CHAPTER 6

BID PROCEDURES AND AWARD OF CONTRACTS FOR PROJECTS OF STATE AGENCIES & DEPARTMENTS, POSTSECONDARY EDUCATION, PSCA, AND SIMILAR AUTHORITIES

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A. APPLICABILITY of CHAPTER

This chapter defines required and recommended procedures for the bid and award of contracts for projects supervised and administered by the Technical Staff. The types of projects to which this chapter applies includes projects of:

- State Agencies & Departments
- Postsecondary Education
- Public School & College Authority (PSCA)
- Alabama Building Renovation Finance Authority (ABRFA)
- Alabama Corrections Institution Finance Authority (ACIFA).
- Alabama Mental Health Finance Authority (AMHFA)
- Other "authorities" established by legislative acts to fund specific construction or improvement programs and which are assigned by the legislative act to the ABC for administration and supervision.

B. ADVERTISEMENT for BIDS

Title 39, "Public Works Law", requires the Awarding Authority to advertise for sealed bids once a week for three weeks for public works projects in excess of $50,000.00. The advertisement is to be published in a newspaper of general circulation in the county or counties in which the project, or any part of the project, is to be performed. If the project involves an estimated amount in excess of $500,000.00, the Awarding Authority must also advertise for sealed bids at least once in three newspapers of general circulation throughout the state. Exceptions may be made in cases of emergencies affecting public health, safety or convenience, so declared in writing by the Awarding Authority, setting forth the nature of the danger involved in any delay.

The advertisement is to be prepared and its publication arranged for by the design professional. The published text of the advertisement is to be bound in the project manual. Proof of publication should be obtained from the newspaper(s) and retained for submission with the contract to the Technical Staff. ABC Form C-1 is a sample Advertisement for Bids containing language satisfying the requirements of various state laws. The design professional should closely follow the language and format of the sample while incorporating project-specific information necessary to legally describe the solicitation. Project-specific information in the advertisement should include:

- Brief description of the scope of the work.
- Where, in the Awarding Authority's offices, plans and specifications are on file for examination.
- Procedure for obtaining plans and specifications.
- Time and place in which bids shall be received and opened publicly.
- Whether prequalification is required and where all written prequalification information is available for review (see Chapter 5, Section D.6 for prequalification procedures required by the Public Works Law).
- If applicable, a statement to the affect that attendance of a pre-bid conference is a mandatory prerequisite for bidding.

C. PRE-BID CONFERENCE

A pre-bid conference to answer questions and allow clarifications of issues is highly recommended by the ABC. The conference should be held well in advance of the bid date in order to provide ample time to issue addenda responding to questions raised during the conference. If the Awarding Authority wishes to make attendance of the pre-bid conference a mandatory prerequisite for prime contractors to bid on the project, this requirement must be stated in the Advertisement for Bids.

D. RECEIPT and OPENING of BIDS

Bids must be received at the location, date and time stated in the Advertisement for Bids or at a location, date, and time subsequently stated in a published addendum to the bid

documents. No bids shall be received after the designated time. All bids shall be opened and read publicly.

Bidders must follow all requirements of the Instructions to Bidders or risk disqualification of their bid. Any discrepancies observed upon opening bids shall be publicly noted at that time. Each bidder's compliance with the following statutory and Commission rule requirements are the minimum elements to be verified upon opening of bids:

1. **Delivery envelope:** Title 34, Chapter 8, Code of Alabama, 1975, requires licensing for general contracting when the cost of the work exceeds amounts established by the State Licensing Board for General Contractors. Under this law it is incumbent upon the design professional and Awarding Authority to require each bidder to show evidence of this license before bidding. In the absence of such evidence, a bid shall not be received or considered. Therefore, the outside of the envelope in which a bid is delivered must bear the bidder's name and state license number for general contracting and the envelope must be sealed. The bid must not be received in the absence of any of these features. The sum being bid may be changed by the bidder by writing the change in price, over the bidder's authorized signature, on the envelope; however, if the sum being bid is revealed on the envelope, the bid no longer constitutes a "sealed bid" and must not be received. No change in price may be made after the time designated for receipt of bids.

