16-51 provides exemptions for municipal agencies. Specifically, the statute

provides that utility services and the following transactions are exempt from the competitive bidding process:

(1) The purchase of insurance.

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

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

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

(5) Contracts for fiscal or financial advice or services.

(6) 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.

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

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

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

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

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

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

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

(14) Purchases of dirt, sand, or gravel by a county governing body from in-county property owners in order to supply a county road or bridge project in which the materials will be used. The material shall be delivered to the project site by county employees and equipment used only on projects conducted exclusively by county employees.

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

(16) Subject to the limitations in this subdivision, purchases of goods made as a part of the purchasing cooperative sponsored by the National Association of Counties, its successor organization, or any other competitive bid nationwide cooperative purchasing program, or other national or regional governmental cooperative purchasing program. This subdivision shall not apply to goods for which a service or service contract, whether subject to competitive bidding under this article or not, is necessary to utilize the goods. Such purchases may only be made if all of the following occur:

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

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

purchasing program.

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

d. The entity purchasing goods under this subdivision 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.

(17) Purchase of goods or services, other than wireless communication services, whether voice or data, from vendors that have been awarded a current and valid Government Services Administration contract. Any purchase made pursuant to this subdivision shall be under the same terms and conditions as provided in the Government Services Administration contract. Prices paid for such goods and services, other than wireless communication services, whether voice or data, may not exceed the amount provided in the Government Services Administration contract.

(b) This article shall not apply to:

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

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

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

(4) The purchase, lease, or other acquisition of machinery, equipment, supplies, and other personal property or services by a

medical clinic board organized under Sections 11-58-1 to 11-58-14, inclusive.

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

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

(7) The purchase of equipment, supplies, or materials needed, used, and consumed in the normal and routine operation of any waterworks system, sanitary sewer system, gas system, or electric system, or any two or more thereof, that are owned by municipalities, counties, or public corporations, boards, or authorities that are agencies, departments, or instrumentalities of municipalities or counties and no part of the operating expenses of which system or systems have, during the then current fiscal year, been paid from revenues derived from taxes or from appropriations of the state, a county, or a municipality.

(8) Purchases made by local housing authorities, organized and existing under Chapter 1 of Title 24, from moneys other than those raised by state, county, or city taxation or received through appropriations from state, county, or city sources. ALA. CODE § 41-16-51(a), (b) (1975).

In addition, counties and municipalities are allowed to rely on state bids in certain conditions. ALA. CODE § 41-16-51.1 (1975) provides:

Notwithstanding any other laws to the contrary,

> when it is necessary for a county or an incorporated municipality to enter into a public contract . . . the county or municipality may, without soliciting and obtaining competitive bids, contract with a vendor or provider for the services at a price which does not exceed the price which the state has established through the competitive bid process for the same services under the same terms and conditions and provided it pertains to a current and active bid on a non-statewide agency contract.

Finally, ALA. CODE § 41-16-52 provides a very narrow exemption for expenditures for repair of certain heavy duty off-highway construction equipment:

> All expenditures of funds of whatever nature for repair parts and repair of heavy duty off-highway construction equipment and of all vehicles with a gross vehicle weight rating of 25,000 pounds or greater, including machinery used for grading, drainage, road construction and compaction for the exclusive use of county and municipal, highway, street and sanitation departments, involving not more than $15,000 made by or on behalf of any county commissions and the governing bodies of the municipalities of the state, and the governing bodies of instrumentalities, including waterworks boards, sewer boards, gas boards, and other like utility boards and commissions, shall be made, at the option of said governing boards, bodies, instrumentalities and commissions, without regard to the provisions of this article. The foregoing exemption from the provisions of this article shall apply to each incident of repair as to any such repair parts, equipment, vehicles or machinery. The amount of such exempted expenditure shall not be construed to be an aggregate of all such expenditures per fiscal year as to any individual vehicle or piece of equipment or machinery.

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 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 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 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. ALA. CODE § 41-16-51(a)(3)". 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.

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), 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 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 (1975). 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), in which the Court held that Competitive Bid Law does not apply to contract to construct new airport terminal building.)

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 and the Office of the Examiner of Public Accounts 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 and the Office of the Examiner of Public Accounts should be helpful determining whether a transaction is exempt from the bid laws.

ARTICLE 2.

OPINIONS

Governmental Entities

A. State Agencies

1. 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 section 41-16-120, et. seq., of the Code of Alabama. 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.

2. 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.

3. The Administrative Office of Courts is authorized under Section 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.

4. State agencies are subject to the Competitive Bid Law pursuant to section 41-16-20, et seq., of the Code of Alabama. 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 of the Code of Alabama. 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.

5. 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.

6. A public corporation, organized under the Health Care Authorities Act of 1982, is exempt from the Competitive Bid Law under ALA. CODE § 22-21-335 (1975) 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.

7. Contracts for audit services do not fall within the competitive bidding procedure specified by ALA. CODE § 36-29-6 (1975) but are professional services that must be procured in accordance with ALA. CODE § 41-16-72(4) (1975) and are subject to review by the Contract Review Permanent Legislative Oversight Committee as required by ALA. CODE § 29-2-41 (1975). Hon. William L. Ashmore, Executive Director, State Employees' Insurance Board, 1-28-03, AG 2003-069.

8. 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 ALA. CODE §§ 22-2A-1 et seq., (1975) 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.

9. When there are numerous vendors that can provide library automation services to public library systems, the exemptions permitted under ALA. CODE §§ 41-16-51(a)(11) and (13) (1975) 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.

10. The purchase of goods, supplies, and services necessary for the maintenance and service of aircraft is exempted from the competitive bid requirements of ALA. CODE § 41-16-21 (1975). Hon. Paul Bowlin, Director, Department of Transportation, 2-28-02, AG 2002-157.

11. The Alabama Institute for Deaf and Blind ("AIDB") may sell "blind-made" products to state agencies without complying with the Competitive Bid Law of the State. Hon. Joseph F. Busta, Jr., President, Alabama Institute for Deaf and Blind, 1-3-02, AG 2002-

110.

12. The medical services contract proposed by the Department of Corrections is exempt from the Competitive Bid Law. Hon. Michael W. Haley, Commissioner, Alabama Department of Corrections, 2-1-01, AG 2001-089.

13. 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 ALA. CODE § 41-16-21.2 (1975). Hon. Jimmy Johnson, Chairman, Alabama Music Hall of Fame, 2-12-97, AG 97-00108.

14. 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.

15. The purchase of the equipment incidental to professional services which are exempted from the Competitive Bid Law by ALA. CODE § 41-16-51(a)(3) (1975) 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.

16. 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.

17. The Alabama Supreme Court and State Law Library may enter into a contractual agreement with a research corporation for a service contract, without bidding, pursuant to the exemption provided by ALA. CODE § 41-16-21 (1975) for sole source vendors or suppliers. Hon. William C. Younger, Supreme Court, 8-23-91, EPA.

18. 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.

19. The Alabama Sports Hall of Fame and its Board are exempt from the State competitive bid requirements by virtue of ALA. CODE § 41-16-21.2 (1975). Hon. Earl Goodwin, Member, State Senate, 11-9-90, AG 91-00082.

20. The selection of a firm to provide the professional engineering and environmental services required for UST closures is exempt from the Alabama Competitive Bid Law pursuant to ALA. CODE § 41-16-21(A) (1975). Hon. George H. Cox, Military Department, 7-23-90, EPA.

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.

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. If printing is part of the package contracted for, it is included in the exemption provided through ALA. CODE § 41-16-51(a)(3) (1975). Ms. Joanne S. Jordan, JC, 4-22-88, EPA.

26. The State Competitive Bid Law does not, as a matter of law, apply to private non-profit entities. Their procurement standards, including the Bid Law, may be determined by state or federal agencies pursuant to contract or grant. Hon. W. M. "Bill" Rushton, ADECA, 8-28-86, EPA.

27. The purchase of books and periodicals by a state library is exempt from the State Competitive Bid Laws under ALA. CODE § 41-16-21(a) (1975), 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.

28. The Attorney General has ruled on numerous occasions that the Competitive Bid Law governing purchases is not operative whenever the contract in question is between two governmental entities. Further, we know of no other law which would prevent a county board of education from obtaining gasoline from the county commission and reimbursing the commission for the purchase price. Hon. Patrick H. Tate, DeKalb County, 7-23-85, EPA.

29. Bureau of Tourism and Travel is excepted from the Competitive Bid Law in the purchase of tourist advertising under ALA. CODE § 41-7-4 (1975). Hon. Ed Hall, Director, Alabama Tourism & Travel, 5-20-85, AG 85-00356.

30. 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.

31. 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.

B. <u>County Agencies</u>

1. A publicly incorporated utility company is not a governmental

unit under the definition of Ala. Code § 41-16-141(2), since it is not a political subdivision, but a rather a public corporation. Because of this, guaranteed energy costs savings contracts entered into are outside the scope of the Guaranteed Energy Cost Savings Act, Ala. Code §§ 41-16-140 to 41-16-144. Hon. James W. Johnson, Chairman, Board of Directors West Escambia Utilities, Inc., 5-14-13, AG 2013-047.

2. The Tennessee Valley Youth Services Board II does not have to bid contractual services related to security plans and procedures because they are exempt under Section 41-16-51(a)(15). Contracts for purchases of other services inextricably intertwined with security services are also exempt. If the services are not inextricably intertwined then they are subject to bid. Hon. Howard Keeton, Chairman, Tennessee Valley Youth Services Board II, 6-15-09, AG 2009-081.

3. Pursuant to Section 11-14-2, Code of Alabama 1975, a county does not have to use the bid process when selling real estate that is owned by the county that may be lawfully disposed. Hon. D'Wayne May, Probate Judge and Chairman, Choctaw County Commission, 01-15-09, AG 2009-031.

4. The Sheriff is not required to obtain the approval of the county before making expenditures from the Sheriff's Fund. Purchases from the fund are not required to be made by competitive bidding. Hon. D.T. Marshall, Montgomery County Sheriff, 10-07-08, AG 2009-003.

5. Morgan County Solid waste disposal contracts between Morgan County and municipalities are not required to be let by competitive bidding, since contracts between public entities are not required to be competitively bid. Hon. William E. Shinn, Jr., County Attorney, 06-11-08, AG 2008-093.

6. A solid waste disposal authority can amend its incorporation agreement to become a "municipal solid waste disposal authority" in order to qualify for the exemption to the Competitive Bid Law found in ALA. CODE § 11-89A-5.

7. If the Mobile County Racing Commission finds that drug-

testing lab services are professional services that require a high degree of skill where the personality of the individual plays a decisive part in a decision, these services would be exempt from the Alabama Competitive Bid Law. The Mobile County Racing Commission may, however, solicit bids for these services, even if not required by the Competitive Bid Law. Hon. Michael E. Box, Attorney, Mobile County Racing Commission, 7-29-02, AG 2002-297.

8. The Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc., may transfer property to the Mobile Mental Health Center with the requirement that it be sold and the proceeds used to pay down the debt on its acquisition of Bay Pointe Hospital, as long as the property is transferred for fair and adequate consideration. The Board may also sell the property by private negotiated sale without becoming subject to the Competitive Bid Laws. Hon. David V. deGruy, President, Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc., 1-9-02, AG 2002-117.

9. Purchases made by the probate judge from discretionary funds controlled solely by the probate judge are not required to be made by competitive bid. Hon. Bobby M. Junkins, Etowah County Probate Judge, 11-13-01, AG 2002-058.

10. If the Baldwin County Board of Education contracts for a "comprehensive energy-saving plan" under which they rely on the contractor's expertise, and turns over to the contractor the job of making and keeping the Board's facilities heating and air-conditioning efficient, and if the purchases are part of a comprehensive energy cost savings proposal and the amount spent on the energy cost savings measures recommended in the proposal do not exceed the amount of energy or operational cost savings, or both, within a ten-year period from the date installation is complete, these purchases may be made without competitive bidding. Hon. Fred K. Granade, Attorney, Baldwin County Board of Education, 11-5-01, AG 2002-053.

11. The costs expended by the county in acquiring easements from private landowners for a water pipeline to deliver water to plant sites are not subject to either the Competitive Bid Law or 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 customers are not subject to the State Competitive Bid Law or the Public Works Law. Hon. Barry D. Vaughn, Talladega County Attorney, 11-2-01, AG 2002-052.

12. 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 Limestone County Water and Sewer Authority. Hon. Winston V. Legge, Jr., Attorney, Limestone County Water and Sewer Authority, 3-30-01, AG 2001-139.

13. "Custom software" may be exempt from the requirements of the Competitive Bid Law. Hardware that is available from multiple sources should be purchased by competitive bid. Hon. Gary C. Sherrer, Attorney for the Houston County Commission, 3-16-99, AG 99-00139.

14. 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.

15. Natural Gas Transportation Services, regulated by the Natural Gas Act, 15 U.S.C.A. Section 717, et seq., are exempt from competitive bid pursuant to ALA. CODE §§ 41-16-21(a) and 41-16-51(a)(13) (1975). A contract for Natural Gas Transportation Services does not contravene Section 22 of the Alabama Constitution of 1901. Hon. Robert J. Miller, Esq., 12-13-95, AG 96-00066.

16. The Mobile County Commission may appropriate funds to the Explore Center, Inc., as long as the funds are used for a public purpose. Private, nonprofit corporations are not generally subject to the Competitive Bid Law. Hon. Freeman E. Jockisch, President, Mobile County Commission, 2-7-95, AG 95-00112.

17. The purchase or lease of voting machines is not exempt from

the Competitive Bid Law. The purchase of ballots and supplies for elections are exempt from the Competitive Bid Law. The management of county employees and county equipment is within the discretion of the county commission in the absence of constitutional or statutory prohibitions. Honorable Hobson Manasco, Jr., Winston County Commission, 5-6-94, AG 94-00187. This opinion, to the extent it conflicts, has been modified by the opinion issued to Thomas T. Gallion, III, Attorney, Montgomery County Commission, 9-23-05, AG 2005-197. That opinion concluded that the purchase of a voting system and related professional services does not have to be competitively bid if the professional services provided by the vendor are inextricably intertwined with that particular voting system.

18. Real estate purchases do not fall within the purview of the Competitive Bid Law. Ms. Brenda Petty, Covington County, 2-11-94, EPA.

19. Contract for fiscal advice including advice and assistance in the collection of local taxes exempt from the bid law per ALA. CODE § 41-16-51(a)(5) (1975). Hon. Jerry Darnell, Mayor, Town of Crossville, 12-9-93, AG 94-00076.

20. Software classified as "custom software" not subject to the Competitive Bid Law. Hon. Robert W. Ennis, IV, Tuscaloosa City Attorney, 10-21-93, AG 94-00023.

21. The purchase of a fully trained police dog by a law enforcement agency is not subject to the Competitive Bid Law. Hon. Edmund M. Sexton, Sr., Tuscaloosa County, 10-19-93, EPA.

22. Renewal of Winston County Solid Waste Landfill contract is not subject to Competitive Bid Laws, provided the price remains the same and there is no substantial change in the terms of the contract. Hon. Hobson Manasco, Attorney for Winston County Commission, 7-30-93, AG 93-00287.

23. Competitive bids shall not be required for contractual services and purchases of commodities for which there is only one vendor or supplier. Determination as to a "sole source" is a management responsibility. Ms. Rebecca Singleton, Colbert County, 7-29-93,

EPA.

24. The purchase of cellular and telecommunications equipment is subject to the bid law. Acquisition of long distance telephone service is not subject to the bid law. Hon. Owen Drake, Jefferson County, 7-28-93, EPA.

25. The purchase of compatible computer system equipment is not subject to competitive bids. If there is only one source from which a compatible computer system may be purchased then the purchase may be made without taking competitive bids. (This concerns hardware). The purchase of software that is available from more than one vendor is subject to the bid law unless the awarding authority can document a professional exemption under ALA. CODE § 41-16-51(a)(3) (1975). Hon. Eddie Ambrose, Lee County, 8-6-92, EPA.

26. Competitive Bid Law does not apply to the sale or lease of instructional television fix service frequencies. Public entities are required to receive fair market value for items sold. Hon. Larry Beaty, President, George C. Wallace State Community College, 12-13-91, AG 92-00080. (See Also: Hon. Doyle Bond, Superintendent, Houston County Board of Education, 12-13-91, AG 92-00081.)

27. Contracts for superintendents of construction, engineers, and consultants do not require competitive bid per ALA. CODE § 41-16-51(a)(3) (1975). Hon. Allen C. Jones, Attorney, Edge Regional Medical Center, 10-10-91, AG 92-00018.

28. Purchase of compatible system hardware equipment is not subject to the bid law. Purchase of identical software for programs already in place is not subject to the bid law unless there is more than one vendor for that identical program. Purchase of new software that costs more than $5000 is subject to the Competitive Bid Law. Hon. Thad Morgan, Superintendent, Enterprise City Schools, 5-30-91, AG 91-00282.

29. The St. Clair County Airport Authority, pursuant to ALA. CODE § 4-3-10 (1975), is exempt from the Competitive Bid Law. William H. Trussell, Esq., St. Clair County, 4-29-91, EPA.

30. 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, Administrator, ABC Board, 1-4-91, AG 91-00131.

31. Purchase of compatible computer system equipment is not subject to the Competitive Bid Law. Hon. James A. Street, Elmore County, 8-8-89, EPA.

32. Since the small bleacher problem was not known at the time of bidding and the Board apparently acted in good faith, the expenditure for the removal of the small section of bleachers does not have to be competitively bid since the total cost is less than $5,000. Hon. Jim Pratt, Marshall County, 7-27-89, EPA.

33. In view of the necessity that additional voting machines must be compatible with existing machines, said purchase may be made without taking competitive bids. Hon. Lee M. Otts, Escambia County, 1-26-89, EPA.

34. Lease of office space or other real property is not subject to the Competitive Bid Law. Hon. Charles D. Baker, Walker County, 4-21-88, EPA.

