PURCHASING, BIDDING AND PROFESSIONAL SERVICES

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(* Patent pending)
WHO DOES THE PURCHASING FOR AN ARKANSAS CITY OR TOWN?

- Short Answer:
  - The mayor or the mayor’s duly appointed representative (§ 14-58-303 mayor-council form of government).
  - City manager (§ 14-47-120 city manager form of government).
  - City administrator (§ 14-48-117 city administrator form of government).
WHO DOES THE PURCHASING FOR AN ARKANSAS CITY OR TOWN?

- Long answer:

In a city of the first class, city of the second class, or incorporated town, the mayor or the mayor’s duly-authorized representative shall have exclusive power and responsibility to make purchases of all supplies, apparatus, equipment, materials, and other things requisite for public purposes in and for the city and to make all necessary contracts for work or labor to be done or material or other necessary things to be furnished for the benefit of the city, or in carrying out any work or undertaking of a public nature in the city.


- See also § 14-47-120 (purchasing powers for city managers) and § 14-48-117 (purchasing powers for city administrators).
LIMITS ON MAYOR’S SPENDING AUTHORITY

- *Not* the $20,000.00 in 14-58-303!

- That’s simply a bidding requirement
  – and only in first class cities
  -- or cities in the second class/incorporated towns that have passed an ordinance authorizing bidding.
In a city of the first class, the mayor or his duly-authorized representative may approve for payment out of funds previously appropriated for that purpose, or disapprove, any bills, debts, or liabilities asserted as claims against the city.

The municipal governing body shall, by ordinance, establish in that connection a maximum amount, and the payment or disapproval of such bills, debts, or liabilities exceeding that amount shall require the confirmation of the governing body.

Ark. Code Ann. § 14-58-305. (Home Rule: likely all cities and towns can do this)
With the exception of public improvements, state law in Arkansas requires only that bids be taken for purchases in cities of the first class.

§ A.C.A. § 14-58-303
WHAT ABOUT OTHER CITIES AND TOWNS?

- Although the statute only requires all cities of the first class to follow bidding requirements for purchases exceeding a certain amount, all other cities and towns, regardless of class, are free to enact local ordinances that establish a bidding requirement.

- And many have….check your ordinances carefully!

- The amount may be much lower than the $20,000 imposed by the state statute.
In cities of the *first class*, bids must be taken for purchases that exceed the sum of twenty thousand dollars ($20,000.00).

This amount could be lower, depending on the local ordinances for cities or towns of any class.
BIDDING PROCEDURES OF § 14-58-303

- Mayor or mayor’s authorized representative [AR] invites competitive bidding
- By legal advertisement in any local newspaper
- Bids opened on specified date in the presence of mayor or mayor’s AR.
MORE BIDDING PROCEDURES § 14-58-303

- Mayor or AR has exclusive power to award the bid
- To lowest *responsible* bidder
- Or to reject any and all bids received.
- Council may *waive* bidding
  - in *exceptional circumstances*
  - when deemed not feasible or practical
  - by ordinance
SPECIFICATIONS

- The absence of good specifications can spell disaster.
- Detailed specifications insure that you acquire the product/equipment that you need to perform the service that you require.
- “An explicit set of requirements to be satisfied by a product, equipment or service.”

- “‘General specifications’ were not sufficient, but it was essential that such definite and detailed specifications accompany the offering as would disclose the thing to be undertaken with circumstantial fullness and precision...and every bidder should know, not only the general plan, but every particular of detail and circumstances which could affect the cost of the work or the advantage of the contract. This is necessary, not only to active and intelligent competition among bidders, but also to a certain and proper comparison of bids.” (Fones Bros. Hardware Co. v. Erb, 54 Ark. 645 (1891) (emphasis added)).
**HELPFUL SPEC. HINTS**

- Understand the job or equipment requirements before you begin the bidding process. This is essential because if you don’t know what you want, you can’t tell them what you want.

- Be as *specific* as you can—up front, so you won’t be disappointed later.

- You be the design engineer. Don’t assume that the dealer will know exactly what you want and will be able to sell you something off the lot.

- Don’t specify brand names or specific vendors—think about the feature you want and specify those.

- Look at prior specs.
“Where public officials have the right to reject any and all bids for a public contract, the view is generally taken that they may consider the differences or variations in the character or quality of the materials, articles, or work proposed to be furnished by the various bidders, in determining whether to accept any of the bids, or which bid to accept.”

Of course the rejection of the lowest bid must be, as it was here, for good cause and in good faith.

AWARDING THE BID

- Things to consider before awarding the bid:
  - Cost
  - Conformance to Bid Specifications
  - Field Testing or Demonstration
  - Previous experience with the bidder
KEEP IN MIND

- All bids should be opened publicly at precisely the time designated in the bid public bid notice.
- No late bids!
- No substitutions!
- Announce the bid results. Do not officially award the bids until you have reviewed the bids carefully and are satisfied that they meet specifications.
Bad faith consists of dishonest, malicious or oppressive conduct with a state of mind characterized by hatred, ill will or a spirit of revenge.