2. **Bid Security:** Bid security must be furnished with bids in excess of $50,000.00. Bid security shall be in the form of a bid bond (executed by a surety company duly authorized and qualified to make such bonds in Alabama) or a cashier's check (drawn on an Alabama bank) payable to the Awarding Authority. The amount of the bid security must be not less than of 5% of the Awarding Authority's estimated cost of the work or of the contractor's bid, but is not required to be more than $10,000.00. If a bid bond is furnished in lieu of a cashier's check, ABC Form C-4, Form of Bid Bond, is to be used.

3. **Proposal Form:** In addition to all pricing requirements, the Proposal Form should be checked for acknowledgment of all addenda, identification of bid security, complete legal signature, and complete identification of data regarding the bidder's state licensing for general contracting.

After bids have been opened, the apparent low bidder may be determined. However, actual determination of the lowest responsible and responsive bidder may only be made after the bids have been tabulated, reviewed, and evaluated within the time period specified in the Instructions for Bidders or Supplemental Instructions to Bidders. All bids shall be made available for public review and inspection by all bidders at the location of the bid opening for a reasonable period of time after they are opened.

DELAYED RECEIPT OF BID ALTERNATE PRICES: For projects with numerous bid alternates, it may be advisable to allow the bidders to delay submission of bid alternate prices for a short period (not to exceed two hours) after they have submitted their base bids. This affords the bidders the opportunity to focus on the bid alternate prices, minimizing the tendency to include contingencies to cover errors that might be made during

pre-bid analysis. Upon their receipt at the advertised time, the sealed base bids must remain sealed and secured in public view at the location in which they were received. The sealed bid alternate prices must then be received at the advertised time and each bidder's sealed base bid and sealed bid alternate prices opened and read publicly. If this procedure is to be utilized it must be stated in the Advertisement for Bids.

LIST OF MAJOR SUBCONTRACTORS AND SUPPLIERS: As stated on the Proposal Form, each bidder "...declares that a list of all proposed major subcontractors and suppliers will be submitted at a time subsequent to the receipt of bids as established by the Architect in the Bidding documents but in no event shall this time exceed twenty four (24) hours after receipt of bids." Upon opening of bids, bidders should be reminded of this requirement and the time by which the information is to be provided.

E. CERTIFIED TABULATION of BIDS

After bids have been received, the design professional shall check and tabulate all bids, certifying that the bids were received sealed, publicly opened and read aloud at the time and place advertised, and that it is a true and correct tabulation of all bids received for the project. This tabulation shall be signed by the design professional, notarized, and furnished to the Awarding Authority and the Technical Staff. If a bid is incomplete, qualified, or bears any condition or irregularity that may affect its responsiveness, the design professional shall note this information on the tabulation. Form ABC B - 6 in Appendix B is a sample Certified Tabulation of Bids which can be utilized or modified to facilitate project-specific bid requirements.

F. BID ERRORS, DISCREPANCIES, and MISTAKES

1. ERRORS AND DISCREPANCIES IN THE PROPOSAL FORM

"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." (' 39-2-7, Public Works Law)

2. MISTAKES WITHIN THE BID

Inherent with the competitive bid process is the possibility for mistakes in the bidder's estimate for the bid. Forcing a contractor to perform under circumstances of an obvious and significant mistake will frequently produce results that are not in the best interest of the state. The Public Works Law, '39-2-11, permits a low bidder discovering a mistake in its bid to seek withdrawal of its bid without forfeiture of its bid guaranty under the following conditions:

a. Timely Notice: The low bidder must notify the Awarding Authority in writing, within three working days after the opening of bids, that a mistake was made. This notice may be given within this time frame whether or not award has been made.

b. Substantial Mistake: The mistake must be of such significance as to render the bid price substantially out of proportion to the other bid prices.

c. Mathematical Error: The mistake must be mathematical in nature due to calculation or clerical error, an inadvertent omission, or a typographical error which results in an erroneous sum. Mistakes of law, judgement, or opinion are specifically excluded from this criteria.

d. Documentary Evidence: Clear and convincing documentary evidence of the mistake must be presented as soon as possible, but no later than three working days after the opening of bids.