35. Competitive bids not required for the purchase of compatible telephone system equipment for which there is only one vendor. Hon. Karl M. Hoven, Chairman, South Alabama Utilitites, 4-7-88, AG 88-00250.

36. Etowah County may purchase equipment from another governmental entity such as TVA without having to comply with the Competitive Bid Law. Hon. Jesse F. Burns, Etowah County, 11-12-87, EPA.

37. Competitive Bid Law is not applicable to a transaction not involving the expenditure of public funds. Hon. Jim L. Winn, Calhoun County, 6-2-87, EPA.

38. A training contract should be exempt from the Competitive Bid Law if the services to be taught are primarily unique, creative and require a high degree of skill. Hon. Roy W. Driver, Jefferson

County, 8-1-86, EPA.

39. Purchase of used equipment by the Fort Payne Improvement Authority is exempted from competitive bidding only if conditions of ALA. CODE § 41-16-51(b)(7) (1975) are met. If competitive bidding is used for purchase of such equipment, bid specifications may use brand names and equipment types if bidder may submit bid on a product equal to the brand name or equipment type specified. Hon. W. D. Scruggs, Jr., Attorney for Fort Payne Improvement Authority, 5-13-86, AG 86-00251.

40. It is not necessary to comply with the Competitive Bid Law when hiring full or part-time county employees to perform janitorial services. Hon. Earl Malcom, Jr., Lawrence County, 4-1-86, EPA.

41. St. Elmo-Irvington Water Authority as presently established is exempt from competitive bid requirements in those operations set out in ALA. CODE § 41-16-51(b)(7) (1975). Hon. Daniel A. Pike, Attorney for St. Elmo-Irvington Water Authority, 3-4-86, AG 86-00177.

42. The Tuscaloosa County Commission can renew its existing contract for garbage service without taking competitive bids as provided for by ALA. CODE § 41-16-51(a)(10) (1975). Hon. John T. Lancaster, Tuscaloosa County, 2-26-86, EPA.

43. The acquisition of utility (telephone) services, the rates of which are fixed under tariff by the Alabama Public Service Commission, is exempt from the requirements of the Competitive Bid Law. Hon. James E. Pruitt, Representative, District 55, 10-29-85, AG 86-00034.

44. The Attorney General has ruled on numerous occasions that the Competitive Bid Law governing purchases is not operative whenever the contract in question is between two governmental entities. Further, we know of no other law which would prevent a county board of education from obtaining gasoline from the county commission and reimbursing the commission for the purchase price. Hon. Patrick H. Tate, DeKalb County, 7-23-85, EPA.

45. Utility Services Corporation is exempt from Competitive Bid Laws when acting within the scope of ALA. CODE § 11-97-20 (1975). Hon. James L. Birchall, Attorney for City of Gulf Shores and Governmental Utility Services Corporation, 6-27-85, AG 85-00411.

46. Preliminary site work and grading is within the purview of ALA. CODE § 41-16-51(b)(6) (1975), and not subject to bid law under ALA. CODE § 41-16-50 (1975). Hon. Jerry Batts, Limestone County, 6-10-85, AG 85-00380.

47. The Tuscaloosa County Board of Education may dispose of trees blown over in a storm without taking competitive bids so long as they receive a fair market value for the property. Dr. Neil Hyche, Tuscaloosa County, 4-19-85, EPA.

48. Preparation of maps using area photographs and computer graphic type maps is exempt from the Competitive Bid Law. Hon. Patrick H. Tate, DeKalb County, 3-12-85, EPA.

49. The Madison County Commission Children's Advocacy Center Fund contains no public funds and purchases are not subject to the Competitive Bid Law. Hon. Robert E. Cramer, Jr., Madison County, 2-14-85, EPA.

50. Mobile County Racing Commission is not subject to the Competitive Bid Law if it wishes to contract with the University of South Alabama for laboratory testing of racetrack canines. Hon. Esau G. Smith, Secretary, Mobile County Racing Commission, 2-7-85, AG 85-00198.

51. Competitive Bid Law does not apply where county expends less than the statutory minimum. Discussion of solid waste disposal. Hon. Thomas A. Snowden, Jr., Probate Judge, Shelby County Commission, 10-2-84, AG 85-00002.

52. The purchase of compatible computer system equipment is not subject to the Competitive Bid Law. Hon. James D. Hunter, Tuscaloosa County, 4-17-84, EPA.

53. Purchases which are made from discretionary funds controlled

solely by the sheriff are not required by ALA. CODE § 41-16-50 (1975) to be let for bids. Hon. Mike Blakely, Sheriff, Limestone County, 3-5-84, AG 84-00191.

54. Competitive Bid Law does not apply where county expends less than statutory minimum. Section 41-16-57(e) does not apply to franchises. Hon. Edwin A. Strickland, Jefferson County, 2-27-84, AG 84-00184.

55. Purchase of equipment by volunteer fire department with funds from private sources is not subject to the Competitive Bid Law. Hon. Miles Prater, Mayor, Town of Millport, 2-17-84, AG 84-00168. However, this opinion has been subsequently modified by two subsequent opinions. The opinion issued to Hon. Thomas M. Little, Attorney, Talladega County Board of Education, 4-1-99, AG 99-00158, found that the contract providing a scoreboard to the Talladega County Board of Education by private corporations in return for the granting of an exclusive concessions contract must be competitively bid. The opinion issued to Hon. Ryan Robertson, Cleburne County Judge of Probate, 12-12-11, AG 2012-016, found that a volunteer fire department is subject to the Competitive Bid and Public Works Laws, but a volunteer fire association is not subject to the Competitive Bid, Public Works, or Open Records Laws.

56. Project built entirely with private funds or industrial development board bond proceeds is not governed by provisions of Competitive Bid Law. Hon. Dennis A. Moore, Chairman, Board of Water and Sewer Commissioners of City of Mobile, 11-7-83, AG 84-00050. However, this opinion is subject to subsequently issued opinion to Hon. Thomas M. Little, Attorney, Talladega County Board of Education, 4-1-99, AG 99-00158, which found that the contract providing a scoreboard to the Talladega County Board of Education by private corporations in return for the granting of an exclusive concessions contract must be competitively bid.

57. Purchase of compatible computer system equipment is not subject to the Competitive Bid Law. Hon. William P. Smith, Covington County, 6-29-83, EPA.

C. Municipal Agencies

1. A contract between a city and a non-profit ambulance service does not have to be competitively bid. Organized rescue squads are public in nature because of their function in protecting the health, safety, and welfare of the public, so they will be deemed public entities for purposes of the Competitive Bid Law. The Competitive Bid Law does not require contracts between public entities to be competitively bid, so this contract is exempt. Hon. Joe Rex Sport, Mayor, City of Luverne, 02-29-12, AG 2012-040.

2. The sale of certain electrical distribution facilities of a public utility by the Montgomery Public Educational Building Authority ("Authority") is not subject to the Competitive Bid Law or the Land Sales Act. Hon. John F. Knight, Jr., Member, House of Representatives, 05-03-11, AG 2011-056.

3. An agreement between the Birmingham-Jefferson Civic Center Authority ("Authority") and a company for the naming rights of the facilities of the Authority is not subject to the Competitive Bid Law. Hon. Thomas L. Stewart, Attorney, Birmingham-Jefferson Civic Center Authority, 04-02-10, AG 2010-054.

4. 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.

5. 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.

6. The transfer of funds from the city general fund to the city municipal court fund for the purchase of an automobile does not require competitive bidding. Hon. Emmett O. Griswold, Jr., Attorney, City of Sampson, 8-1-06, AG 2006-123.

7. A contract for engineering and professional management

services is exempt from the Competitive Bid Law if the non-professional services are incidental to and integrated with the professional services. Hon. Guy F. Gunter, Attorney, City of Opelika, 9-9-05, AG 2005-192.

8. The City of Mountain Brook is not prohibited by the Competitive Bid Laws from entering into an agreement with a development company. The agreement involves re- annexed property which has been recently been given "village" district classification, which imposes strict use and development restrictions designed to achieve specific aesthetic and functional objectives within the classified property. Because the expenditures for improvements will be made by an individual owner and the city will only receive certain benefits as part of a "package deal," and because the development company is the only supplier of the property and the project, this transaction is exempt from the competitive bidding process. Hon. Lawrence T. Oden, Mayor, City of Mountain Brook, 8-12-03, AG 2003-213.

9. A general service contract entered into between the Chattahoochee Valley Water Supply District and a professional services company is excluded from competitive bidding under the provisions of ALA. CODE § 41-16-51(a)(3) (1975). Each factual situation must be individually examined by the awarding authority and if, upon the consideration of the totality of the circumstances, the professional services are incidental to the purchase of equipment, the purchase of the equipment is subject to the Competitive Bid Law. A contract that falls within an exception to the Competitive Bid Law requirement is not subject to the three-year limitation on public contracts for purchase of personal property or contractual services. Hon. William L. Nix, Attorney, Chattahoochee Valley Water Supply District, 5-19-00, AG 2000-152.

10. A municipal public building authority is not required to take competitive bids for the construction of a building to house the county jail and administrative offices of the Sheriff of Coosa County when such building is to be built and the building, furnishings, equipment, and fixtures are to be owned by the municipal public building authority, and leased to the county. Hon. Jasper Fielding, Chairman, Coosa County Commission, 6-10-99,

AG 99-00224.

11. 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.

12. Contracts between the East Central Alabama Solid Waste Disposal Authority and municipal and county governments are not subject to the Competitive Bid Law. Contracts entered into by the East Central Alabama Solid Waste Disposal Authority with respective county and municipal governments may be valid for a term of five years or longer. However, an abundance of caution should be exercised upon entering such long-term contracts. Hon. Bill Curtis, Executive Director, East Central Alabama Solid Waste Disposal Authority, 5-6-94, AG 94-00183.

13. The agreement between the Birmingham-Jefferson Civic Center Authority and Fastix is not subject to the provisions of the Competitive Bid Law as no public funds are expended by the authority under the agreement. Hon. Thomas Stewart, Attorney, Birmingham-Jefferson Civic Center Authority, 11-9-92, AG 93-00038.

14. The Water Works and Sewer Board of the Town of Eclectic, is exempt from the bid law pursuant to ALA. CODE § 41-16-51(7) (1975). Ms. Pamela C. Glover, Elmore County, 3-18-91, EPA.

15. The Historical Preservation Authority of the City of Birmingham is exempt from the Competitive Bid Law regardless of whether the City of Birmingham donates money to the Authority. Hon. Earl P. Hilliard, State Senator, 2-21-91, AG 91-00178.

16. 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, ABC Board, 1-4-91, AG 91-00131.

17. The Elamville Water Authority falls within the exclusion to the

bid law found in ALA. CODE § 11-16-51(b)(7) (1975). Hon. Boyd Whigham, Barbour County, 10-19-90, EPA.

18. The preparation of the recodification of a municipal code is not subject to the Competitive Bid Law. The printing of such recodification is subject to the Competitive Bid Law. The choosing of an update service for the municipal code of Jacksonville is subject to the Competitive Bid Law. Hon. John B. Nisbet, Mayor, City of Jacksonville, 8-28-89, AG 89-00411.

19. The Birmingham Airport Authority is exempt from compliance with the Competitive Bid Law pursuant to ALA. CODE § 4-3-60 (1975). Hon. T. M. Burgin, Jefferson County, 5-29-89, EPA.

20. City Board of Education may employ services of Superintendent of Construction without competitive bidding. City Board of Education is an instrumentality of municipality which may award a contract to resident bidder under ALA. CODE § 41-16-50 (1975). That portion of ALA. CODE § 41-16-50 (1975), regarding awarding of bid to resident bidder, applies only to purchase of personal property. Hon. J. Russell Gibson, III, Tuscaloosa County, 11-10-88, AG 89-00036.

21. The Attorney General has ruled on numerous occasions that the Competitive Bid Law governing purchases is not operative whenever the contract in question is between two governmental entities. Further, we know of no other law which would prevent a county board of education from obtaining gasoline from the county commission and reimbursing the commission for the purchase price. Hon. Patrick H. Tate, DeKalb County, 7-23-85, EPA.

22. Mobile Airport Authority not covered by Act 84-830 which requires all leases for official business purposes to be competitively bid since City of Mobile is not political subdivision of Mobile County. Hon. Ian F. Gaston, Attorney, Mobile Airport Authority, 8-13-84, AG 84-00391.

23. Escambia Industrial Development Authority is not required to use competitive bidding if it constructs a building to lease for purposes of industrial development. However, requirements of the Competitive Bid Law must be met if the Authority renovates a

building to use as its office. Hon. David W. Hutchinson, Executive Director, Escambia County Industrial Development Authority, Inc., 4-17-84, AG 84-00246.

Educational Entities

A. Higher Education

1. In accordance with ALA. CODE § 41-16-51(b)(5) (1975) the University of South Alabama Medical Center is exempt as to all purchases for public hospitals and nursing homes operated by the governing boards of instrumentalities of the state, counties and municipalities. "Purchases" does not include the term "construction, expansion or enlargement" of a public facility. Hon. Stanley K. Hammack, Colleges and Universities, 12-16-85, EPA.

2. Contract which the Auburn City Board of Education wishes to award may be exempt from the Bid Law only if such contract involves in a major part the services of a professional engineer. Hon. Edward R. Richardson, Superintendent, Auburn City Schools, 4-8-85, AG 85-00291.

3. Contracts for broadcast of University Sporting Events are excluded from the Competitive Bid Law. Dr. James Martin, President, Auburn University and Dr. Joab L. Thomas, President, University of Alabama, 3-5-85, AG 85-00237.

4. The Competitive Bid Law, the laws pertaining to the duties of the State Building Commission and the laws pertaining to bonds required on public projects do not apply to the expenditures of money appropriated by the State Legislature to Tuskegee Institute. Hon. Henry B. Steagall, II, Director of Finance, 8-2-84, AG 84-00376.

5. A public contract for professional services involving the purchase of integrated sophisticated scientific equipment and services requiring a high degree of professional skill is exempt from the Competitive Bid Law pursuant to ALA. CODE § 41-16-21 (1975). Dr. Richard Morrison, President, Alabama A&M University, 4-30-84, AG 84-00263.

6. Under the facts presented, the University of North Alabama may

purchase a Central Processing Unit from IBM without inviting bids under the single source exclusion to the Competitive Bid Law. Hon. Roy Stevens, Colleges and Universities, 5-11-84, EPA.

7. Alabama Commission on Higher Education may contract for collection services on student loans and such contract is exempt from Competitive Bid Law under ALA. CODE § 41-16-21(a) (1975). Hon. Joseph T. Sutton, Executive Director, ACHE, 2-11-83, AG 83-00184.

B. Post-Secondary Education

1. From facts presented, the proposal for the services of a professional graphics designer to create a completely new format for a quarterly class schedule, would be exempt from the Competitive Bid Law. Hon. J. Brian Wilkinson, Jefferson State Community College, 7-23-93, EPA.

2. Because this proposed repair contract is part of a negotiated settlement of a pending lawsuit involving the facility, the contract is incapable of being competitively bid under these circumstances. Hon. George B. Gordon, Colleges, 7-26-89, EPA.

3. Equipment used in instructional courses in schools may be purchased without strict adherence to the Competitive Bid Law where it is necessary to train students on a particular brand of equipment and there is only one vendor for the brand. Hon. Rickey A. Huffstutler, Russell County and CC, 4-1-86, EPA.

4. Lawson State Community College will not be required to solicit competitive bids to contract with ERIC Engineering to implement an energy control program at the school under facts presented. Dr. Jesse J. Lewis, Community Colleges, 11-3-83, EPA.

C. K-12

1. A sale or lease of real property by the Escambia County Board of Education is not subject to the requirements of ALA. CODE §§ 9-15-70 et seq., (1975). Any such transfer must be for adequate consideration, even if the consideration is non-monetary, and the Board must use the consideration for school purposes. Hon. Broox

G. Garrett, Jr., Attorney, Escambia County Board of Education, 9-6-00, AG 2000-228.

2. The State Competitive Bid Law and the Public Works Law are not applicable where an educational building authority, organized under ALA. CODE § 16-17-1 et seq., (1975)., issues revenue bonds to finance facilities for a private school when the authority is not a party to the contracts, 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, Attorney, Educational Building Authority of the City of Tuscaloosa, 1-25-99, AG 99-00095.

3. The Alabama Competitive Bid Law does not apply to purchases of appraisal services. Hon. Warcheta Bedgood, Lowndes County Board of Education, 10-19-95, EPA.

4. City Board of Education may employ services of Superintendent of Construction without competitive bidding. City Board of Education is an instrumentality of municipality which may award a contract to resident bidder under ALA. CODE § 41-16-50 (1975). That portion of ALA. CODE § 41-16-50 (1975), regarding awarding of bid to resident bidder, applies only to purchase of personal property. Hon. J. Russell Gibson, III, Tuscaloosa County, 11-10-88, AG 89-00036.

5. Discussion of the exemption under the Bid Law to the bond issue of the Baldwin County Board of Education. Hon. Al Umphrey, Baldwin County, 1-21-86, EPA.

6. Typewriters used in instructional courses in schools may be purchased without strict adherence to the Competitive Bid Law. Dr. James J. Benson, Mobile County, 5-16-85, EPA.

7. Purchases made by individual schools of the county or municipal public school systems from moneys other than those raised by taxation or received through appropriations from State or County sources are not subject to the Competitive Bid Law. Dr. Kenneth Wilson, Marshall County, 5-16-84, EPA.

Corporate Bidders

1. Long distance telephone service is not a bid item pursuant to ALA. CODE § 41-16-51(A) (1975). Hon. Wayne Hall, Examiners of Public Accounts, 2-23-90, EPA (Birmingham-Jefferson County Civic Center).