Bids are not required for motor fuels, oil, asphalt, asphalt oil, natural gas, and in certain cases, new motor vehicles.

An existing contract may be renewed or extended without bidding.

On different terms? For different work? New specs? Prior court opinions are unfavorable and the court may well consider it a new contract rather than an existing one.
**DANGERS OF MESSING UP THE BIDDING PROCESS**

- “Arkansas statutes create a property interest in a competitively bid public contract for the lowest bidder that complied with the bidding specifications and procedures.” (Harris v. Hays, 452 F.3d 714, 719 (8th Cir. 2006) (citing L & H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517, 524 (8th Cir. 1985)).

- This means that this property interest can be taken away unconstitutionally if a responsible lowest bidder is not given the contract.
  - And that means **LAWSUIT!**

- Not following bidding procedure does not excuse performance of the contract by the municipality.

- Restitution based on unjust enrichment has been permitted even when the associated contract was “void.” City of Damascus v. Bivens, 291 Ark. 600, 602-03, 726 S.W.2d 677, 679 (1987) (citing City of Little Rock v. The White Co., 193 Ark. 837, 103 S.W.2d 58 (1937)); Int’l Harvester Co. v. Searcy Cnty., 136 Ark. 209, 206 S.W. 312 (1919)).
INTERNET PURCHASING/BIDDING

- A municipality has the option to make purchases by participating in a Reverse Internet Auction. § 14-58-303(c)(1)

- Exception: Purchasing and contracts for construction projects and other materials shall be undertaken pursuant to § 22-9-203(a) and (b), which is the Public Improvements statute.
“Reverse Internet auction” means an Internet-based process in which bidders
- Are given specifications for items and services being sought for purchase by a municipality; and
- Bid against one another in order to lower the price of the item or service to the lowest possible level.

There are a bunch of specialized requirements in § 14-58-303(c)(2)-(5) that should be read and followed before conducting a Reverse Internet auction.
SPECIAL BIDDING REQUIREMENTS FOR PUBLIC IMPROVEMENTS

- A.C.A. § 22-9-203

Applies to Contracts over $35,000.00, that are for
- Major repair or alteration
- The construction or erection of buildings or other structures
- Or other permanent improvements
- And it applies to all cities and towns
“Construction” means any of the following services, functions, or combination of the following services or functions to construct a building, building site, or structure, or to construct a permanent improvement to a building, building site, or structure, including site work:

- (A) Alteration; (B) Design; (C) Erection; (D) Reconditioning; (E) Renovation; (F) Repair; or (G) Replacement;
- Pretty much everything
PUBLIC IMPROVEMENT PROCEDURES

Publication of intent to receive bids

- For two consecutive weeks (at least)
- 1 week gap between publication and receipt of bids
- The newspaper notice must contain seven (7) different things
- For contracts over $75,000.00, a statement encouraging participation of small, minority, and women’s business enterprises.

A.C.A. § 22-9-203
SEVEN NOTICE REQUIREMENTS

- Notice contains brief description of work
- Approximate location of work
- Where to obtain specifications and plans
- Date, time, and place where sealed bids will be received
- Amount of bid bond required (may state as percentage)
- A statement of city’s right to reject any or all bids
- “Other pertinent facts or information”

WHAT IF THE BIDS EXCEED THE BUDGET?

- Local governments may negotiate an award of a public improvement contract with the apparent responsible low bidder if all bids exceed the amount appropriated for the contract if:

  - Bidding on alternates was not required AND
  
  - The low bid is within 25% of the appropriated amount.

A.C.A. § 22-9-203(f)
ALTERNATES IN PUBLIC IMPROVEMENT CONTRACTS

- § 22-9-203(f) permits plans and specifications to require bids on alternates, but it imposes a limit of three alternates, requires that they be deductive and requires that they be set forth in the plans and specifications in numerical order.

- The apparent low bidder may be determined by deducting the alternates in numerical order, and after the deductions are made, the cost must be less than 25% of the amount appropriated.
If the contract for a public improvement calls for payment to the contractor from the city at completion of the project, then the municipality has 90 days to pay after completion before they begin to owe the contractor 10% interest on the amount owed per annum.

§ 22-9-205

This requirement does not apply to cities participating in Municipal League programs. Ark. Op. Atty. Gen. No. 83-198. The reason is that, through the League, cities are supplying their own needs rather than going out on the open market. Additionally, League programs are not insurance.
Any state agency, department, board, commission, or other body having the authority to construct or purchase, or negotiate for the construction or purchase of, any memorial, statue, bust, monument, or other similar article which is to be paid for from public funds shall establish specifications for the object, take competitive bids on the cost of constructing or furnishing the object, and award the contract to furnish or construct the object to the lowest responsible bidder meeting the established specifications.