The law further stipulates that the Awarding Authority's decision regarding a low bidder's request to withdraw its bid without penalty shall be made within 10 days after receipt of the bidder's evidence or by the next regular meeting of the Awarding Authority. Upon withdrawal of bid without penalty, the low bidder shall be prohibited from (1) doing work on the project as a subcontractor or in any other capacity and (2) bidding on the same project if it is re-bid.

G. RETURN of BID SECURITY

"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. . ." (' 39-2-5, Public Works Law)

H. NEGOTIATIONS to REDUCE COST

Negotiations with a low bidder to reduce a project cost when the low bid exceeds the available funds should be considered highly unusual and generally a procedure not to be recommended. Instead, every effort should be made in preparation of bid documents to secure bids within the funds available by the use of bid alternates. However, extenuating circumstances may arise under which an Awarding Authority determines that negotiation of the low bid is in the public interest to avoid delay and added costs associated with redesigning and rebidding a project.

When considering negotiation of the low bid, the Awarding Authority should be prepared to thoroughly document a shortage of funding, that the negotiated changes and prices are in the public interest and do not materially alter the original scope and nature of the project, that time is of essence, and that no collusion, fraud, or unjust enrichment is evidenced by the negotiations. The Awarding Authority and its legal advisor should consider guidelines for such negotiations as contained in a June 15, 1979, opinion of the Attorney General. The Awarding Authority must also recognize that the Technical Staff's approval of a contract resulting from negotiating the low bid does not certify its legality as this

responsibility rests with the Awarding Authority and its legal advisor.

I. RETENTION of PROPOSAL FORMS

The Awarding Authority must keep a permanent record of the original bid proposals, the proposal envelopes with any changes in bid prices, and in general all documents pertaining to the bids received and the award of a contract. These records shall be open to public inspection.

J. DETERMINATION of the LOWEST RESPONSIBLE and RESPONSIVE BIDDER

"The contract shall be awarded to the lowest responsible and responsive bidder, unless the Awarding Authority finds that all bids are unreasonable or that it is not to the interest of the Awarding Authority to accept any of the bids..." (' 39-2-6(a), Public Works Law) "Proposals may be rejected if they contain any omissions, alterations of forms, additions not called for, conditional bids, alternate bids not called for, incomplete bids, erasures, or irregularities of any kind. However, the Awarding Authority may reject any and all proposals or waive technical errors if, in its judgement, the best interests of the Awarding Authority will be promoted." (ABC Rule 170-X-5-.06)

Through the Certified Tabulation of Bids the design professional is required to record the relationship of the bids and any bid conditions or irregularities that may affect the responsiveness of any proposal. The final responsibility of determining the lowest responsible and responsive bidder rests with the Awarding Authority.

1. DETERMINATION OF THE LOWEST BIDDER

When bid alternates are used, the method defined in "Determination of Low Bidder by Use of Alternates" in the Instructions to Bidders must be followed exactly. Where all, or part(s), of the planned work is bid on a unit price basis, both the unit prices and the extensions of the unit prices constitute a basis of determining the lowest bidder. In cases of error in the extension of prices of bids, the unit price will govern. Unit prices for application to potential changes in the work are not a basis for determining the lowest bidder.

2. DETERMINATION OF THE LOWEST RESPONSIVE BIDDER

As defined by Public Works Law '39-2-6, "A responsive bidder is one who submits a bid that complies with the terms and conditions of the invitation to bids. Minor irregularities in the bid shall not defeat responsiveness."

Upon receipt of the Certified Tabulation of Bids and bid proposals from the design professional, the Awarding Authority must determine whether or not the lowest bidder is responsive. If the lowest bid is determined to be non-responsive, then this determination must be made of the second, third, etc., lowest bidders until the lowest responsive bidder is determined. In determining the lowest responsive bidder, the Awarding Authority has the discretion to waive technical errors and

omissions in bid proposals; but it may not waive statutory requirements or Commission rules.

a. A Bid Must Be Rejected If:

(1) It does not bear the full, legal description of the bidder as required on pages 1 and 2 of the Proposal Form.