2. Copies of the ALA. CODE 1975 may be purchased from the Michie Co. without having to comply with the Bid Law pursuant to authority found in ALA. CODE § 41-16-21 (1975). Hon. Douglas A. Valeska, Houston County, 2-25-88, EPA.

3. Corporations organized pursuant to ALA. CODE §§ 11-60-1 (1975) et seq. are exempt from Competitive Bid Law pursuant to ALA. CODE § 11-60-19 (1975). Hon. Norman J. Gale, Jr., Attorney, Mobile Park and Recreation Board, 11-1-84, AG 85-00054.

CHAPTER 6

PROCEDURE UNDER COMPETITIVE BID LAW

ARTICLE 1.

Introduction

The Competitive Bid Law contains many detailed procedural requirements. Some procedural issues can be quite complex, and because of this, the Attorney General and the Examiner of Public Accounts have written numerous opinions regarding procedural issues related to the Competitive Bid Law.

ALA. CODE § 41-16-24(a) (1975) discusses the procedure for advertising bids. Specifically, the statute provides:

> (a) The Purchasing Agent shall advertise for sealed bids on all purchases in excess of the competitive bid limit as established in Section 41-16-20 by posting notice thereof on a bulletin board maintained outside the office door or by publication of notice thereof, one time, in a newspaper published in Montgomery County, Alabama, or in any other manner, for such lengths of time as the Purchasing Agent may determine. The Purchasing Agent shall also solicit sealed bids or bids to be submitted by reverse auction procedure by notifying all Alabama persons, firms, or corporations who have filed a request in writing that they be listed for solicitation on bids for the particular items set forth in the request and the other persons, firms, or corporations the Purchasing Agent deems necessary to insure competition.

ALA. CODE § 41-16-24(b) (1975) discusses the procedure for submitting bids to the purchasing agent. This portion of the statute notes that "[a]ll bids . . . shall be sealed when received, shall be opened in public at the hour stated in the notice, and all original bids together with all documents pertaining to the award of the contract shall be retained in accordance with a retention period

established by the State Records Commission and shall be open to public inspection." Id. Moreover, as the Opinions below establish, the submission of a bid by fax or e-mail is not permitted. Competitive bids may be requested by telephone, but bids cannot be received or accepted by telephone. Contractual service contracts of local governing bodies are limited to three years. The Alabama Supreme Court in Huddleston v. Humble Oil & Refining Co., 260 Ala. 384, 71 So. 2d 39 (Ala. 1954) held that where a Sunday is fixed to be the last day to receive the bids, Sunday must be excluded and the following Monday shall be counted as the last day for submitting bids.

Another predominant procedural issue is particular bid specifications for public contracts. According to the Competitive Bid Law and the Opinions interpreting it, 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), explaining that 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.

Another issue is the power that is granted to the awarding authority. ALA. CODE § 41-16-27(a) (1975) provides:

> When purchases are required to be made through competitive bidding, award shall, except as provided in subsection (f), be made to the lowest responsible bidder taking into consideration the qualities of the commodities proposed to be supplied, their conformity with specifications, the purposes for which required, the terms of delivery, transportation charges and the dates of delivery provided, that the awarding authority may at any time within 30 days after the bids are opened negotiate and award the contract to anyone, provided he secures a price at least five percent under the low acceptable bid. The award of such a negotiated contract shall be subject to approval by the Director of Finance and the Governor, except in

> cases where the awarding authority is a two- year or four-year college or university governed by a board. The awarding authority or requisitioning agency shall have the right to reject any bid if the price is deemed excessive or quality of product inferior.

The awarding authority can choose to accept the bid, reject the bid, negotiate for price at least five percent lower, or rebid the project as a whole. The awarding authority may also waive or correct technical errors and informalities in the bidding procedure. When a low bidder is released from the contract, the awarding authority can then turn to the next lowest bidder. In general, a wide range of flexibility and discretion is given to the awarding authority. However, once a bid or offer is rejected, it ceases to exist, and the awarding authority cannot accept the rejected bid. Also, it is the responsibility of the awarding authority to state their invitations to bid and to whom the bid should be delivered; however, it is the responsibility of the bidder to submit the bid at the time and to the person specified. The Supreme Court of Alabama addressed the power of awarding authorities in Townsend v. McCall, 262 Ala. 554, 80 So. 2d 262 (1955). In this case, the city commission rejected all bids except one which was allegedly made by a mistake. The bidder who had made the mistake declined to accept a contract. The Court held that 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.

ALA. CODE § 41-16-27 (1975) goes on to describe various other procedural issues. Subsection (c) notes that "[e]ach bid, with the name of the bidder, shall be entered on a record. Each record, with the successful bid indicated thereon and with the reasons for the award if not awarded to the lowest bidder shall, after award of the order or contract, be open to public inspection." Subsection (d) allows for the Purchasing agent to give preferential treatment to Alabama resident bidders. Subsection (e) explains the time limits placed on the Competitive Bid Law. This subsection reads:

> (e) Contracts for the purchase of personal property or contractual services other than personal services

> shall be let by competitive bid for periods not greater than five years and current contracts existing on February 28, 2006, may be extended or renewed for an additional two years with a 90-day notice of such extension or renewal given to the Legislative Council, however, any contract that generates funds or will reduce annual costs by awarding the contract for a longer term than a period of three years which is let by or on behalf of a state two- year or four-year college or university may be let for periods not greater than 10 years. Any contract awarded pursuant to this section for terms of less than 10 years may be extended for a period not to exceed 10 years from the initial awarding of the contract provided that the terms of the contract shall not be altered or renegotiated during the period for which the contract is extended. ALA. CODE § 41-16-27(e) (1975).

Yet another issue is the issuance of bid bonds. ALA. CODE § 41-16-28 (1975) provides that "[b]ond in a responsible sum for faithful performance of the contract, with adequate surety, shall be required in an amount specified in the advertisement for bids. Various Attorney General opinions have accepted postal money orders, certified checks, cashier's checks, irrevocable letters of credit, or certain bonds or U.S. treasury notes in lieu of a bid bond, but never a personal or company check. Entities may not require certified checks or other forms of security instead of bid bonds; however, they can choose to accept alternative satisfactory payment methods. Although bonds typically become the property of the purchaser, in Water Works Board of the City of Fort Payne v. Jones Environmental Construction, Inc., 533 So. 2d 225 (Ala. 1988), the Court held that a bidder that withdraws its bid (due to a mistake) after it has been submitted but before the contract has been awarded does not forfeit its bid bond.

Although several procedural issues related to the Competitive Bid Law are case-specific, a few recurring issues present themselves in both the Opinions prepared by the Attorney General and the Examiners of Public Accounts listed below.

ARTICLE 2.

OPINIONS

Governmental Entities

A. State Agencies

1. Section 41-16-50(c) permits, but does not require, awarding authorities to require bidders to furnish a bid bond. If the lowest bidder's bond suffers from some technical deficiency, the authority may allow the bid to be corrected after it has been unsealed, particularly if the notice to bidders includes a clause retaining the right to waive any formality in any bid. Hon. Jim Byard, Jr., Director, Alabama Department of Economic and Community Affairs, 10-22-2013, AG 2014-011.

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 Alabama's 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. It would not be legal to pay someone for services contemplated during a period of time not covered by a signed contract. Hon. Paul Dentiste, Regional Organizations, 10-25-88, EPA.

8. 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.

9. In the event only one bidder responds to the invitation to bid, the awarding authority may reject the bid and negotiate the purchase or contract, providing the negotiated price is lower than the bid price. Hon. Richard S. Little, Mental Health, 8-18-86, EPA.

10. Specifications of the contract entered into must be the same as those used in the basis of the bidding, and any material departure in the contract awarded from the terms on which the bidding is had is invalid. Hon. Jerry L. Peters, Highway Department, 8-20-85, EPA.

11. 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.

12. 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.

13. The Department of Youth Services may not, consistent with the State's Competitive Bid Law, purchase a computer from a state contract which has expired even if the vendor agrees to sell at the bid price. Hon. Tom H. Kennedy, Sr., Department of Youth Services, 8-1-84, EPA.

14. 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.

15. 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. Opinion of Attorney General to Hon. S. Richardson Hill, Jr., M.D., President, University of Alabama in Birmingham, 6-30-81 AG 81-00443.

16. 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.

17. 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. Opinion of Attorney General to Hon. Ira L. Myers, M.D., State Health Officer, 12-14-79, AG 80-00124.

18. In the event that all bids are rejected on a project, the project must be rebid. Opinion of Attorney General to Hon. Ralph Smith, Jr., Attorney, Marshall County Hospital, 10-29-79, 80-00047.

19. Each response by a bidder to a set of specifications advertised by an awarding authority represents a distinct and separate transaction. Thus, a bid bond submitted in response to the first set of specifications cannot be considered as responsive to subsequent specifications and requests for bids. EPA letter to Hon. M. D. Herring, 10-20-76.

20. All bids shall be opened in public at the hour stated in the notice. According to office clocks a bid was apparently late by a minute or two. The time-of-day service was called and the office clocks were found to be running fast. Based on this, the last bid was accepted as entered on time. In this circumstance, the Competitive Bid Law was complied with. EPA letter to Hon. L. M. Sims, 8-5-75.

21. 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. Opinion of the Attorney General to Hon. Thomas M. Galloway, 5-2-74.

22. 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. Opinion of Attorney General to Hon. L. R. Driggers, 2-14-73.

B. <u>County Agencies</u>

1. Under Ala. Code § 41-16-82, all persons who are awarded a contract over $5,000 in a competitive bid process must submit a disclosure statement within 10 days of the award. Even if the parties regularly contract with each other, this disclosure statement must be prepared for every contract award, and not merely once a year. Honorable Bernard H. Eichold II, Health Officer, Mobile County Health Department, 1-10-2014, AG 2014-037.

2. A county commission may sell material if there is a need to dispose of it as surplus property. A county commission may sell material to a federal agency, a state agency, or another county

commission under section 11-1-10 of the Code of Alabama. The governing bodies of two or more local agencies subject to section 41-16-50 of the Competitive Bid Law may enter into a joint purchasing agreement for materials, equipment and supplies under section 41-16-50(b) of the Code of Alabama. The agreement may provide that one of the agencies will serve as a joint purchasing or bidding agent to physically purchase and obtain items from the vendor for all of the agencies and that the remaining agencies will obtain their share from and reimburse the purchasing agency. Hon. K. Doyle Allen, Chairman, Randolph County Commission, 11-02-2010, AG 2011-007.

3. Under Alabama's 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.

4. The three-year limit found in ALA. CODE § 41-16-57(e) (1975) on public contracts for contractual services applies only to contracts that are competitively bid. The chairman of the county commission must sign a contract approved by the commission. Hon. Don Strength, Director, Randolph Co. Emergency Management Agency, 12-11-00, AG 2001-049.

5. Where only one bid is submitted in response to an invitation to bid, the awarding authority may accept the bid, rebid the project, or reject the bid and negotiate the purchase or contract, provided the negotiated price is lower than the bid price. Hon. Steven R. Ballard, Administrator, DeKalb County Commission, 5-8-98, AG 98-00140.

6. Two vendors responded to invitation to bid. One vendor did not submit a bid bond. As only one vendor is eligible, the awarding authority may negotiate, providing the negotiated price is lower than the bid price. Hon. Jim Fitzgerald, Baldwin County, CC, 7-1-94, EPA.

7. A county commission is not an awarding authority or subject to the provisions of Title 39, Chapter 2. County commissions are

subject to the provisions of ALA. CODE § 41-16-50 (1975). Hon. Bob Wright, Baldwin County, 5-17-94, EPA.

8. Whenever an examination of bids submitted reveals deficiencies in specifications, rather than consider factors not specified, the awarding authority should reject all bids and begin again. Hon. H. Lynn Bell, Montgomery County, 5-7-92, EPA.

9. Bidders must honor their bids upon award of the contract. A bid must be evaluated for conformity with specifications. Hon. George W. Grayson, Member, House of Representatives, 4-28-92, AG 92-00262.

10. An irrevocable letter of credit may be accepted as the bid bond required under the Competitive Bid Law. Hon. Yvonne Kennedy, President, Bishop State Community College, 11-15-91, AG 92-00053.

11. A county cannot purchase equipment items, the cost of which meets the competitive bid requirements, from an auction. Hon. Bobby Jo Johnson, Wilcox County, 10-26-90, EPA.

12. A bid submitted pursuant to ALA. CODE § 41-16-54 (1975) must be sealed when received; submission by facsimile machine does not meet the requirements of the statute. Hon. Constance S. Aune, In-House Counsel, Board of School Commissioners of Mobile County, 10-9-90, AG 91-00016.

13. Section 41-16-50(c) requires that a bidder must furnish a bid bond for his bid to be considered. Contract must be awarded to lowest responsible bidder in conformity with specifications. Hon. Randy Beard, Marshall County Attorny, 2-13-90, AG 90-00140.

14. The Mobile County Commission should not waive as a technicality a mistake in the unit price of a bid on a bridge repair project. ALA. CODE § 39-2-7 (1975) is applicable only to state agencies and does not in and of itself preclude a county from waiving or correcting a technical error contained in a unit price of a bid. Hon. Lawrence M. Wettermark, Attorney at Law, 10-24-89, AG 90-00015.

15. An awarding authority may waive or correct technical errors and informalities in the bidding procedure where it will result in reduced cost to the taxpayer. Hon. M. D. Herring, Mobile County, 8-14-89, EPA.

16. A wide range of flexibility is vested in the awarding authority to accept or reject a proposal or to waive informalities or technical errors contained in the proposal, where the best interests of the awarding authority would be served. Hon. Edward F. McFadden, Mobile County, 5-8-89, EPA.

17. Provided there is no change in the bid specifications, there is no objection to awarding a contract to the low bidder even though the bid was made eight months ago. Hon. Douglas A. Valeska, Houston County, 10-12-88, EPA.

18. It is not acceptable to award a bid with a price increase clause injected by the vendor. The awarding authority may utilize an escalation clause in limited and compelling circumstances. Ms. Jeannie Ard, Baldwin County and JC, 9-16-88, EPA.

19. Once a bid is accepted as responsible and a contract signed thereto it should be performed according to the terms of that contract without material change. Absent an escalation clause, the vendor cannot increase his price in a contract. Ms. Jeannie Ard, Baldwin County and JC, 8-16-88, EPA.

20. An awarding authority may reject any or all bids. The awarding authority does not have to justify such rejection. The authority may rebid a purchase or contract and change the specifications. Hon. Ernest R. Davis, CC and Etowah County, 4-29-88, EPA.

21. Once a contract is awarded it should be performed according to the terms of that contract without material change. Hon. Calvin Biddle, Etowah County, 11-18-86, EPA.

22. Invitation to bid may use brand name in specifications when followed by words "or equal" so that a bid for equipment of better or equal quality may be submitted. Cannot mail invitations to bid on a crawler dozer only to Caterpillar dealers. Hon. F. R. Albritton, Jr., Probate Judge, Wilcox County, 9-15-86, AG 86-00359.

23. A vendor who appears approximately one hour after the time specified did not respond in a timely fashion to the invitation to bid. Hon. James R. Pratt, Jackson County, 8-20-86, EPA.

24. Discussion of mistake in a contract bid. Since the contract has not been awarded, the awarding authority may reject all bids and readvertise. Hon. Kenneth L. Joiner, Calhoun County, 7-17-86, EPA.

25. If the Pike County Commission determines that the Action Truck Center bid "with explanation" was responsive to their specifications, they may accept the bid. If they determine that the bid was not responsive, they may reject the bid for not meeting their specifications, and they are not required to re-bid since other bidders have complied with the invitation to bid. Ms. Guynette Smith, Pike County, 7-17-86, EPA.

26. Vendor that submitted bid after the bid process was over did not respond in a timely fashion and results are final. Hon. Marvin Etheridge, Clarke County, 6-30-86, EPA.

27. Even though a vendor who does not have the state contract offers a purchase price less than the state bid price, bids must be taken. Restrictive specifications or brand names (e.g., Xerox, IBM, etc.) may be used in letting bids for the purchase of items to be used for instructional purposes. Hon. B. G. Grissette, Monroe County, 6-9-86, EPA.

28. The proper procedure to follow when a low bid exceeds the funds available is to redesign the project and rebid it or negotiate with the low bidder to bring the cost within available funds. The amount changed from negotiations shall not exceed 10 percent. Hon. Obie J. Littleton, Chilton County, 12-6-85, EPA.

29. When low bidder is released from contract, the awarding authority may go to next lowest bidder. Hon. Bobby G. Grissette, Monroe Co., 9-16-85, EPA.

30. In the event only one bidder responds to the invitation to bid, the awarding authority may reject the bid and negotiate the purchase or contract, providing the negotiated price is lower than

the bid price. Hon. William A. Waddell, Morgan County, 8-30-85, EPA.

31. Under facts presented, the West Alabama Emergency Medical Services, Inc. must rebid for a 1984 van since the original bid was for a 1983 van. Hon. Mark Perkins, Tuscaloosa County, 7-26-83, EPA.

32. Under the facts presented, the Department of EPA has no objection to the issuance of a joint check, drawn in the alternative, as provided for in ALA. CODE § 7-3-116(a), to fulfill the requirements to the primary contractor. Hon. B. G. Grissette, Monroe County, 7-17-85, EPA.

33. A county commission may amend their minutes to correct an error. A county commission may not accept a bid on an item which was not advertised for bids. A company which contracts to merely haul crushed stone is not a general contractor as defined in ALA. CODE § 34-8-1 (1975). Hon. W. C. Buttram, President, DeKalb County Commission, 5-3-83, AG 83-00300.

34. Competitive bids may be requested by telephone as long as the other methods required by ALA. CODE § 41-16-54 (1975) are used. Bids cannot be received or accepted by telephone. Hon. F. R. Albritton, Jr., Chairman, Wilcox County Commission, 2-22-83, AG 83-00199.

