

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

November 9, 2018

Paul Watkins, Jr., Esq.
Mayo Mallette, PLLC
5 University Office Park
Oxford, Mississippi 38655

Re: Mississippi Code Annotated Section 31-7-13(d)(iv)

Dear Mr. Watkins:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response.

Issues Presented

You inquire about the negotiation authority granted to agencies and governing authorities in Mississippi Code Annotated Section 31-7-13(d)(iv). Specifically, you ask the following:

I represent the Oxford School District, which is planning to build a new elementary school. Instead of awarding the entire contract to a single general contractor, the District has retained the professional services of a construction manager as advisor and intends to solicit bids for fifteen separate prime bid packages that make up the entire project. This is not the "construction manager at risk" arrangement described in Miss. Code Ann. Section 31-7-13.2. There is no cost guarantee and the District intends to comply with competitive bid requirements for each contract it solicits. In other words, the District will have fifteen prime contractors instead of one, all of which will be supervised by the construction manager.

Miss. Code Ann. Section 31-7-13(d)(iv) provides that, "[i]f the lowest and best bid is not more than ten percent (10%) above the amount of funds allocated for a public construction or renovation project, then the agency or governing authority shall be permitted to negotiate with the lowest bidder in order to enter into a contract for an amount not to exceed the

funds allocated.” The District has approved an overall budget for the project, but it has not allocated a specific amount of funds for each individual bid package. One of the primary advantages of using a construction manager in this manner is overall cost savings realized by seeking the lowest possible price for each portion of the project. This arrangement will be less beneficial to the District if it is not able to exercise the negotiation authority provided under this statute.

The District has asked me to seek your opinion about its statutory negotiation authority. If the total amount of the lowest and best bids for all of the fifteen bid packages exceeds the total amount of funds allocated for the entire project by no more than ten percent, may the District negotiate with some or all of the individual lowest bidders to enter into contracts that do not cumulatively exceed the amount of funds allocated for the entire project?

Response

No. The authority to negotiate pursuant to Mississippi Code Annotated Section 31-7-13(d)(iv) is triggered only when **the lowest and best bid** does not exceed more than ten percent (10%) of the funds allocated for the project. The language contained in Section 31-7-13(d)(iv) does not contemplate a “project” with multiple lowest and best bids.

Applicable Law and Discussion

Section 31-7-13(d)(iv) of the Mississippi Code Annotated specifically provides that:

[i]f the lowest and best bid is not more than ten percent (10%) above the amount of funds allocated for a public construction or renovation project, then the agency or governing authority shall be permitted to negotiate with the lowest bidder in order to enter into a contract for an amount not to exceed the funds allocated.

We have issued prior opinions interpreting what constitutes “the amount of funds allocated” in Section 31-7-13(d)(iv). See MS AG Op., Watkins (April 20, 2012)(determination as to the amount of funds allocated should be made prior to solicitation of bids); MS AG Op., Davis (October 9, 2015)(only costs specifically included in the bid specifications for the letting of the contract may be considered when making a determination of the allocation of funds); MS AG Op., Webb (May 23, 1997)(determination of what may be included when considering funds allocated must correspond directly to the request for bids). In our opinion to Paul Watkins, we provided that the:

determination as to the amount of funds available for the procurement of the proposed construction contract should be made prior to the solicitation of bids. In fact, the term "allocated" is in the past tense and presumes that

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the allocation has already been completed. As a general rule, a public entity, when procuring a construction contract, has provided the construction professional with its proposed budget in order for the professional to develop a design within the limits of the budget. Naturally, the design development phase has been completed prior to solicitation and receipt of bids. This practice ensures that the public entity has a general idea as to whether it has sufficient funds available to procure the proposed construction contract and helps to ensure that the public entity is paying a fair price for such contract.

Furthermore, the Supreme Court recently issued an opinion concerning its interpretation of Section 31-7-13(d)(iv). In *Hemphill Construction Company, Inc. v. City of Clarksdale*, 250 So.3d 1258 (2018), the Court took a very narrow approach to the phrase "funds allocated" and concluded that:

[t]he first phrase, "funds allocated," is included twice in the statute. The term "funds allocated" is in the past tense and can only refer to funds that already have been allocated, not funds to allot in the future. The City's authority to "negotiate ... to enter into a contract" was limited by the amounts originally allocated for the project, i.e., before the bids were opened."

According to your set of facts, while the school district asserts there is one "project", there will be fifteen bid packages which, ultimately, will result in fifteen lowest and best bids. Prior to issuing a solicitation of bids, the allocation of funds for each solicitation should be completed so that the school district can ensure that there are sufficient funds available to procure the proposed construction contract and that the public entity is paying a fair price for such contract. To consider the subject bid packages in the aggregate in an effort to trigger the negotiation authority granted in Section 31-7-13(d)(iv) would be, in our opinion, inconsistent with the limitations imposed in Section 31-7-13(d)(iv). Thus, considering the aforementioned and your factual scenario, we are of the opinion that an allocation would have to be made for each bid package, and, assuming that the lowest and best bid does not exceed more than ten percent (10%) of the funds allocated for each, the public entity could exercise the authority granted to it in Section 31-7-13(d)(iv).

If our office may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Leigh Triche Janous
Special Assistant Attorney General