Whenever a municipality enters into a contract for a public improvement (building or repairing buildings, the construction or improvement of highways, roads, streets, sidewalks, curbs, gutters, drainage or sewer projects) that involve trenches or excavations exceeding 5 ft. in depth, the municipality must:

- Incorporate OSHA standards into specs AND
- Include a separate pay item on the contract bid forms for trench/excavation safety systems to be included.

A.C.A. § 22-9-212
PROFESSIONAL SERVICES

- Competitive bidding may not be used in procuring legal, financial advisory, architectural, engineering, construction management and land surveying consultant services. See Ark. Code Ann. § 19-11-801 and following.

- Cities and towns may make other professional services subject to this statute by a two-thirds (2/3) vote of the governing body. See Ark. Code Ann. § 19-11-801(c).
Ark. Code Ann. § 19-11-802 states that a city “may encourage” firms engaged in the relevant professions to provide annual statements of qualifications.

- Or may request “as needed.”

- Perhaps “encourage” means “advertise.”
Ark. Code Ann. § 19-11-803 explains how the qualifications of each firm shall be evaluated, using criteria such as experience and technical competence; the capacity of the firm to perform the work; past record of performance; and the firm’s proximity to and familiarity with the area in which the project is located.
Ark. Code Ann. § 19-11-804 requires the city to select three firms.

Then select the best-qualified and negotiate a contract.

If unable to negotiate a contract, select another qualified firm from the three and undertake negotiations. § 19-11-805.

If unable to negotiate a contract with any of the three, compile a new list of qualified firms and start over. § 19-11-805.
AN EXAMPLE OF A PROF. SERV. MISHAP

- A municipality advertised price in a “bidding” style advertisement for an engineer’s services:

- “Presumably, the legislature wanted professional services to be procured on the basis of qualifications above all else without consideration of price until the firms were ranked and negotiations had begun. The interjection of price at any time prior to selecting the most qualified firms would seriously undermine this goal.”

DESIGN-BUILD CONSTRUCTION:

If one or more Arkansas firms have submitted bids for a public utility project*, and those bids are competing against non-Arkansas firms, then the public agencies “shall accept the lowest qualified bid from a firm resident in Arkansas.”


*Includes pipeline installation, sanitary, waterline, sewage, waterworks, and similar projects. 19-11-259(c).
HOW THE “BUYING LOCAL” STATUTE WORKS

- Essentially, a public agency must accept an Arkansas firm’s bid over the lowest qualified bid (which is from a non-resident) if the Arkansas firm’s bid is less than 5% higher than the non-resident bid.

- So you subtract 5% of the total bid from the Arkansas bid, and if that 5% reduction drops it below the non-resident lowest qualified bid, then the public agency must choose the Arkansas bid.

- A.C.A. §19-11-259
**PREFERENCE TO LOCAL BIDDERS**

- When a municipality is purchasing commodities or services by competitive bidding, it may enact an ordinance granting a preference of up to five percent (5%) to the lowest qualified bid from a resident firm in the municipality. A.C.A. § 14-58-105 (b)(1)(A)

- A municipality may also place a specific dollar cap on the total amount of preference granted, regardless of the percentage designated in the ordinance. A.C.A. § 14-58-105 (b)(1)(C)
WHAT IS A RESIDENT FIRM?

- A “resident firm” is “any individual, partnership, association, or corporation,” that:

  1) maintains at least one staffed place of business within the corporate limits of the municipality; and

  2) has paid taxes, for at least two successive years before submitting a bid, to the county that benefit the municipality on property either used or intended to be used in connection with the firm’s business. A.C.A. § 14-58-105 (a)(2)
HOW TO CALCULATE THE PREFERENCE

- Municipality’s procurement officials must take the total amount of each bid from a resident firm claiming the preference and deduct the percentage mandated by the ordinance from the total amount. A.C.A. § 14-58-105 (b)(1)(D)(i)

- After the deductions have been calculated, if the bid of a resident firm is lower than a bid from a nonresident, then the municipality must award the bid to the resident firm who submitted the lowest bid, regardless of whether or not that particular resident firm claimed the preference. A.C.A. § 14-58-105 (b)(1)(D)(ii)
WHEN PREFERENCE APPLIES

- The preference only applies when a municipality is comparing bids between one or more resident firms and other bids by nonresidents. A.C.A. § 14-58-105 (b)(2)(A)

- It does not apply when all the bids are from resident firms. A.C.A. § 14-58-105 (b)(2)(B)

- The preference will not apply when federal or state rules or regulations conflict. A.C.A. 14-58-105
QUESTIONS/COMMENTS?