C. Municipal Agencies

1. The Birmingham Water Works Board may make purchases from the state bid list without further bidding if the purchase is made from the vendor to whom the state awarded the contract and the state bid included political subdivisions and instrumentalities of political subdivisions on the state bid. Hon. A. Jackie Robinson, III, Chairman/President, The Birmingham Water Works Board, 11-15-2010, AG 2011-011.

2. A written proposal on the outside of a sealed bid made prior to the bid opening can be considered part of the proposal. Hon. William L. Nix, Attorney, Hughley Water, Sewer, and Fire Protection Authority, 7-25-2005, AG 2005-160.

3. Under Alabama's 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.

4. There is no specific state law that prohibits advertising on a city's law enforcement vehicles. Exclusive grants of franchises on contracts must be competitively bid. Hon. Sammie E. Maze, Mayor, Town of Kimberly, 11-13-02, AG 2003-031.

5. A bidder, who previously withdrew his bid, may rebid on the same contract if all bids on the original contract are subsequently rejected and the contract is rebid, provided there is no fraud or collusion presented. Hon. Jay M. Ross, Attorney, City of Daphne, 6-5-02, AG 2002-246.

6. Contract for operating and managing a utility board must be bid at the end of the term of the contract. Hon. Oliver Kitchens, Attorney, Utilities Board of the City of Roanoke, 10-28-96, AG 97-00025.

7. Once a bid or offer is rejected, it ceases to exist. Pursuant to the Competitive Bid Law, the awarding authority cannot accept the rejected bid and award a contract for services. Hon. James E. Atchison, Attorney, Mobile Board of Water and Sewer Commissioners, 9-17-96. AG 96-00317.

8. Municipalities may renew existing contracts without taking competitive bids provided the terms are not changed and the original contract provides for renewal. If the terms are materially changed, then the contract must be rebid in accordance with § 41-16-50(a). Hon. Jonathan A. Brown, Attorney, City of Vernon, 2-23-96, AG 96-00142.

9. Section 41-16-50(c) clearly states that all bidders must furnish a bid bond on any contract exceeding $10,000. Ms. Wanda Dunn, Etowah County, 3-4-91, EPA.

10. Contractual service contracts of local governing bodies are

limited to three years pursuant to ALA. CODE § 41-16-57(e) (1975). Hon. Ellie B. Glasscox, Superintendent, Shelby County Board of Education, 2-17-89, AG 89-00173.

11. Under the particular facts presented, where bids are six months old, city council should begin a new bid process for the purchase of a fire truck. Hon. Frances L. Allsup, City Clerk, City of Hokes Bluff, 9-13-88, AG 88-00446.

12. The City Council of Vestavia Hills may write the invitation to bid specifications to include real estate, as well as the plans and specifications for the construction of the fire station building. Hon. Patrick H. Boone, City Attorney, City of Vestavia Hills, 6-23-87, AG 87-00220.

13. A situation wherein 1) the city awards the contract, 2) designates the contractor as its agent to purchase materials on City Purchase Orders, 3) the vendors invoice the City, and 4) the invoice is paid by the city, is in compliance with the Bid Law. Ms. Dala T. Lane, Montgomery County, 10-22-86, EPA.

14. Brand name may be used in bid specifications to indicate a level of quality. Hon. Nelson R. Starkey, Jr., Member, Alabama House of Representatives,
12-6-85, AG 86-00070.

15. In a public contract, all original bids together with all documents pertaining to the award of the contract are open to public inspection. Commissioner Faye S. Baggiano, Alabama Medicaid Agency, 8-19-85, AG 85-00473.

16. Alabama municipality may not contract to provide services to a Georgia municipality. Hon. Mac H. Langley, Mayor, City of Lanett, 5-8-84, AG 84-00268.

17. There is no specific time frame in which to apply the statutory amount limitation. If any single purchase exceeds the statutory amount or if the cumulative cost of a series of purchases of like items exceeds the statutory amount, the purchase must be made by competitive bidding. Opinion of Attorney General to Hon. G. R. Craft, Chairman, Utilities Board, Town of Citronelle, 8-30-82 AG 82-00526.

Educational Entities

A. Higher Education

1. Since a contract has not been awarded, the University of Montevallo may reject all bids originally submitted, rewrite the specifications and advertise for new bids for the purchase of a library security system. Hon. Joan Roberts, Colleges and Universities, 3-13-92, EPA.

2. Where the highest bidder withdrew his bid for surplus property and, as a result, a member of the Board of Trustees of the University of South Alabama is the new high bidder, the sale of the property should be rebid to avoid any appearance of impropriety. Hon. Frederick P. Whiddon, President, University of South Alabama, 2-24-92, AG 92-00187.

3. Various Attorney General Opinions have accepted postal money orders, certified checks, cashier's checks, irrevocable letters of credit, or certain bonds or notes of the United States in lieu of a bid bond, but never a personal or company check. Hon. Thomas G. Ramey, Education, 3-4-91, EPA.

4. A university may not receive telephone bids prior to public opening of sealed bids. Opinion of Attorney General to Hon. Charles C. Rowe, 10-8-75.

B. Post-Secondary Education

1. A state community or junior college may not require any other form of security in lieu of a bid bond. However, they may accept such other form of security if they choose to do so. Hon. Allen Hubbard, JC, Marshall County, 3-22-91, EPA.

2. It is the responsibility of the awarding authority to clearly state in their invitations to bid, exactly where and, in some cases, to whom the bid should be delivered. It is then the responsibility of the bidder to deliver said bid to the designated place or person for submittal of the bid. Ms. Patricia Moore, Colleges and Universities, 12-22-86, EPA.

3. All bids received that are less than the market value of a bid object may be rejected in accordance with ALA. CODE § 41-16-101(b) (1975). The services of a broker may be obtained after such rejection of low bids. Hon. James G. Sasser, Dale County, Technical Colleges, 8-14-84, EPA.

C. K-12

1. When a School Board gives specific instructions for submitting a bid and a bidder fails to follow those instructions, the error is not a minor informality and cannot be waived. Hon. Barry Sadler, Superintendent, Eufala City Schools, 7-22-03, AG 2003-196.

2. Absent statutory authority, a city or county school board cannot deposit their funds in a credit union. Hon. William M. Phillips, Esq., Education, 6-29-94, EPA.

3. A contract can be entered between the Geneva County Schools and the Organ Transplants of Alabama for services or programs that the Geneva County Schools have legal authority to provide. Hon. George M. Reid, Geneva County, 2-11-92, EPA.

4. A board of education does not have to specify that there will be three brands of each piece of equipment it plans to install in a new kitchen. The Alabama Competitive Bid Law requires "free and open competitive bidding." Hon. T. G. Smith, Education, 8-16-88, EPA.

5. No legal authority which would permit a board of education to reimburse a bidder for a portion of the bidder's cost in securing a performance bond. Hon. B. G. Grissette, Monroe County, 8-15-85, EPA.

6. If requirements of Act No. 84-228 are not met, Washington County Board of Education may reject bids and readvertise for bids. The Board in its discretion may not waive a defect in a bid under Act 84-228 where nonresident contractor failed to submit required letter with his bid. The Board is not required to give preference to resident Alabama contractors over Mississippi contractors. Dr. Fred M. Scoggins, Superintendent, Washington County Board of Education, 5-15-85, AG 85-00354.

7. The Board of Education did not follow the requirements of the Bid Law in the purchase of a wood lathe and "like items" by splitting the order in order to avoid placing the items up for competitive bidding. Hon. Jim Fitzgerald, Marengo County, 1-8-85, EPA.

8. Boards of Education may not require a certified check in lieu of a bond but may accept certified checks if they choose to do so. Hon. James C. Bailey, President, Wallace State Community College, 10-18-84, AG 85-00032.

9. A county board of education may specify a brand name in soliciting bids for radios which would be compatible with the board's present power unit and radio system. Dr. Charles Sprayberry, Superintendent of Education, Tuscaloosa County Board of Education, 10-14-83, AG 84-00006.

10. Jackson County Board of Education has authority to waive technical errors and informalities in the competitive bid procedure where it will result in reduced cost to the taxpayer. Hon. Jim Pratt, Jackson County, 6-24-83, EPA.

11. Boards of education may not elect to receive certified check rather than bid bond from bidders on public works. Hon. Edward Jackson, Attorney for Houston County Board of Education, 1-31-83, AG 83-00154.

12. No purchase or contract involving an amount in excess of the statutory amount shall be divided into parts involving statutory amounts or less for the purpose of avoiding the requirements of the Competitive Bid Law. If an agency knows that it will purchase like items in excess of the statutory amount during the fiscal year, then purchase must be bid. Opinion of Attorney General to Hon. Charles Sprayberry, Ed. D., Superintendent of Education, Tuscaloosa County Board of Education, dated 5-18-82, AG 82-00343.

13. A contract is created when bid is accepted. EPA letter to Hon. Scott Dennis, Superintendent, Cleburne County Board of Education.

14. A county board of education must ask for bid proposals from both vendors offering unique yet identical energy management services if it is to remain in compliance with Bid Law provisions. EPA letter to Dr. James J. Benson, dated 5-21-79.

15. The opening of bids by a committee at a public meeting at a time prior to the Board of Education regular meeting for the purpose of tabulating bids and clearing up questions does not violate the letter or spirit of the Bid Law. EPA letter to Hon. Willis M. Grimm, 1-21-77.

CHAPTER 7

CONFLICTS OF INTEREST

ARTICLE 1.

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. These rules are codified in two places. Section 41-16-30 applies to the Competitive Bid Law applicable to the State and deals with conflicts of interest of purchasing agents. Section 41-16-60 deals with conflicts of interest of members or officers of governmental entities, such as school boards, county commissioners, and utility board members. Although these statutes are similar, it is important to recognize that each section deals with a different level of government and with a separate group of public officials.

Section 41-16-30 provides that no purchasing agent, any of his assistants, or any of his employees is allowed to be financially interested in any purchases or contracts made under competitive bidding procedures. The section goes on to forbid any purchasing agent, any of his assistants, or any of his employees to receive any gift (including monetary gifts and future contracts) from a bidder, prior to or after the bidding process. If a purchasing agent (or any of his employees or assistants) is found to be in direct violation of the provisions of this section, he or she will be found guilty of a misdemeanor. He or she may be imprisoned for up to 12 months or fined up to $500 or both, and immediately removed from office.

Section 41-16-60 was substantially amended in 2011, and it now provides that members and officers of boards of education and independent school districts may have a financial or personal beneficial interest in the purchase of or contract for personal property or contractual services, but only under one of two conditions: the contract or agreement implicating the member or officer's financial interest was created prior to the election or appointment to the position, or the member or officer does not

participate in, by discussion or by vote, the decision-making process which creates the financial or personal beneficial interest. This amendment stands in stark contrast to the previous version of the statute, which categorically prohibited acquisition of interests and prescribed criminal penalties for violation of the statute. It should be noted that Ala. Code § 16-13B-10 (1975) still contains language identical to the previous version of Section 41-16-60. However, it is the opinion of the Attorney General's office that Section 41-16-60 should be considered controlling, not Section 16-13B-10—the Legislature intended to repeal Section 16-13B-10 because of the irreconcilable conflict with the enacted amendments to Section 41-16-60. *See* Hon. Patrick C. Davidson, Attorney, Auburn City Board of Education, 12/14/11, AG 2012-017. But in any action taken, the board member should be mindful of potential violations of the Ethics Law. *Id.*

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 a 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 ALA. CODE §41-16-60 (1975) 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, Act No. 2001-955, which was later codified as ALA. CODE §§ 41-16-80 to 88 (1975), was enacted. This legislation requires 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, and § 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 government funds. Also, no relationship disclosure form is required to be completed or filed for contracts between state agencies or departments.

ARTICLE 2.

OPINIONS

Government Entities

Official opinions regarding conflicts of interest that have been issued by the Attorney General and the Examiner of Public Accounts are listed below for reference purposes.

A. <u>State Agencies</u>

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.

B. <u>County Agencies</u>

1. There is no longer a statutory prohibition against a county contracting with a company owned by a county commissioner so long as the commissioner does not vote on, or in any manner participate in, the transaction. But a county commissioner should not financially benefit from the business of the county commission, so the contracting may be improper. Hon. Ricky McElwain, Chairman, Crenshaw County Commission, 02-07-2013, AG 2013-032.

2. Pursuant to Section 41-16-60 of the Code of Alabama, a member of a city or county board of education may contract with the board of education for property or personal services if (1) the contemplated contract was in existence before a person was elected or appointed to the board, or (2) the individual does not participate in the deliberation or vote on the proposed contract. This is true notwithstanding the language of Section 16-13B-10 prohibiting such contracting—because the two statutes are in direct conflict, it is the opinion of the Attorney General's office that the legislature intended to repeal Section 16-13B-10 by the later amendment of Section 41-16-60. Hon. James E. Turnbach, Attorney, Etowah County Board of Education, 12-14-2011, AG 2012-018.

3. Act 2010-760 does not prohibit a legislator from being employed as the executive director of the Elmore County Economic Development Authority ("ECEDA"), a private, nonprofit corporation. Even if the ECEDA receives a funding grant from a state agency, a legislator is not prohibited from being employed as the executive director of the ECEDA. Hon. Barry

Mask, Member, House of Representatives, 05-26-2011, AG 2011-066.

4. The Jefferson County Board of Health is a state agency receiving state funds that is subject to the Relationship Disclosure Law; Honorable David S. Maxey, Attorney, Jefferson County Board of Health, 5-1-07, AG 2007-087.

5. The Tuscaloosa County Park and Recreation Authority is not prohibited from accepting a gift of construction services from a board member. The donation of construction services to the Park and Recreation Authority is not subject to the Competitive Bid Law or the Public Works Law. Hon. Don Kelly, Executive Director, Tuscaloosa County Park and Recreation Authority, 10-7-99, AG 2000-003.

6. No statute prohibits county officials and employees from bidding upon sales of surplus county property where the sale is open to the public. Hon. Steven R. Ballard, Administrator, DeKalb County Commission, 4-30-98, AG 98-00135.

7. Transaction between county and company in which a county commissioner is stockholder may violate ALA. CODE § 41-16-60 (1975), even if the transaction is carried out in accordance with the competitive bid process. Ethics question should be submitted to Ethics Commission. Hon. William J. Benton, Jr., Attorney, Russell County Commission, 3-24-95, AG 95-00164.

8. Without considering the State Ethics Law, there is no State law that would prohibit the Choctaw County Commission from purchasing a refrigerator truck from a company owned by the county tax collector, provided there has been compliance with the applicable Competitive Bid Law. The State Ethics Commission should be contacted for possible violations of the State Ethics Law. Hon. Charles V. Ford, Chairman, Choctaw County Commission, 8-29-91, AG 91-00378.

9. Under conditions stated in the opinion, Water Works and Sewer Board of Clanton may contract with a company owned by an uncle of a board member, and which employs the board member's brother. The board member should not participate in discussions or

voting on contracts by the board with his uncle's business. Hon. John H. Jackson, Attorney at Law, 5-3-90, AG 90-00261.

10. Without considering the State Ethics Law, there appears to be no conflict of interest if Russell County Commission contracts with an ambulance service that is owned by the relative of a county commissioner, who is not his spouse, and where the related commissioner does not participate or vote in the award. Hon. Nathaniel Gosha, III, Russell County Commissioner, 1-22-90, AG 90-00109.

11. The Macon County Commission may purchase real property from a private nonprofit corporation whose president is also a county commissioner provided that the commissioner receives no profit from the sale. The commissioner may not participate in the decision to purchase the real property. Hon. Edwin L. Davis, Macon County Attorney, 8-8-89, AG 89-00394.

12. ALA. CODE § 41-16-60 (1975) prohibits a member of an industrial development board from contracting with the board. Hon. Jimmy S. Calton, City Attorney, City of Eufaula, 2-23-89, AG 89-00198.

13. Member of County Board of Education cannot transact business with that Board even if there is compliance with the Competitive Bid Laws. A member of County Board of Education cannot do business with that Board even if the transaction is for an amount that is excepted from the Competitive Bid Laws. Hon. Lewis S. Hamilton, Attorney for Butler County Board of Education, 4-7-88, AG 88-00245.

14. The spouse of a Utility Board Member should not bid on a construction contract with that Board. Hon. James E. Turnbach, Attorney, Utility Board of Rainbow City, 4-26-85, AG 85-00327.

15. Discussion of several questions pertaining to conflict of interests, e.g., board member obtaining employment for member of his family, board member owning more than 10 percent of the stock in a company dealing with the board, and the definition of who is a city official. Hon. J. Louis Workman, Shelby County, 4-5-85, EPA.

16. The Lauderdale County Commission may purchase automobiles and parts from a dealership where a commissioner is employed provided the commissioner receives no benefit from the contract. The commissioner should not participate in the decision to award the contract to the automobile dealership. Hon. William B. Duncan, Chairman, Lauderdale County Commission, 2-18-83, AG 83-00197.

C. <u>Municipal Agencies</u>

1. A water works board, being a public corporation separate from its town, may lease equipment from an employee of the board, so long as the employee is not involved in the decision on behalf of the board. Hon. William D. Latham, Attorney, Water Works and Gas Board of the Town of Maplesville, 02-06-2013, AG 2013-031.

2. Class 7 and 8 municipalities may legally purchase personal property or personal services from elected officials, employees, or board members under the Competitive Bid Law provided the official does not participate in the decision-making process and is the lowest responsible bidder. Hon. John Ben Jones, Attorney, City of Valley, 01-31-2013, AG 2013-028.

3. Section 11-43-12 of the Code of Alabama does not prohibit a city employee from holding the position of president of the humane society that provides contractual services to the City of Lanett, so long as the employee receives no compensation from the humane society. Hon. Oscar Crawley, Mayor, City of Lanett, 10-02-2012, AG 2013-002.