(2) It is not submitted with the required bid security.

(3) It does not bear an authorized signature of the bidder.

(4) It is for more than the amount requiring licensing pursuant to Title 34, Chapter 8, Code of Alabama, 1975 and does not bear the information regarding the bidder's state license for general contracting as required on page 2 of the Proposal Form.

b. A Bid May Be Rejected If:

(1) It contains any omissions, alterations of forms, additions not called for, conditional bids, alternate bids not called for, incomplete bids, erasures, or irregularities of any kind.

(2) All, or part(s), of the planned work is bid on a unit price basis and any of the unit prices are obviously unbalanced or non-competitive. This does not apply to unit prices requested for application to change orders, which may be rejected without rejecting the entire bid.

3. DETERMINATION OF RESPONSIBLE BIDDER

As defined by Public Works Law '39-2-6, "A responsible bidder is one who, among other qualities determined necessary for performance, is competent, experienced, and financially able to perform the contract."

The Awarding Authority must determine which is the lowest responsible and responsive bidder by verifying whether or not the lowest responsive bidder is properly licensed by the State Licensing Board for General Contractors and is otherwise a "responsible bidder". Bidders prequalified to bid pursuant to prequalification procedures and criteria published by the Awarding Authority are deemed "responsible bidders" (see Chapter 5, Section D.6). If the lowest responsive bidder is found not to be responsible, the Awarding Authority may then consider the second, third, etc., lowest responsive bidders to determine the lowest responsible and responsive bidder. Upon any reasonable cause, the Awarding Authority has the right to reject any or all bids.

K. DISQUALIFICATION of BIDDERS

Any bidder(s) may be disqualified from consideration for contract award for the following reasons:

1. COLLUSION (Public Works Law '39-2-6)

"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."

2. ADVANCE DISCLOSURE (Public Works Law '39-2-6)

"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."

3. FAILURE TO SETTLE OTHER CONTRACTS (ABC Rule 170-X-5-.07)

The Awarding Authority may reject a proposal from a bidder who has not paid, or satisfactorily settled, all bills due for labor and material on other contracts in force at the time of letting.

L. AWARD of CONTRACT

The notice of award of a contract should state the amount for which the contract is to be awarded, clarifying which bid alternates are to be included, if any, and it should address acceptance, rejection, and/or negotiation of unit prices. The Public Works Law addresses the award of contracts under the following possible conditions:

1. NORMAL CONDITIONS

The successful bidder is to be notified by telegram, confirmed facsimile, or letter to the address shown on the bidder's proposal at the earliest possible date. (' 39-2-6)

2. DELAYED AWARD

"Should no award be 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 bid security." (' 39-2-5)

3. ONLY ONE OR NO BIDS RECEIVED

"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 ... 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." (' 39-2-6)

"Force Account Work" is defined by '39-2-1 to mean: "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."

4. ALL BIDS ARE UNREASONABLE

"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." (' 39-2-6)

5. WORK BY NEGOTIATION OR FORCE ACCOUNT

"On any construction project on which the Awarding Authority has prepared plans and specifications, received bids, and which 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 the 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." (' 39-2-6)

M. PROJECTS COSTING less than $50,000

Under the Public Works Law, if the cost of a public works project is less than $50,000, certain provisions of that law are waived as follows:

1. **Advertisement for Bids**: An Awarding Authority may let contracts for public works involving $50,000 or less with or without advertising. '39-2-2(c)

2. **Sealed Bids:** An Awarding Authority may let contracts for public works involving $50,000 or less with or without sealed bids. '39-2-2(c)

3. **Performance and Payment Bonds:** Performance and Payment Bonds are not required for contracts in an amount less than $50,000. '39-1-1(e)

4. **Advertisement for Completion:** For contracts of less then $50,000, 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. '39-1-1(g)

Although a formal, competitive bid process is not required by state law for public works projects costing less than $50,000, the Alabama Building Commission recommends soliciting at least three informal bids for such projects to assure that fair and reasonable prices are being paid.