

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

December 7, 2018

Anthony E. Nowak, Esq.
Board Attorney, DeSoto County Board of Supervisors
Post Office Box 346
Hernando, Mississippi 38632

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

Dear Mr. Nowak:

Attorney General Jim Hood received your letter of request and assigned it to me for research and response.

Issue Presented

You inquire about the impact of a recent case concerning the negotiation authority granted to agencies and governing authorities in Mississippi Code Annotated Section 31-7-13(d)(iv). Specifically, you provide the following:

As you are aware, our office serves as legal counsel for the DeSoto County Board of Supervisors. In that capacity, I have been authorized to request an opinion regarding the effect of *Hemphill Construction Company, Inc. v. City of Clarksdale, MS (2017-CA-00008-SCT)* on purchasing procedures.

In *Hemphill, Id.*, the Mississippi Supreme Court addressed a public bid dispute. The City of Clarksdale issued notice soliciting bids for a public construction project. Two bids were submitted in response to the notice issued by the City. Both bids exceeded, by more than 10%, the amount of public funds the City had allocated to the project. The City then sought to negotiate a better proposal with the lowest bidder, and to add additional funding to the project budget to cover the projected costs. The Court held that the City could not award the bid to either bidder due to the fact both bids exceeded the funding originally allocated by the City by more than 10%. More particularly, the Court held that the "City was without statutory authority to negotiate, conditionally accept, or enter into a contract with either Landmark or Hemphill based on the amount of funds the City had

allocated when the bids were opened.” *Hemphill, Id.* at page 8.

The *Hemphill* decision is a matter of first impression interpreting Miss. Code Ann. Section 31-7-13(d)(iv). Due to the Court’s interpretation of “negotiating” as being synonymous with “executing” a contract, a number of questions have arisen with respect to DeSoto County’s future public bidding and related budgeting practices. In an effort to obtain some clarity and guidance, I submit to you the following questions:

1. DeSoto County often establishes a budgeted amount for large construction projects and purchases. The project budget has separate line items within it for various aspects of the project or purchase. For example, with a construction project, the budget will have a total sum of funds allocated for the project and within the project’s budget there will be line items such as engineering, construction and architect services. When there is a budgeted project with separate line items within the fund, and one aspect of the purchase is advertised for bids such as actual construction, what constitutes the funds allocated, the particular line item identified for the item being bid or the entire project’s budget? In other words, in determining whether bids are within 10% of the funds allocated should the overall total project/purchase budget be looked at or the individual line item within that project’s budget that is identified for the item being submitted for bids?

2. If your answer to the first question is that DeSoto County must refer to the individual line item to determine the 10% compliance, would DeSoto County be able to move funds from line item to line item within the project’s budget to supplement the allocated funds to determine if bids are within 10%? Moving funds within line items is not an allocation of additional funds for a project/purchase but is merely a transfer of funds between line items within an established budget.

3. May DeSoto County simply allocate funds to a project budget without establishing specific line items for each element of the project, thereby allowing it to utilize all funds allocated for determining if bids for one aspect of the project/purchase are within 10% [of] allocated funds?

4. In *Hemphill, Id.*, the MS Supreme Court held that [the] City [of] Clarksdale could not “procure additional public funds post bid-opening.” In *Hemphill, Id.*, the additional public funds were from a third party. If DeSoto County has additional funds in its cash reserve for project contingency purposes within the overall capital project fund could those funds be considered as part of the funds allocated, or could those funds be transferred to the project/purchase budget, after bid opening since those funds do not have to be “procured” but are merely an internal budget transfer?

5. When determining a budget for a project could the County simply not set a specific budget amount and "allocate" all available funds in the County's budget not otherwise budgeted for another purpose?

Response

Pursuant to the provisions of Mississippi Code Annotated Section 7-5-25, official opinions of the Attorney General are limited to questions involving determinations solely on questions of state law. We note that the majority of your inquiries refer to the budgeting procedures of the county on its projects. As you know, we are prohibited from interpreting policies and procedures and must refrain from opining on matters that require us to do so. Therefore, to the extent that your inquiries require this office to make determinations which exceed the limitations established in Section 7-5-25, we decline to respond by way of official opinion and provide the following for future guidance.

As to your first inquiry, the term "allocated funds" as contemplated in Section 31-7-13(d)(iv) is limited to the funds specifically allocated for the letting of the construction contract itself. Regardless of whether the funds are a "separate line item" in the county's project budget, the allocated funds must correspond directly to the specifications contained in the invitation for bids. In response to your remaining questions, the only funds that may be considered when determining whether the construction project negotiations authority granted in Section 31-7-13(d)(iv) has been triggered are the funds that the governing authority intends on using to procure the construction contract for which it has solicited bids.

Applicable Law and Discussion

In regard to what constitutes "allocated funds," we have previously opined that "the amount of funds allocated for a public construction project...under the statute must correspond directly to the request for bids." MS AG Op., Watkins (April 20, 2012)(citing MS AG Op., Webb (May 23, 1997)). In our opinion to William H. Davis, Jr. dated October 9, 2015, we opined that:

...the governing authority's negotiation authority granted in Section 31-7-13(d)(iv) would be limited to the funds specifically allocated for the letting of the construction contract itself and could not include fees and costs outside of the construction contract. As we provided in Watkins, the determination as to the amount of funds allocated for the construction contract is a factual determination to be made by the governing authority. Such determination is not one that can be made by this office and would be supported by an assessment of the bid documents, specifically, the bid specifications, of the construction/renovation project.

In fact, the Court in *Hemphill Construction Company, Inc. v. City of Clarksdale, MS*, 250 So.3d 1258, specifically referenced our Watkins opinion cited above and concluded that

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"[t]he 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." *Id.* at 1263. Thus, in our opinion, the "allocated funds" as contemplated in Section 31-7-13(d)(iv) would be limited to the funds specifically allocated for the letting of the construction contract itself. Regardless of whether the funds are a "separate line item" in the county's project budget, the allocated funds must correspond directly to the specifications contained in the invitation for bids. With respect to the "movement" of funds, the only funds that may be considered when determining whether the construction project negotiations authority granted in Section 31-7-13(d)(iv) has been triggered are the funds that the governing authority intends on using to procure the construction contract for which it has solicited bids. MS AG Op., Watkins (April 20, 2012). See also MS AG Op., Lowrey (December 23, 1998)(once sum allocated, board may not add allocations to its budget).


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

Sincerely,

JIM HOOD ATTORNEY GENERAL

OFFICIAL

By:


Leigh Triche Janous
Special Assistant Attorney General