4. The City of Prattville may not surplus city property and exchange said property with a sitting council member's property. Hon. David A. McDowell, Attorney, City of Prattville, 06-25-2012, AG 2012-065.

5. Pursuant to Section 41-16-60 of the Code of Alabama, a member of a city or county board of education may contract with the board of education for property or personal services if (1) the contemplated contract was in existence before a person was elected or appointed to the board, or (2) the individual does not participate in the deliberation or vote on the proposed contract. This is true

notwithstanding the language of Section 16-13B-10 prohibiting such contracting—because the two statutes are in direct conflict, it is the opinion of the Attorney General's office that the legislature intended to repeal Section 16-13B-10 by the later amendment of Section 41-16-60. Hon. Patrick C. Davidson, Attorney, Auburn City Board of Education, 12-14-2011, AG 2012-017.

6. Directors of the Public Park Authority of the Cities of Lincoln and Talladega are eligible to submit bids or contract for their services. Whether such action may be prohibited pursuant to the State Ethics Law is a matter that should be submitted to the Ethics Commission. Hon. Charles P. Gaines, Attorney, The Public Park Authority of the Cities of Lincoln and Talladega, 07-25-2011, AG 2011-081. However, a subsequent opinion issued to Hon. Ricky McElwain, Chairman, Crenshaw County Commission, 2-7-2013, AG 2013-032, is relevant to this opinion. It found that there is no statutory prohibition against the Crenshaw County Commission accepting bids and contracting with a company owned by a county commissioner, as long as the county commissioner owning the company does not vote on, or in any manner participate in, the transaction. Although not statutorily prohibited, under common law a county commissioner should not financially benefit from the business of the county commission.

7. A Class 7 or 8 municipality may enter into a contract with a business owned by a municipal officer or employee if the officer or employee is the only domiciled vendor of the personal property or service within the municipality, the officer or employee does not participate in the decision- making process, and the cost does not exceed $3,000.

If the cost exceeds $3,000, the municipality may contract with the municipal officer or employee under the Competitive Bid Law, provided the official or employee does not participate in the decision-making process, is the lowest responsible bidder, and makes a full disclosure of the extent of his or her ownership in the business. The municipal officer or employee may act as a subcontractor on city work exceeding $3,000 if the official or employee does not participate in the decision-making process and makes a full disclosure of the extent of his or her ownership in the business. Hon. John D. Whetstone, Attorney, City of Gulf Shores,

06-11-08, AG 2008-092.

8. A Class 7 or 8 municipality may not enter into a non-bid contract with a non-domiciled business owned by the mayor. A Class 7 or 8 municipality may enter into a contract with a business owned by the mayor pursuant to the Competitive Bid Law, if he is domiciled in the municipality. Hon. C. Daniel White, Attorney, Town of Flomaton, 6-20-06, AG 2006-109.

9. ALA. CODE §11-43-12.1 (1975) allows the City of Guntersville, a Class 7 municipality, to do business with a company owned by the mayor when that company is the only vendor of that personal property or service within the municipality and the cost of the purchase does not exceed the sum of $3000. If the cost of the purchase of personal property or service exceeds the sum of $3000, then the company owned by the mayor may bid on providing the personal property or service to the city. Honorable Dan Warnes, Attorney, City of Guntersville, 5-23-06, AG 2006-099.

10. A member of the Civil Service Board of the City of Gadsden is not prohibited by the Constitution of Alabama or ALA. CODE § 11-43-12 (1975) from serving as a consultant on a fee-for-service basis for the city's public works department. Such consultant services may be subject to the State Competitive Bid Law. Hon. William R. Willard, Attorney for Civil Service Board for the City of Gadsden, 4-12-02, AG 2002-209.

11. Because the Town of Odenville is a Class 8 municipality, ALA. CODE §11-43-12.1 (1975) permits the town to do business with a company that is owned by a municipal officer when that company is the only vendor of that personal property or service within the municipality and the cost of the personal property or service does not exceed $3,000 yearly. If the property or service will exceed $3,000 yearly, then the council member may bid on providing service or property to the town pursuant to ALA. CODE § 1-43-12.1(b) and in accordance with ALA. CODE §§ 41-16-50 and 41-16-51 (1975). Honorable Rodney Christian, Mayor, Town of Odenville, 4-21-05, AG 2005-118.

12. The Mayor of the Town of Cedar Bluff, who is also a member of the Cedar Bluff Utilities Board and Solid Waste Authority, may

sell real property to the Cedar Bluff Utilities Board and Solid Waste Authority if the Board determines that the property is necessary for the utility system. The Utilities Board may not purchase property from the mayor for the purpose of directly selling that property to the Town of Cedar Bluff. The State Ethics Commission should be contacted to determine whether this sale would violate the State Ethics Law. Honorable H. Dean Buttram, Jr., Attorney for the Town of Cedar Bluff and the Cedar Bluff Utilities Board and Solid Waste Authority, 3-10-03, AG 2003-095.

13. A city council member may not successfully bid, under the Competitive Bid Law, for any contract or service with the City of Prattville if he has a direct financial interest in the company bidding. Hon. David A. McDowell, City Attorney, City of Prattville, 11-19-01, AG 2002-065.

14. Council member may sell gasoline to an incorporated municipal board. Council member may sell gasoline to the municipality only in compliance with ALA. CODE § 11-43-12.1 (1975). Hon. K. Mark Parnell, Attorney, Town of Brookside, 10-22-96, AG 97-00015.

15. A council member is not prohibited from participating in the award of a contract where a bid was submitted by a car dealership whose general manager is his brother if the council member has no financial interest in the dealer. Hon. Bruce Sanford, Mayor, City of Boaz, 8-23-93, AG 93-00319.

16. Water Works and Sewer Board of City of Oxford may contract for maintenance services on its vehicles and other miscellaneous services not covered by the bid law with suppliers, owned wholly or in part by a city councilman. State Ethics Commission should be contacted as to whether there would be a violation of ethics law under the proposed contractual arrangement. Hon. Bruce Rice, Attorney for the Water Works and Sewer Board of the City of Oxford, 6-18-93, AG 93-00264.

17. The City of Trussville may contract with the Chamber of Commerce to provide a feasibility study for the city or the city can contract directly with the agency making the study. Hon. Charles I. Grover, Mayor, City of Trussville, 11-26-91, AG 92-00060.

18. Where spouse of municipal employee owns less than majority of stock of corporation, ALA. CODE § 11-43-12 (1975) does not prohibit municipality from doing business with that corporation. Hon. Bill Dukes, Mayor, City of Decatur, 4-27-90, AG 90-00245. However, this opinion was modified by an opinion issued to Valerie Bullard, Internal Auditor, City of Dothan, 12-4-2000, AG 2001-042, which found that under ALA. CODE § 11-43-12, a city may not contract with a close corporation in which a city employee or the employee's spouse owns stock.

19. Where police chief owns service station, municipality may not purchase gasoline from him unless he is the sole vendor (Class 7 and 8 municipalities) or he bids under ALA. CODE §§ 41-16-50 et seq., and 11-43-12.1 (1975). Hon. Wilburn Gower, Mayor, Town of Town Creek, 2-20-90, AG 90-00162.

20. Under ALA. CODE § 11-43-12 (1975), City of Cullman is prohibited from doing business with city employee's family-held corporation. Questions concerning State Ethics Law should be referred to State Ethics Commission. Hon. Don Hale, Member, State Senate, 2-8-90, AG 90-00127.

21. The fact that Pell City Council appoints members to Pell City Board of Education, Pell City Industrial Development Board, Pell City Public Building Authority and Pell City Medical Clinic Board does not in and of itself create conflict of interest that would prohibit member of Pell City Council from transacting business with such entities. Hon. Lawrence Fields, Mayor, City of Pell City, 8-28-89, AG 89-00409.

22. Individual serving on Board of Directors of Cullman Utilities Board, which is public corporation, may bid on, and if low bidder, accept construction contract to be awarded by City of Cullman. Hon. James F. Berry, Cullman County, 6-22-89, AG 89-00329.

23. The Hackleburg Industrial Board may purchase property from relatives of the mayor or relatives of members of the town council if the relatives are not members of the household of the mayor or council members in question, and are not financially dependent upon them, and the mayor or council member will not receive a direct or indirect beneficial or financial gain. Hon. Warren A.

Williford, Marion County, 4-17-89, EPA.

24. Mayor or other member of municipal governing body prohibited by ALA. CODE §§ 11-43-54 or 41-16-60 (1975) or both, from voting, by virtue of special financial interest, on question of placing funds of municipality in bank in which he or she owns less than a majority interest of stock, or for which he or she serves as officer or director. Mayor or other member of municipal governing body not prohibited from serving as officer or director of bank. Hon. John D. Harrison, Crenshaw County, 2-17-89, AG 89-00174. However, it is important to note that ALA. CODE § 41-16-60, relating to conflicts of interest of members or officers of certain public offices or positions, upon which this opinion relies, was amended, effective 6-9-2011.

25. City may not award contract for lawn maintenance to a full time city employee without violating ALA. CODE § 11-43-12 (1975). Hon. Robert W. Ennis, IV, Tuscaloosa County, 2-8-89, EPA.

26. If a city council member does not own a controlling interest in the stock of a corporation, ALA. CODE § 11-43-12 (1975) does not prohibit the city from doing business with that corporation. Hon. J. David Stout, Mayor, City of Fort Payne, 8-2-88, AG 88-00400.

27. Under provisions of ALA. CODE § 11-43-12 (1975), municipality is prohibited from doing business with corporation whose owner and sole stockholder is spouse of municipal employee. Hon. Bill Dukes, Mayor, City of Decatur, 4-26-88, AG 88-0275.

28. If council member owns less than a majority of the stock of a corporation, municipality is not, under the provisions of ALA. CODE § 11-43-12 (1975), prohibited from doing business with that corporation. Hon. William C. Brewer, III, Attorney and Counselor at Law, 3-9-88, AG 1988-203. However, this opinion was modified by an opinion issued to Valerie Bullard, Internal Auditor, City of Dothan, 12-4-2000, AG 2001-042, which concluded that under ALA. CODE § 11-43-12, a city may not contract with a close corporation in which a city employee's spouse owns stock.

29. City of Gadsden may not enter into a contract for architectural services with the architectural firm of the husband of a council member. Hon. Holley Arbery, President, City Council, City of Gadsden, 8-10-87, AG 87-00287.

30. The company of which a Sylacauga Utilities Board member is president and part owner can contract with or perform services for the Utilities Board if he is not a majority stockholder in the company. Hon. C. W. McKay, Jr., Attorney Utilitites Board of Sylacauga, 12-3-86, AG 87-00063.

31. Under ALA. CODE § 11-43-12.1 (1975), the mayor may bid on an item placed up for bid by the Town of Hayneville as long as he conforms to the requirements set out in the referenced statute. Ms. Barbara Jennings, Lowndes County, 11-6-86, EPA.

32. City of Phenix City cannot purchase goods from business of which a council member is general manager and vice president. Hon. Sam E. Loftin, Attorney for the City of Phenix, 8-20-85, AG 1985-481.

33. A municipality may accept a bid on an automobile from a dealership in which the mayor is a minority stockholder and his brother owns the majority of the stock. Opinion of Attorney General to Hon. James H. Massey, Mayor, City of Citronelle, 8-14-81, AG 81-00514.

34. Member of Hospital Board may not be financially interested in or benefited by a contract entered into by the public body with which he is associated. Opinion of Attorney General to Hon. Homer Cornett, Attorney, Phenix City, 9-10-79, AG 79-00281.

Educational Entities

A. Higher Education

1. Since teachers, instructors, and other employees are not "members" or an "officers" of a state college, they may participate fully and legally in any competitive bid process. Hon. Ronald R. Davis, CC and Mobile County, 5-8-89, EPA.

2. The University of South Alabama should not award the job of installing the air conditioning system to the company of which the consulting engineer for the job serves as president. Hon. Maxey J. Roberts, University Attorney, University of South Alabama, 10-23-85, AG 86-00019.

B. Post-Secondary Education

1. Officers of junior college are prohibited by ALA. CODE § 41-16-60 (1975) from purchasing or contracting for financial services of a bank on whose board of directors they serve. Hon. James C. Bailey, President, Wallace State Community College, 11-30-88, AG 98-00071. However, it is important to note before relying on this opinion that ALA. CODE § 41-16-60, upon which this opinion relies, was amended, effective 6-9-2011.

C. K-12

1. The conflict of interest law prohibits members of the Board of Education from having any financial interest in the purchase of or contract for personal property or contractual services. Hon. Sam B. Hollingsworth, Monroe County Board of Education, 9-7-95, EPA.

2. Under ALA. CODE § 41-16-60 (1975), member of Chilton County Board of Education may not sell supplies to Chilton County schools, teachers, or school clubs and organizations if office supply company in question is owned solely by Board member or spouse or both of them. If Board member and spouse own less than a majority of stock and business is not family-held corporation, Board member may sell supplies to aforementioned entities and persons. Hon. John Hollis Jackson, Jr., Chilton County, 6-16-89, AG 89-0324. However, this opinion does not take into account subsequent amendments to ALA. CODE § 41-16-60 (effective 6/9/2011) and § 16-13B-10 (effective 8/1/2009).

3. Since teachers, instructors, and other employees are not "members" or an "officers" of a state college, they may participate fully and legally in any competitive bid process. Hon. Ronald R. Davis, CC and Mobile County, 5-8-89, EPA.

4. Chilton County Board of Education may not do business with

company owned solely by a board member, but may do business with corporation where board member owns less than majority of stock and it is not a family-held corporation. Hon. John Hollis Jackson, Jr., Chilton County, 3-30-89, AG 89-00227.

5. Board of education may not do business with a company owned solely by a board member but may do business with a corporation where board member owns less than a majority of the stock and it is not a family-held corporation. Hon. Frank Daniel, Superintendent of Education, 2-23-89, AG 89-00195.

Corporate Bidders

Absent a determination that a corporation is "family-held", that corporation, for which a board member serves as vice president, may submit bids to board of education. Hon. Clifford S. Smith, Superintendent, Phenix City Public Schools, 12-17-85, AG 86-00093.

CHAPTER 8

LEASE AGREEMENTS

ARTICLE 1.

Introduction

Although many people incorrectly assume that the Competitive Bid Law governs only purchases made by governmental entities, Ala. Code § 41-16-50 (1975) provides that certain leases are also subject to the Competitive Bid Law. Specifically, this section reads:

> "[A]ll expenditure of funds of whatever nature for . . . the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually, bound under the terms of the lease, to pay a total amount of fifteen thousand dollars ($15,000) or more, made by or on behalf of any [agency receiving State funds] . . . , except as hereinafter provided, shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder . . . ." ALA. CODE § 41-16-50.

Leases and lease-purchase agreements are treated very similarly to purchases under the Competitive Bid Law. For example, if a public agency is required to follow a specific procedure in opening bids for purchases, then it will also be required to follow the same procedure for leases. If a conflict of interest exists in a particular purchase, then a conflict of interest will exist in a lease transaction involving the same surrounding circumstances.

However, much like purchases, circumstances do exist in which the competitive bid laws will not apply for leases and lease-purchases made by public agencies. For example, a statutory exemption can be found in ALA. CODE § 41-16- 52(c) (1975). This statute provides that expenditures for the lease of heavy duty off-highway construction equipment may be made without compliance

with the Competitive Bid Law. In order for a transaction involving the lease of such equipment to fall into this exemption, the particular piece of equipment must have a gross vehicle weight of 25,000 pounds or greater. If the equipment does weigh more than 25,000 and the lease meets the financial requirements of this provision ($5,000/month for exclusive use of county and municipalities, highway, street and sanitation departments and $15,000/month for exclusive use of utility boards and county commissions), then the lease will not be subject to the competitive bidding procedure. It is important to note, though, that this statutory exemption applies only to leases and not to lease-purchase agreements.

The lease of real property, in which the State or a state agency is the lessor, must generally be leased pursuant to the competitive bidding process. ALA. CODE § 9-15-71 (1975). Act 95-280, now codified in article 3, chapter 15 of title 9, Ala. Code (1975) (ALA. CODE §§ 9-15-70 to -84), overruled Cotton Bayou Association v. Department of Conservation, 622 So. 2d 924 (Ala. 1993) and numerous Attorney General Opinions, which had held generally that a public agency could lease property as long as it received fair market value from its lessee. 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. In addition, various transactions, such as timber sales and leases are exempt from the requirement to handle the sale or lease through the Lands Division. ALA. CODE § 9-15-82. The above requirements apply if the appraised value of the property is $20,000 or more. ALA. CODE § 9-15-71 (1975). The requirement of competitive bidding does not apply to leases of easements and rights of way where there is no market for such rights. ALA. CODE § 9-15-82 (1975).

Generally, a lease or a lease purchase agreement must comply with the bid law if it meets the $15,000 limit, does not involve a piece of equipment excluded under § 41-16-52(c), and does not involve real property. Nonetheless, the Attorney General and the Examiners of Public Accounts have answered numerous questions regarding leases and lease purchase agreements under

the Competitive Bid Laws. These opinions are topically outlined below.

ARTICLE 2.

Opinions.

Governmental Entities

A. State Agencies

1. The authority given to the Alabama Public Library Service ("APLS") in section 41-8-5 of the Code of Alabama 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.

2. 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. Honorable Richard F. Allen Commissioner, Department of Corrections, 04-21-08, AG 2008-074.

3. 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.

4. 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.

5. A governmental entity may lease equipment to a non-profit private organization if the entity receives a fair market value for the leased equipment. Hon. Thomas A. McLeod, Tax Collector, 1-22-90, EPA.

6. A lease with an option to purchase agreement is subject to the Competitive Bid Law and must be awarded on a competitive bid basis. Section 41-16-52(c) is applicable only to a straight lease. A lease-purchase will come under the requirements of § 41-16-50. Hon. David L. Martin, Lawrence County, 9-21-88, EPA.

7. 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.

8. An item previously bid for rental/lease can be subsequently purchased without further competitive bidding. Ms. Tina Davis, Mental Health, 11-9-84, EPA.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. Any lease-purchase type contract the State may enter must give the State the option to terminate the contract at the end of each year without incurring any liability. EPA letter to Hon. Michael S. Opitz, 8-23-76.

B. <u>County Agencies</u>

1. 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, 09-28-2011, AG 2011-106.

2. The Jefferson County Board of Education ("Board") may enter into the contemplated contractual arrangement with the City of Clay ("City") as long as the school board receives fair and adequate consideration for these transactions and the Board determines that its actions serve a public purpose. The City may enter into the contractual arrangement with the Board as long as any funds expended by the City serve a public purpose and the arrangement does not bind future councils. Hon. Phillip B.

Hammonds, Superintendent Board of Education of Jefferson County, 06-25-08, AG 2008-101.

3. A 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.

4. If a board of education leases its FCC granted rights to unused frequencies to a commercial wireless provider, this transaction is subject to the Competitive Bid Laws. However, the exemption stated in § 41-16-51(a)(13) will not be satisfied simply because there has only been one potential bidder. Hon. Joseph C. Mitchell, Alabama House of Representatives, 7-8-05, AG 2005-158.

5. The Competitive Bid Law applies to the lease-purchase of a vehicle by the County Emergency Management Agency. Hon. Steve Swafford, Cleburne County EMA, 5-17-95, EPA.

6. A lease-purchase of two motor graders that will exceed five years is not in compliance with the bid law. Ms. Cindy G. Arrington, Randolph County, 1-11-94, EPA.

7. City and county boards of education may enter into lease-purchase agreements under Competitive Bid Law. Hon. Wayne Teague, State Superintendent of Education, 3-10-93, AG 93-00169.

8. Public lands may be leased to private entities for hunting purposes. It is suggested that such leasing be done by the competitive bidding process. Hon. Johnny Cagle, Member, House of Representatives, 4-24-92, AG 92-00250.

9. Discussion of a Xerox Order Agreement (a lease-purchase contract) between the County Board of Education and Xerox Corporation. Ala. Code § 41-16-50(a) (1975) requires "All expenditures . . . made by or on behalf of any . . . county board of

education . . . shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder." Hon. Bill Sims, Dallas County, 8-8-91, EPA.

10. A lease-purchase contract must be awarded on a competitive bid basis. A vehicle may be leased without bids on an annual basis if the total amount of payments does not exceed $5.000 in one year. A new vehicle may not be purchased without bidding even if the cost of the vehicle is less than the current state bid price. Hon. Bryant Mixon, Dale County, 12-17-89, EPA.

11. The lease of real estate by a public agency to a private lessee is not subject to the Competitive Bid Law. Ms. Elaine S. Clark, Greene County, 10-24-89, EPA.

12. A lease with an option to purchase agreement is subject to the Competitive Bid Law and must be awarded on a competitive bid basis. Section 41-16-52(c) is applicable only to a straight lease. A lease-purchase will come under the requirements of § 41-16-50. Hon. David L. Martin, Lawrence County, 9-21-88, EPA.

13. A lease-purchase agreement for heavy-duty off-highway construction equipment is subject to the $3,000 fiscal year bid requirements for competitive bidding pursuant to § 41-16-50. Hon. Wayne Bassett, EPA, 7-7-88, EPA.

14. Whether the county enters into a lease or a lease-purchase contract, so long as the county expends less than $3,000 per fiscal year on like items, there is no requirement for competitive bidding. Hon. Frank C. Ellis, Shelby County, 2-28-86, EPA.

15. An entity may enter into a lease agreement that spans more than a fiscal year, but the lease must provide an option to terminate said contract at the end of each year without incurring any liability. Hon. Tommy Smith, Tuscaloosa County, 2-21-85, EPA.

16. The provisions of Act No. 84-830 are applicable to the Mobile County Board of School Commissioners to solicit competitive bids on leases. Hon. Abe L. Hammons, Superintendent, Board of School Commissioners of Mobile County, 10-10-84, AG 85-00007.

17. Act No. 84-830 is applicable to Mobile County Personnel Board. Thus, the Personnel Board must execute lease for office space by competitive bidding. Hon. Mylan R. Engel, Attorney, Mobile County Personnel Board, 9-5-84, AG 84-00440.

18. If the original bid was a straight purchase and the commission subsequently decided to pursue a lease-purchase arrangement, then the contract would have to be rebid in order to give all vendors the opportunity to bid on a lease-purchase. Hon. Robert J. Teel, Coosa County, 7-6-84, EPA.

19. If a county extended its credit to a private contractor for a four-year period in a purchase contract, this would conflict with Section 94 of the Constitution of Alabama. A lease-purchase contract is suggested. Hon. Jasper Fielding, Coosa County, 3-26-84, EPA.

20. Payment to a lessor requesting additional payments above the amount listed in the bidded lease is a violation of the Competitive Bid Law unless the bid specifications for the lease in question specifically provided for the additional payments, commonly referred to as an escalation clause. EPA letter to Hon. Charles A. Wyborny, 5-1-79.

21. Leases with an option to purchase can exceed one year so long as the lease-purchase type contract gives the county the option to terminate said contract at the end of each year without incurring any liability. EPA letter to Hon. Jim Ray, 3-15-78.

22. Counties cannot lease construction equipment for $2,000 per month without soliciting competitive bids. Opinion of Attorney General to Hon. T. O. Owens, 12-19-75.

23. The transfer of one lease agreement from one institution to another constitutes a new and different lease agreement. Thus, the contract for lease must be re-let in full compliance with the State Bid Law. Opinion of Attorney General to Hon. Phillip J. Hamm, 11-12-70.

24. A lease-purchase agreement whose continuation is made subject to available budgetary appropriation does not encumber funds beyond the current year's appropriation as prohibited by the

Constitution of Alabama 1901. Opinion of Attorney General to Gen. W. M. Fondren, 8-24-70.

25. A county may execute a lease agreement for twenty years provided the county either pays the entire amount of such lease in advance or retains in the lease agreement the option to discontinue at the end of the fiscal term. Opinion of Attorney General to Hon. James C. Wood, 4-22-69.

C. Municipal Agencies

1. A water works board, being a public corporation separate from its town, may lease equipment from an employee of the board, so long as the employee is not involved in the decision on behalf of the board. Hon. William D. Latham, Attorney, Water Works and Gas Board of the Town of Maplesville, 02-06-2013, AG 2013-031.

2. Town of West Jefferson may declare space at top of a water tower to be surplus real property and may lease the space to a commercial interest for fair market value. If the Town determines that the property is not real property and the lease would be a grant of an exclusive franchise, the town may lease the space by taking competitive bids. Hon. Troy Ford, Mayor, Town of West Jefferson, 1-5-2009, AG 2009-028. However, this opinion was overruled to the extent that it conflicts with the opinion issued to Hon. Timothy Prevatt, Mayor, Town of Avon, 9-9-2013, AG 2013-067, which found that the leasing of municipal property need not be for fair market value, but rather for an amount determined by the council to be adequate consideration.

3. A town may lease surplus real property to a non-employee, or to an employee who does not participate in the discussion of the consideration of the lease by the town council, for rent in an amount determined by the council to be adequate consideration. Hon. Timothy Prevatt, Mayor, Town of Avon, 9-9-2013, AG 2013-067.

4. A 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 city council must approve the lease-purchase of an automobile, even if it is to be used exclusively by the mayor, and the purchase must be made by competitive bid if the cost involves $7,500 or more. Hon. Milton C. Davis, Attorney, City of Tuskegee, 5-2-01, AG 2001-171.

6. City and county boards of education may enter into lease-purchase agreements under Competitive Bid Law. Hon. Wayne Teague, State Superintendent of Education, 3-10-93, AG 93-00169.

7. A lease between a park and recreation board and a private operator-lessee which sets compensation as money, plus the making of permanent improvements, does not violate the Competitive Bid Law. Hon. Demetrius C. Newton, Member, House of Representatives, 10-8-91, AG 92-00001.

8. A lease with an option to purchase agreement is subject to the Competitive Bid Law and must be awarded on a competitive bid basis. Section 41-16-52(c) is applicable only to a straight lease. A lease-purchase will come under the requirements of § 41-16-50. Hon. David L. Martin, Lawrence County, 9-21-88, EPA.

9. Section 41-16-52(c) provides that municipality may lease heavy-duty off-highway construction equipment and vehicles without submitting contract for open competitive bidding where monthly rental does not exceed $3,000 per vehicle or piece of equipment or $8,000 total. Town of Wilsonville may purchase liability insurance on the leased equipment subject to limitations of Code of Ala. § 11-93-2. Hon. Frances L. Phelps, Mayor, Town of Wilsonville, 11-20-87, AG 88-00058.

10. Industrial Development Board of Goodwater may enter into a lease sale agreement. Hon. Jasper Fielding, Coosa County, 4-17-86, EPA.

11. City of Mobile not covered by provisions of Act No. 84-830, relating to competitive bidding of leases. Hon. William R. Lauten, Assistant City Attorney. Mobile, 4-19-85, AG 85-00317.

12. Huntsville City Schools may lease realty that it owns. There is no requirement that it be advertised for bids. Constitution of Alabama 1901, Amendment 26, is not applicable if no funds are being expended. Dr. Mary Jane Caylor, Huntsville City Schools, 2-27-85, AG 85-00229.

13. The purchase by a municipality of used equipment is subject to the Competitive Bid Law. Equipment is treated as "used" if originally owned via a rental contract and subsequently an offer is made by the rentor to allow purchase (where there was no lease-purchase agreement in the original contract). Formal Opinion of Attorney General, Volume 171, page 31, 6-16-78.

Educational Entities

A. Higher Education

1. A lease with an option to purchase agreement is subject to the Competitive Bid Law and must be awarded on a competitive bid basis. Section 41-16-52(c) is applicable only to a straight lease. A lease-purchase will come under the requirements of § 41-16-50. Hon. David L. Martin, Lawrence County, 9-21-88, EPA.

2. Equipment leased from the telephone company prior to the requirement that competitive bids be used may be purchased without soliciting bids. Purchase of compatible computer system equipment is not subject to competitive bids. Ms. Kathryn C. Peregoy, Colleges and Universities, 10-12-84, EPA.

B. Post Secondary Education

1. A lease with an option to purchase agreement is subject to the Competitive Bid Law and must be awarded on a competitive bid basis. Section 41-16-52(c) is applicable only to a straight lease. A lease-purchase will come under the requirements of § 41-16-50. Hon. David L. Martin, Lawrence County, 9-21-88, EPA.

2. Equipment leased from the telephone company prior to the requirement that competitive bids be used may be purchased without soliciting bids. Purchase of compatible computer system equipment is not subject to competitive bids. Ms. Kathryn C. Peregoy, Colleges and Universities, 10-12-84, EPA.

C. K-12

1. If a board of education leases its FCC granted rights to unused frequencies to a commercial wireless providers, this transaction is subject to the Competitive Bid Laws. However, the exemption stated in § 41-16-51(a)(13) will not be satisfied simply because there has only been one potential bidder. Hon. Joseph C. Mitchell, Alabama House of Representatives, 7-8-05, AG 2005-158.

2. City and county boards of education may enter into lease-purchase agreements under Competitive Bid Law. Hon. Wayne Teague, Superintendent of Education, 3-10-93, AG 93-00169.

3. Discussion of a Xerox Order Agreement (a lease-purchase contract) between the County Board of Education and Xerox Corporation. Ala. Code § 41-16-50(a) (1975) requires "All expenditures . . . made by or on behalf of any . . . county board of education . . . shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder." Hon. Bill Sims, Dallas County, 8-8-91, EPA.

4. A lease with an option to purchase agreement is subject to the Competitive Bid Law and must be awarded on a competitive bid basis. Section 41-16-52(c) is applicable only to a straight lease. A lease-purchase will come under the requirements of Ala. Code § 41-16-50 (1975). Hon. David L. Martin, Lawrence County, 9-21-88, EPA.

5. Huntsville City Schools may lease realty that it owns. There is no requirement that it be advertised for bids. Constitution of Alabama 1901, Amendment 26, is not applicable if no funds are being expended. Dr. Mary Jane Caylor, Huntsville City Schools, 2-27-85, AG 85-00229.

6. The provisions of Act No. 84-830 are applicable to the Mobile County Board of School Commissioners to solicit competitive bids on leases. Hon. Abe L. Hammons, Superintendent, Board of School Commissioners of Mobile County, 10-10-84, AG 85-00007.

CHAPTER 9

INTRODUCTION TO COMPETITIVE BID LAWS GOVERNING BOARDS OF EDUCATION

In 2009, the Legislature passed Alabama Act 2009-760, in order "to remove the city and county boards of education from the competitive bid laws in Title 41 and provide substantially the same provisions in Title 16 . . . ." The provisions governing competitive bidding procedures of boards of education now appear in ALA. CODE §§ 16-13B-1 – 16-13B-11 (1975).

While Act 2009-760 did amend some provisions of the competitive bidding law, it did not remove all references to city or county boards of education from Title 41—this creates a potential for conflict. This conflict is particularly prominent when comparing ALA. CODE § 16-13B-10 with ALA. CODE § 41-16-60. These two provisions govern potential conflicts of interest in the dealings of city and county boards of education. The two statutes were previously identical—they each prohibited any board member from having a financial or personal beneficial interest in the purchase of or contract for personal property or contractual service by the board of education, and they each specified a criminal penalty for violation of the statutes. In 2011, however, the Legislature amended ALA. CODE § 41-16-60 to allow board members to have a financial interest in a contract so long as the contract was agreed to prior to the board member's election or appointment, or the board member did not participate in the board's decision-making process. The language of ALA. CODE § 16-13B-10 has not been amended, creating a direct conflict between the statutes. Because of this, the Attorney General's office has concluded that Section § 41-16-60, not Section § 16-13B-10, should be treated as the controlling authority—because the two statutes are in irreconcilable conflict and Section § 41-16-60 is the later pronouncement, the Legislature intended to repeal Section § 16-13B-10 by its adoption of Section § 41-16-60. *See* Hon. James E. Turnbach, Attorney, Etowah County Board of Education, 12-14-2011, AG 2012-018; Hon. Patrick C. Davidson, Attorney, Auburn City Board of Education, 12-14-2011, AG 2012-017.

Section 16-13B-1(a) states the general rule that all contracts

entered into by boards of education involving $15,000 or more, apart from public works contracts, shall be entered into "by free and open competitive bidding, on sealed bids, to the lowest responsible bidder." Contracts may not be divided into parts less than $15,000 in order to avoid the competitive bidding requirements; such contracts are void. ALA. CODE § 16-13B-4(e). To determine the lowest responsible bidder, the board of education should take into account:

- The qualities of the commodities to be supplied,
- Conformity of the commodities with the stated specifications,
- The purposes for which the commodities are required,
- The terms of delivery,
- Transportation charges, and
- Dates of delivery.

ALA. CODE § 16-13B-7(a). A board of education may also examine the total cost of ownership of personal property to be purchased, including the life cycle costs, if the total cost of ownership can be reasonably ascertained from "industry recognized and accepted sources." The board of education must include the possibility of examination of life cycle costs in the invitation to bid. ALA. CODE § 16-13B-7(c).

A board of education may establish a local preference zone. If a responsible bidder from the local preference zone submits a bid that is not the lowest bid, the board of education may still award the contract to that bidder if the bid is no more than three percent greater than the bid of the lowest responsible bidder. The local preference zone may consist of either (1) the legal boundaries of the jurisdiction of the board of education, (2) the boundaries of the county in which the board of education is located, or (3) the boundaries of the core based statistical area (created by the federal Office of Management and Budget to include a city center and the surrounding commuting area) in which the board of education is located. ALA. CODE § 16-13B-1(b).

A board of education may also give preference to commodities produced in Alabama or sold by Alabama persons or

businesses, provided there is no sacrifice in loss or quality. However, the board of education, in awarding a contract based on purchase of materials for construction or repair of a publicly owned facility, may not specify the use of materials or systems by a sole source, unless (1) that product is indispensable and the only sufficient product; (2) the sole source specification has been recommended by the architect or engineer of record; and (3) all information substantiating the use of a sole source specification is documented in writing and filed into the project file. ALA. CODE § 16-13B-7(b).

The board of education may reject any bid if the price is deemed to be excessive or the product is of an inferior quality. ALA. CODE § 16-13B-7(d). If only one bid is received, the board of education may reject the bid and negotiate a lower price for which to award the contract. ALA. CODE § 16-13B-1(b).

If the lowest responsible bidder defaults on its obligations, the board of education may terminate the award of the contract and award it to the second-lowest responsible bidder without rebidding, so long as the terms, conditions, and price of the award are the same or better than the original bid submitted by the second-lowest responsible bidder. ALA. CODE § 16-13B-7(a).

Generally, all bids must remain sealed until they are opened publicly at the time stated in the notice—advance disclosure of the terms of a bid shall render the proceedings void and require new advertisement and award of the contract. ALA. CODE §§ 16-13B-4(b), 6. However, the board of education may open the bids earlier when utilizing a reverse auction procedure. A reverse auction either consists of real-time, online anonymous bidding (usually lasting less than 1 hour), or an extended bidding process (usually lasting less than 2 weeks) in which bids are submitted online. A reverse auction is only allowed when the item to be purchased is not available on the state purchasing program or if a reverse auction will yield price and terms equal to or better than available under the state purchasing program. ALA. CODE § 16-13B-4(c).

All proposed purchases in excess of $15,000 must be advertised by posting a notice on a bulletin board outside the purchasing office of the board of education and "in any other

manner and for any length of time as may be determined." Bids are also required to be submitted by sending notice by mail or electronically to all persons or businesses who have requested such notice for the particular items or services solicited; this listing may be canceled if the person or business does not respond to a solicitation after receipt of three solicitations. ALA. CODE § 16-13B-4(a). However, a board of education may award contracts without public advertisement in the case of an "emergency affecting public health, safety, or convenience." Such a finding must be in writing, and the board of education must immediately make the action and reasoning public. ALA. CODE § 16-13B-3.

Boards of education may require bidders to furnish a bid bond, so long as the requirement applies to all bidders, is included in the written bid specifications, and bid bonding is available. ALA. CODE §§ 16-13B-1(d), 8.

Collusion among prospective bidders in restraint of freedom of competition, either by agreement to bid at a fixed price, to refrain from bidding, or otherwise, is prohibited. Such bids shall be void, and the bidders shall be disqualified from submitting future bids to the board of education. The participants in the collusion are also subject to criminal penalties, varying based on the amount of the bid. ALA. CODE § 16-13B-5.

Section 16-13B-7(f) limits the length of time that contracts may be let:

- Purchase of personal property or contractual services – 3 years maximum
- Lease-purchase contracts for capital improvements and repairs to real property – 10 years maximum
- All other lease-purchase contracts – 10 years maximum.

The successful bidder may not assign the contract to another entity without written consent of the board of education; but regardless of written consent, a contract may not be assigned to an unsuccessful bidder "whose bid was rejected because he or she was not a responsible bidder." ALA. CODE § 16-13B-9.

All documents pertaining to the award of a contract,

including all original bids, must be retained for at least seven years. ALA. CODE § 16-13B-4(d). A record of the bidding, including notation of the successful bid and any reasons for not awarding a bid to the lowest bidder, must be made open to public inspection. ALA. CODE § 16-13B-7(e). Boards of education must maintain the necessary purchasing facilities and procedures to carry out the competitive bidding requirements. ALA. CODE § 16-13B-2(b).

Multiple boards of education may enter into an agreement for joint purchases. The agreement must set forth the categories of items or services to be purchased, the allocation of expenses and manner of payment, and "other matters deemed necessary to carry out the purposes of the agreement." ALA. CODE § 16-13B-1(c).

All contracts entered into in violation of the chapter are void, and violations are punishable as a Class C felony. ALA. CODE § 16-13B-2(c). Any taxpayer within the jurisdiction of a board of education and any unsuccessful bidder may sue to enjoin execution of a contract entered into in violation of the chapter. ALA. CODE § 16-13B-11.

Section 16-13B-2(a) lists types of purchases to which the competitive bidding requirements do not apply. This list is reproduced in the next chapter. Section 16-13B-4(e) reiterates that contracts for professional services are not subject to the chapter.

CHAPTER 10

COMPETITIVE BIDDING FOR CERTAIN CONTRACTS OF COUNTY AND CITY BOARDS OF EDUCATION (Title 16, Chapter 13B, Code of Alabama (1975))

16-13B-1. Applicability; local preference zone; joint agreement; bid bond.

16-13B-2. Exceptions to competitive bidding requirements.

16-13B-3. Emergency action.

16-13B-4. Notice of proposed purchase; reverse auction procedures.

16-13B-5. Collusive agreements.

16-13B-6. Advance disclosure of bid terms.

16-13B-7. Defaulting bidder; award to second lowest responsible bidder; preferences; sole source specification; life cycle costs; rejection of bids; lease-purchase contracts.

Section 16-13B-1. Applicability; local preference zone; joint agreement; bid bond.

(a) This chapter shall apply to county boards of education and city boards of education, or any combination of city and county boards of education as herein provided for the competitive bidding of certain contracts. With the exception of contracts for public works whose competitive bidding requirements are governed exclusively by Title 39, all expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars ($15,000) or more, and the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually, bound under the terms of the lease, to pay a total amount of fifteen thousand dollars ($15,000) or more, made by or on behalf of any city or county board of education,

except as hereinafter provided, shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.

(b) Prior to advertising for bids for an item of personal property, where a city or county board of education, thereof is the awarding authority, the awarding authority may establish a local preference zone consisting of either the legal boundaries or jurisdiction of the awarding authority, or the boundaries of the county in which the awarding authority is located, or the boundaries of the core based statistical area (CBSA) in which the awarding authority is located. If no such action is taken by the awarding authority, the boundaries of the local preference zone shall be deemed to be the same as the legal boundaries or jurisdiction of the awarding authority. 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 local preference zone where a city or county board of education, thereof is the awarding authority, and the bid is no more than three percent greater than the bid of the lowest responsible bidder, the awarding authority may award the contract to the resident responsible bidder. In the event only one bidder responds to the invitation to bid, the awarding authority may reject the bid and negotiate the purchase or contract, providing the negotiated price is lower than the bid price.

(c) The governing bodies of two or more city or county boards of education, or any combination of two or more city or county boards of education, counties, municipalities, or instrumentalities thereof, may provide, by joint agreement, for the purchase of labor, services, or work, or for the purchase or lease of materials, equipment, supplies, or other personal property for use by their respective agencies. The agreement shall be entered into by official actions of the contracting agencies adopted by each of the participating governing bodies which shall set forth the categories of labor, services, or work, or for the purchase or lease of materials, equipment, supplies, or other personal property to be purchased, the manner of advertising for bids and the awarding of contracts, the method of payment by each participating contracting agency, and other matters deemed necessary to carry out the purposes of the agreement. Each contracting agency's share of

expenditures for purchases under any agreement shall be appropriated and paid in the manner set forth in the agreement and in the same manner as for other expenses of the contracting agency. The contracting agencies entering into a joint agreement, as herein permitted, may designate a joint purchasing or bidding agent, and the agent shall comply with this chapter. Purchases, contracts, or agreements made pursuant to a joint purchasing or bidding agreement shall be subject to all terms and conditions of this chapter. Any participation by counties and municipalities authorized in this section shall be subject to the provisions of subsection (b) of Section 41-16-50. In the event that utility services are no longer exempt from competitive bidding under this chapter, non-adjoining boards of education may not purchase utility services by joint agreement under authority granted by this subsection.

(d) The awarding authority may require bidders to furnish a bid bond for a particular bid solicitation if the bonding requirement applies to all bidders, is included in the written bid specifications, and if bonding is available for the services, equipment, or materials.

Section 16-13B-2. Exceptions to competitive bidding requirements.

(a) Competitive bids shall not be required for utility services for county or city boards of education, the rates for which are fixed by law, regulation, or ordinance, and the competitive bidding requirements of this chapter shall not apply to:

(1) The purchase of insurance.
(2) Contracts for securing services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, consultants, certified public accountants, public accountants, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part.
(3) Contracts of employment in the regular civil service.
(4) Contracts for fiscal or financial advice or services.
(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) Purchases of maps or photographs from any federal agency.

(7) Purchases of manuscripts, books, maps, pamphlets, or periodicals.

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

(9) Existing contracts up for renewal for sanitation or solid waste collection, recycling, or disposal and those providing the service.

(10) Purchases of computer and word processing hardware when the hardware is the only type that is compatible with hardware already owned by the entity taking bids and custom software.

(11) Contractual services and purchases of commodities for which there is only one vendor or supplier and contractual services and purchases of personal property which by their very nature are impossible to award by competitive bidding.

(12) Contractual services and purchases of products related to, or having an impact upon, security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or infrastructures.

(13) Purchases of goods made as a part of any purchasing cooperative sponsored by the National Association of Counties, its successor organization, or any other competitive bid nationwide cooperative purchasing program, or other national or regional governmental cooperative purchasing program. This subdivision shall not apply to goods for which a service or service contract, whether subject to competitive bidding under this chapter or not, is necessary to utilize the goods. Such purchases may only be made if all of the following occur:

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

b. The goods are either not at the time available to local boards of education on the state purchasing program or are available at a price equal to or less than that on the state purchasing program.

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

(14) Purchases of unprocessed agricultural products as defined in subsection (b) of Section 16-1-46 and the food is purchased with a cost of one hundred thousand dollars ($100,000) or less.

(b) This chapter shall not apply to:

(1) Any purchases of products where the price of the products is already regulated and established by state law.
(2) Purchases made by individual schools of the county or municipal public school systems from moneys other than those raised by taxation or received through appropriations from state or county sources.

(c) The city and county boards of education shall establish and maintain such purchasing facilities and procedures as may be necessary to carry out the intent and purpose of this chapter by complying with the requirements for competitive bidding in the operation and management of each city and county board of education.

(d) Contracts entered into in violation of this chapter shall be void, and anyone who violates this chapter shall be guilty of a Class C felony.

Section 16-13B-3. Emergency action.

In case of emergency affecting public health, safety, or convenience, so declared in writing by the awarding authority, setting forth the nature of the danger to public health, safety, or convenience involved in delay, contracts may be let to the extent necessary to meet the emergency without public advertisement. Such action and the reasons therefor shall immediately be made public by the awarding authority.

Section 16-13B-4. Notice of proposed purchase; bids; reverse auction procedures.

(a) All proposed purchases in excess of fifteen thousand dollars ($15,000) shall be advertised by posting notice thereof on a bulletin board maintained outside the purchasing office and in any other manner and for any length of time as may be determined. Sealed bids or bids to be submitted by a reverse auction procedure shall also be solicited by sending notice by mail or other electronic means to all persons, firms, or corporations who have filed a request in writing that they be listed for solicitation on bids for the particular items that are set forth in the request. If any person, firm, or corporation whose name is listed fails to respond to any solicitation for bids after the receipt of three solicitations, the listing may be cancelled.

(b) Except as provided in subsection (c), all bids shall be sealed when received and shall be opened in public at the hour stated in the notice.

(c) The awarding authority may make purchases or contracts through a reverse auction procedure; provided, however, that a reverse auction shall only be allowed where the item to be purchased at a reverse auction is either not at the time available on the state purchasing program under the same terms and conditions or, if available, the lowest price offered in the reverse auction is equal to or less than the price for which the item is available on the state purchasing program under the same terms and conditions. All of the purchases shall be subject to audit by the Department of Examiners of Public Accounts. For purposes of this chapter, a reverse auction procedure includes either of the following:

(1) A real-time bidding process usually lasting less than one hour and taking place at a previously scheduled time and Internet location, in which multiple anonymous suppliers submit bids to provide the designated goods or services.

(2) a. A bidding process usually lasting less than two weeks and taking place during a previously scheduled period and at a previously scheduled Internet location, in which multiple anonymous

suppliers submit bids to provide the designated goods or services.

b. The Department of Examiners of Public Accounts shall establish procedures for the use of reverse auction, which shall be distributed to all contracting agencies and shall be used in conducting any audits of the purchasing agency.

(d) All original bids together with all documents pertaining to the award of the contract shall be retained in accordance with a retention period of at least seven years established by the Local Government Records Commission and shall be open to public inspection.

(e) No purchase or contract involving professional services shall be subject to the requirements of this chapter and no purchase or contract involving an amount in excess of fifteen thousand dollars ($15,000) shall be divided into parts involving amounts of fifteen thousand dollars ($15,000) or less for the purpose of avoiding the requirements of this chapter. All such partial contracts involving fifteen thousand dollars ($15,000) or less shall be void.

Section 16-13B-5. Collusive agreements.

(a) Any agreement or collusion among bidders or prospective bidders in restraint of freedom of competition, by agreement, to bid at a fixed price or to refrain from bidding or otherwise shall render the bids of such bidders void and shall cause such bidders to be disqualified from submitting further bids to the awarding authority on future purchases.

(b) Whoever knowingly participates in a collusive agreement in violation of this section involving a bid or bids of fifteen thousand dollars ($15,000) and under shall be guilty of a Class A misdemeanor and, upon conviction, shall be punished as prescribed by law.

(c) Whoever knowingly and intentionally participates in a collusive agreement in violation of this section involving a bid or bids of over fifteen thousand dollars ($15,000) shall be guilty of a Class C felony, and upon conviction shall be punished as

prescribed by law.

Section 16-13B-6. Advance disclosure of bid terms.

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.

Section 16-13B-7. Defaulting bidder; award to second lowest responsible bidder; preferences; sole source specification; life cycle costs; rejection of bids; lease-purchase contracts.

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

(b) The awarding authority in the purchase of or contract for personal property or contractual services shall give preference, provided there is no sacrifice or loss in price or quality, to commodities produced in Alabama or sold by Alabama persons, firms, or corporations. Notwithstanding the foregoing, no county or city board of education charged with the letting of contracts or purchase of materials for the construction, modification, alteration, or repair of any publicly owned facility may specify the use of

materials or systems by a sole source, unless:

(1) The board of education can document to the satisfaction of the State Building Commission that the sole source product or service is of an indispensable nature, all other viable alternatives have been explored, and it has been determined that only this product or service will fulfill the function for which the product is needed. Frivolous features will not be considered.

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

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

(c) (1) For purchases of personal property in instances where the awarding authority determines that the total cost of ownership over the expected life of the item or items, including acquisition costs plus sustaining costs or life cycle costs, can be reasonably ascertained from industry recognized and accepted sources, the lowest responsible bid may be determined to be the bid offering the lowest life cycle costs and otherwise meeting all of the conditions and specifications contained in the invitation to bid. To utilize this subdivision to determine the lowest responsible bidder, the awarding authority shall include a notice in the invitation to bid that the lowest responsible bid may be determined by using life cycle costs and identify the industry recognized and accepted sources that will be applicable to such an evaluation.

(2) The Department of Examiners of Public Accounts shall establish procedures for the use of life cycle costs, which shall be distributed to all contracting agencies and shall be used in conducting any audits of the purchasing agency.

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

(e) Each record, with the successful bid indicated thereon, and with the reasons for the award if not awarded to the lowest bidder, shall, after award of the order or contract, be open to public inspection.

Section 16-13B-8. Bond requirement.

Bond in a responsible sum for faithful performance of the contract, with adequate surety, may be required in an amount specified in the advertisement for bids.

Section 16-13B-9. Assignment of contract.

No contract awarded to the lowest responsible 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 bidder.

Section 16-13B-10. Conflict of interests; violations.

(a) No member or officer of the city and county boards of education shall be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for any personal property or contractual service, nor shall any person willfully make any purchase or award any contract in violation of this chapter.

(b) Any violation of this section shall be deemed a misdemeanor, and any person who violates this section, upon conviction, shall be imprisoned for not more than 12 months or fined not more than five hundred dollars ($500), or both. Upon conviction thereof, any person who willfully makes any purchase or awards any contract in violation of this chapter shall be removed from office.

Section 16-13B-11. Action to enjoin execution of contract.

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 this chapter.

CHAPTER 11

AUTHORITY INTERPRETING COMPETITIVE BID LAWS GOVERNING BOARDS OF EDUCATION

ARTICLE 1.

Case Summaries.

1. Anderson v. Fayette County Board of Education, 738 So. 2d 854 (Ala. 1999).

In 1996 the Fayette County Board of Education 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, a Fayette County taxpayer 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 and turned over to Trane the job of making and keeping the board's facility's heating and air conditioning systems efficient. The Alabama Supreme Court held that the contract between the board and Trane was exempt from the Competitive Bid Law. It concluded that Trane's "personality" was a major part of the contract, stating: "the language of the PACT, as quoted above, 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.' (ALA. CODE § 41-16-51(a)(3))." The court, after listing the activities Trane would undertake through its professional staff, concluded that the board purchased more than just equipment.

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

Defendant BOE ignored advice of its attorney and various staff members in accepting the bid of Moyer Ford. International met all

specifications and was the lowest bidder for 20 school buses.

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

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

4. 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.

ARTICLE 2.

Attorney General's Opinions

1. Pursuant to Section 41-16-60 of the Code of Alabama, a member of a city or county board of education may contract with the board of education for property or personal services if (1) the contemplated contract was in existence before a person was elected or appointed to the board, or (2) the individual does not participate in the deliberation or vote on the proposed contract. This is true notwithstanding the language of Section 16-13B-10 prohibiting such contracting—because the two statutes are in direct conflict, it is the opinion of the Attorney General's Office that the legislature intended to repeal Section 16-13B-10 by the later amendment of Section 41-16-60. Hon. James E. Turnbach, Attorney, Etowah

County Board of Education, 12-14-2011, AG 2012-018.

2. Pursuant to Section 41-16-60 of the Code of Alabama, a member of a city or county board of education may contract with the board of education for property or personal services if (1) the contemplated contract was in existence before a person was elected or appointed to the board, or (2) the individual does not participate in the deliberation or vote on the proposed contract. This is true notwithstanding the language of Section 16-13B-10 prohibiting such contracting—because the two statutes are in direct conflict, it is the opinion of the Attorney General's office that the legislature intended to repeal Section 16-13B-10 by the later amendment of Section 41-16-60. Hon. Patrick C. Davidson, Attorney, Auburn City Board of Education, 12-14-2011, AG 2012-017.

3. 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, Cullman County Board of Education, 12-16-08, AG 2009-022.

4. The Jefferson County Board of Education ("Board") may enter into the contemplated contractual arrangement with the City of Clay ("City") as long as the school board receives fair and adequate consideration for these transactions and the Board determines that its actions serve a public purpose. The City may enter into the contractual arrangement with the Board as long as any funds expended by the City serve a public purpose and the arrangement does not bind future councils. Hon. Phillip B. Hammonds, Superintendent Board of Education of Jefferson County, 06-25-08, AG 2008-101.

5. If a board of education leases its FCC granted rights to unused frequencies to a commercial wireless providers, this transaction is subject to the Competitive Bid Laws. However, the exemption stated in § 41-16-51(a)(13) will not be satisfied simply because there has only been one potential bidder. Hon. Joseph C. Mitchell, Alabama House of Representatives, 7-8-05, AG 2005-158.

6. The purchase of a multifunctional device is subject to a purchase by competitive bid by educational institutions if the device is going to actually be used for printing, scanning, emailing, faxing, etc. in addition to copying. Hon. Stephanie Walker, Brewton City Board of Education, 4-14-05, AG 2005-107.

7. If the Baldwin County Board of Education contracts for a "comprehensive energy-saving plan" under which they rely on the contractor's expertise, and turns over to the contractor the job of making and keeping the Board's facilities heating and air-conditioning efficient, and if the purchases are part of a comprehensive energy cost savings proposal and the amount spent on the energy cost savings measures energy or operational cost savings, or both, within a ten-year period from the date installation is complete, these purchases may be made without competitive bidding. Hon. Fred K. Granade, Attorney, Baldwin County Board of Education, 11-5-01, AG 2002-053.

8. A sale or lease of real property by the Escambia County Board of Education is not subject to the requirements of ALA. CODE §§ 9-15-70 et seq., (1975). Any such transfer must be for adequate consideration, even if the consideration is non-monetary, and the Board must use the consideration for school purposes. Hon. Broox G. Garrett, Jr., Attorney, Escambia County Board of Education, 9-6-00, AG 2000-228.

9. The contract providing a scoreboard to the Talladega County Board of Education by private corporations in return for the granting of an exclusive concessions contract must be competitively bid. Hon. Thomas M. Little, Attorney, Talladega County Board of Education, 4-1-99, AG 1999-158.

10. The Alabama Competitive Bid Law does not apply to purchases of appraisal services. Hon. Warcheta Bedgood, Lowndes County Board of Education, 10-19-95, EPA.

11. The conflict of interest law prohibits members of the Board of Education from having any financial interest in the purchase of or contract for personal property or contractual services. Hon. Sam B. Hollingsworth, Monroe County Board of Education, 9-7-95, EPA.

12. The law requires that like items of equipment, materials or nonperishable food products which cost more than $5000 in the aggregate must be bid. While the Examiners as a matter of policy do not criticize boards of education for failure to take competitive bids on perishable food items such as bread and milk, boards may establish their own requirements if they choose to seek bids and require a bid bond. In like manner, boards of education may decide to forego requiring a bid bond when purchasing perishable food items. Hon. Talmadge Miles, Macon Co., 7-2-93, EPA.

13. City and county boards of education may enter into lease-purchase agreements under Competitive Bid Law. Hon. Wayne Teague, State Superintendent of Education, 3-10-93, AG 93-00169.

14. The acquisition of new or additional telecommunications equipment by the County Board of Education must be by competitive bid. Hon. Thomas H. Frazier, Baldwin County, 10-18-91, EPA.

15. Discussion of a Xerox Order Agreement (a lease-purchase contract) between the County Board of Education and Xerox Corporation. Ala. Code § 41-16-50(a) (1975) requires "All expenditures . . . made by or on behalf of any . . . county board of education . . . shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder." Hon. Bill Sims, Dallas County, 8-8-91, EPA.

16. The fact that Pell City Council appoints members to Pell City Board of Education, Pell City Industrial Development Board, Pell City Public Building Authority and Pell City Medical Clinic Board does not in and of itself create a conflict of interest that would prohibit a member of Pell City Council from transacting business with such entities. Hon. Lawrence Fields, Mayor, City of Pell City, 8-28-89, AG 89-00409.

17. Under ALA. CODE § 41-16-60 (1975), a member of Chilton County Board of Education may not sell supplies to Chilton County schools, teachers, or school clubs and organizations if the office supply company in question is owned solely by the board member and/or his spouse. If the board member and/or his spouse own less than a majority of the stock and the business is not a family-held corporation, the board member may sell supplies to the aforementioned entities and persons. However, this opinion does not take into account subsequent amendments to ALA. CODE § 41-16-60 (effective 6/9/2011) and § 16-13B-10 (effective 8/1/2009). Hon. John H. Jackson, Jr., Attorney at Law Chilton County, 6-16-89, AG 89-00324.

18. Chilton County Board of Education may not do business with a company owned solely by a board member, but may do business with a corporation where board member owns less than a majority

of the stock and it is not a family-held corporation. Hon. John Hollis Jackson, Jr., Attorney at Law, Chilton County, 3-30-89, AG 89-00227.

19. Board of education may not do business with a company owned solely by a board member but may do business with a corporation where a board member owns less than a majority of the stock and it is not a family-held corporation. Hon. Frank Daniel, Superintendent of Education, Chilton County, 2-23-89, AG 89-00195.

20. City Board of Education may employ services of a Superintendent of Construction without competitive bidding. City Board of Education is an instrumentality of the municipality which may award a contract to a resident bidder under ALA. CODE § 41-16-50 (1975). That portion of ALA. CODE § 41-16-50 (1975), regarding awarding of bid to resident responsible bidder, applies only to purchases of personal property. Hon. J. Russell Gibson, III, Phelps, Owens, Jenkins, Gibson & Fowler, Attorneys of Law, Tuscaloosa, 11-10-88, AG 89-00036.

21. A board of education does not have to specify that there will be three brands of each piece of equipment it plans to install in a new kitchen. The Alabama Competitive Bid Law requires "free and open competitive bidding." Hon. T. G. Smith, Education, 8-16-88, EPA.

22. Member of County Board of Education cannot transact business with that Board even if there is compliance with the Competitive Bid Laws. A member of County Board of Education cannot do business with that Board even if the transaction is for an amount that is excepted from the Competitive Bid Laws. Hon. Lewis S. Hamilton, Attorney, Butler County Board of Education, 4-7-88, AG 88-00245.

23. The local boards of education should solicit bids for playground equipment and act as the awarding authority. Hon. Jerry Milner, Chambers County, 3-4-86, EPA.

24. Discussion of the exemption under the Bid Law to the bond issue of the Baldwin County Board of Education. Hon. Al Umphrey, Baldwin County, 1-21-86, EPA.

25. Absent a determination that a corporation is “family-held,” that corporation, for which a board of education member is vice

president, may submit bids to the board of education. Hon. Clifford S. Smith, Superintendent, Phenix City Public Schools, 12-17-85, AG 86-00093.

26. There is no legal authority which would permit a board of education to reimburse a bidder for a portion of the bidder's cost in securing a performance bond. Hon. B. G. Grissette, Monroe County, 8-15-85, EPA.

27. The Attorney General has ruled on numerous occasions that the Competitive Bid Law governing purchases is not operative whenever the contract in question is between two governmental entities. Further, we know of no other law which would prevent a county board of education from obtaining gasoline from the county commission and reimbursing the commission for the purchase price. Hon. Patrick H. Tate, DeKalb County, 7-23-85, EPA.

28. If the requirements of Act No. 84-228 are not met, Washington County Board of Education may reject bids and readvertise for bids. The Board in its discretion may not waive a defect in a bid under Act 84-228 where nonresident contractor failed to submit required letter with his bid. The Board is not required to give preference to resident Alabama contractors over Mississippi contractors. Dr. Fred M. Scoggins, Superintendent, Washington County Board of Education, 5-15-85, AG 85-00354.

29. The Tuscaloosa County Board of Education may dispose of trees blown over in a storm without taking competitive bids so long as they receive a fair market value for the property. Dr. Neil Hyche, Tuscaloosa County, 4-19-85, EPA.

30. Contract which the Auburn City Board of Education wishes to award may be exempt from the Bid Law only if such contract involves in a major part the services of a professional engineer. Hon. Edward R. Richardson, Superintendent, Auburn City Schools, 4-8-85, AG 85-00291.

31. The Board of Education did not follow the requirements of the Bid Law in the purchase of a wood lathe and "like items" by splitting the order in order to avoid placing the items up for competitive bidding. Hon. Jim Fitzgerald, Marengo County, 1-8-85, EPA.

32. Boards of Education may not require a certified check in lieu of a bond but may accept certified checks if they choose to do so.

Hon. James C. Bailey, President, Wallace State Community College, 10-18-84, AG 85-00032.

33. A county board of education may specify a brand name in soliciting bids for radios which would be compatible with the board's present power unit and radio system. Dr. Charles Sprayberry, Superintendent of Education, Tuscaloosa County Board of Education, 10-14-83, AG 84-00006.

34. Jackson County Board of Education has authority to waive technical errors and informalities in the competitive bid procedure where it will result in reduced cost to the taxpayer. Hon. Jim Pratt, Jackson County, 6-24-83, EPA.

35. Boards of education may not elect to receive a certified check rather than a bid bond from bidders on public works. Hon. Edward Jackson, Attorney, Houston County Board of Education, 1-31-83, AG 83-00154.

36. No purchase or contract involving an amount in excess of the statutory amount shall be divided into parts involving statutory amounts or less for the purpose of avoiding the requirements of the Competitive Bid Law. If an agency knows that it will purchase like items in excess of the statutory amount during the fiscal year, then purchase must be bid. Hon. Charles Sprayberry, Superintendent of Education, Tuscaloosa County Board of Education, 5-18-82, AG 82-00343.

37. A contract is created when a bid is accepted. Hon. Scott Dennis, Superintendent, Cleburne County Board of Education, EPA.

38. A county board of education must ask for bid proposals from both vendors offering unique yet identical energy management services if it is to remain in compliance with Bid Law provisions. Dr. James J. Benson, 5-21-79, EPA.

39. The opening of bids by a committee at a public meeting at a time prior to the Board of Education regular meeting for the purpose of tabulating bids and clearing up questions does not violate the letter or spirit of the Bid Law. Hon. Willis M. Grimm, 1-21-77, EPA.

CHAPTER 12

INTRODUCTION TO PUBLIC WORKS LAW

The Public Works Law, codified in ALA. CODE §§ 39-1-1, et. seq. (1975), defines Public Works as being, "[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." ALA. CODE § 39-2-1(5) (1975). 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 bond requirement statute, codified in ALA. CODE § 39-1-1, (1975), requiring that bonds be submitted by winning bidders to secure contracts that are equal to or exceed $50,000 in value. Specifically, among other requirements, ALA CODE § 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 shall, before commencing the work, execute a performance bond, with penalty equal to 100 percent of the amount of the contract price. In addition, another bond, payable to the 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 attorneys' 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 ALA. CODE § 39-1-4 (1975), the Alabama Legislature sought to prevent favoritism and corruption in the purchase of insurance and bonds. The statute reads:

> (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 . . .
>
> ALA. CODE § 39-1-4(a)–(b) (1975).

The remaining portions of ALA. CODE § 39-1-1 (1975) discuss other aspects of the bid bond requirements.

Chapter 2 of the Public Works Law, ALA. CODE § 39-2-1, et. seq. (1975), 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 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). After giving the crucial definitions in § 39-2-1, the remaining portions of 39 chapter 2 deal with procedural issues relating to the advertising and letting of contracts.

ALA. CODE § 39-2-11(a) and (b) (1975) highlight the procedure(s) to be followed in the event the successful bidder fails to comply with the bid bond and potential securities requirements. Specifically, the statute reads:

> (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.

ALA. CODE § 39-3-5(a) (1975) notes that when awarding contracts, the awarding authority should give preference to resident contractors (contractors that are domiciled to the state of Alabama). The statute reads:

> (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.

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

Generally, the Public Works laws are more straightforward and easily understandable than the Competitive Bid Laws. Because of this, substantially fewer Attorney General Opinions exist regarding Public Works issues. Nonetheless, the Attorney General does and has answered substantive questions on issues regarding Public Works Laws, and these opinions are topically outlined below for your convenience.

CHAPTER 13

PUBLIC WORKS LAW
(Title 39, Chapters 1 – 7, Code of Ala. (1975))

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 shall, before commencing the work, execute a performance bond, with penalty equal to 100 percent of the amount of the contract price. In addition, another bond, payable to the 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 attorneys' 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's 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 shall, 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, 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's 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 fifty thousand dollars ($50,000).

(f) The contractor shall, immediately after the completion of the contract, give notice of the completion by an advertisement in a newspaper of general circulation published within the city or county in which the work has been done, for a period of four successive weeks. A final settlement shall not be made upon the contract until the expiration of 30 days after the completion of the notice. Proof of publication of the notice shall be made by the contractor to the authority by whom the contract was made by affidavit of the publisher and a printed copy of the notice published. If no newspaper is published in the county in which the work is done, the notice may be given by posting at the courthouse for 30 days, and proof of same shall be made by the judge of probate, sheriff, and the contractor.

(g) Subsection (f) shall not apply to contractors performing contracts of less than fifty thousand dollars ($50,000) in amount. In such cases, the governing body of the contracting agency, to expedite final payment, shall cause notice of final completion of the contract to be published one time in a newspaper of general circulation, published in the county of the contracting agency and shall post notice of final completion on the agency's bulletin board

for one week, and shall require the contractor to certify under oath that all bills have been paid in full. Final settlement with the contractor may be made at any time after the notice has been posted for one entire week.

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, Act 97-225 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.

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 State Building Commission, 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) Before entering into any contract for a public works involving an amount in excess of fifty thousand dollars ($50,000), the awarding authority shall advertise for sealed bids. 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. 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. With the exception of the Department of Transportation, for all public works contracts involving an estimated amount in excess of five hundred thousand dollars ($500,000), awarding authorities shall also advertise for sealed bids at least once in three newspapers of general circulation throughout the state. 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. All bids shall be opened publicly at the advertised time and place. No public work as defined in this chapter involving a sum in excess of fifty thousand dollars ($50,000) shall be split into parts involving sums of fifty thousand dollars ($50,000) or less for the purpose of evading the requirements of this section.

(b) (1) An awarding authority may let contracts for public works involving fifty thousand dollars ($50,000) 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 publish 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) 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.

(e) 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. The action and the reasons for the action taken shall immediately be made public by the awarding authority upon request.

(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 State Building Commission 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.

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). 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 to 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 telegram, confirmed facsimile, 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) 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.

(d) 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.

(e) 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.

(f) 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.

(g) 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.

(h) 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.

(i) 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 (*l*), 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 (*l*), 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. Treasurer Notes, U.S. Treasurer 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 surety, otherwise assign, pledge, discount, sell or transfer his interest in said 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 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 120 days of receipt of the demand. If the contractor fails to remit payment in full of the overpayment within 120 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 requirements 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 Repealed by Acts 1997, No. 97-225, effective April 22, 1997.

39-3-3 Repealed by Acts 1997, No. 97-225, 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, 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 steel produced within the United States when

specifications in the construction contract require the use of 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 the above mentioned domestic 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 steel requirements of subsection (a), and domestic 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.

MINIMUM WAGES UNDER PUBLIC WORKS CONTRACTS

Sections 39-4-1 through 39-4-18.

Repealed by Acts 1979, No. 79-122, effective May 19, 1980.

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 of 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 article are cumulative thereto.

CHAPTER 14

CASES INTERPRETING PUBLIC WORKS LAWS

1. Lake Cyrus Dev. Co. v. Attorney Gen. of Ala. ex rel. Bessemer Water Serv., CV-97-378, 2014 WL 92634 (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, so the statute requiring bid bonds must be complied with. The purpose of the bid bond statute was to protect laborers and materialmen, and a public contractor is responsible for knowing the requirements of the bond statute.

CHAPTER 15

ATTORNEY GENERAL OPINIONS INTERPRETING PUBLIC WORKS LAW

Governmental Entities

A. <u>State Agencies</u>

1. 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.

2. 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.

3. 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.

4. Public Works Consultant's services for preparation of request for proposals may be procured without competitive bidding in accordance with the ALA CODE (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.

B. <u>County Agencies</u>

1. Pursuant to Section 39-2-1 of the Code of Alabama, 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 Section 41-16-50, et. seq., of the Alabama Code. Ala. Code § 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.

2. 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.

3. 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.

4. 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.

5. The preference to resident contractors over out-of-state contractors, found in section 39-3-5(a) of the Code of Alabama, 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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, Attorney, Phelps, Jenkins, Gibson & Fowler, L.L.P., Tuscaloosa County, 11-28-01, AG 2002-071.

13. 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.

14. 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.

15. The 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.

16. 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 waterworks, 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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 ALA. CODE § 39-2-1,

et seq. Hon. Don Kelly, Tuscaloosa County Park and Recreation Authority, 10-07-99, AG 2000-003.

22. 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.

23. A Public Works contract between county and Alabama Correctional Industries does not violate ALA. CODE §§ 39-1-1, et seq., and § 41-16-20 and §§ 41-16-50, et seq. (1975). Hon. Julie S. Moody, Covington County Commission, 06-05-97, AG 97-00202.

C. <u>Municipal Agencies</u>

1. 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.

2. A contract for project management and planning of a housing development, not including construction services between a municipal housing authority and a developer, is exempt from the Public Works Law under section 39-2-2(d) of the Code of Alabama. A private entity is not subject to the Public Works Law. Hon. Ralph D. Ruggs, Executive Director, Tuscaloosa Housing Authority, 09-27-12, AG 2012-089.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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

11. 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.

12. A contract by the Smiths Water and Sewer Authority to install a main sewer outfall line must be bid under ALA. CODE § 39-2-2 (1975). Hon. Kenneth Vann, Smiths Water and Sewer Authority, 10-24-06. AG 2007-007.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. A member of the Civil Service Board of the City of Gadsden is not prohibited by the Constitution of Alabama or section 11-43-12 of the Code of Alabama from serving as a consultant on a fee-for-service basis for the city's public works department. Such consultant services may be subject to the state competitive bid law. Hon. William R. Willard, Attorney for Civil Service Board for the City of Gadsden, 04-12-02, AG 2002-209.

21. Pursuant to ALA. CODE § 39-2-1 (1975), 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.

22. The State 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.

23. When work is done by force account there is no contract to be signed; therefore the bid requirement found in ALA. CODE § 39-2-2 (1975) 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.

24. 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 develop 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

Educational Entities

A. Higher Education

1. 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.

2. As an awarding authority under Alabama's 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.

B. Post Secondary Education

1. Painting contracts of $50,000 or less entered into by the Alabama Department of Postsecondary Education qualify as public works under ALA. CODE § 39-2-2(b) (1975) 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.

C. K-12

1. The State 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, Attorney, Educational Building Authority of Tuscaloosa, 01-25-99, AG 99-00095.