

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

January 11, 2019

Keith W. Turner, Esq.
Attorney, West Rankin Utility Authority
Post Office Box 180807
Richland, Mississippi 39218-0807

Re: Mississippi Code Annotated Section 31-7-13

Dear Mr. Turner:

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 as to whether the publication of the proposed specifications and subsequent award based on said specifications would amount to a circumvention of the provisions of the public purchasing statutes found at Section 31-7-13 of the Mississippi Code. Specifically, you provide the following:

The West Rankin Utility Authority (the "Authority") has begun the process to construct a new wastewater treatment plant. The project and its several components are subject to the purchasing procedures set forth at Miss. Code Ann. Section 31-7-13. The project engineer has proposed certain language for the Declaration of Equipment Manufacturers section of an upcoming bid-request publication related to the project. In discussions with the Authority, the project engineer has been firm in its position that the proposed language is legally acceptable and within the requirements of Section 31-7-13, stating to the Authority that the engineer has employed such language in projects around Mississippi.

Facts

The Authority is unaware of any legal authority directly on point, and therefore seeks your Office's opinion. The Authority is asking whether it is permissible for a public entity, subject to Section 31-7-13, to employ certain bidding procedures. As an example, then, the engineer's

proposed language reads as follows:

5.01 Declaration of Equipment Manufacturers

- A. The successful Bidder shall provide equipment for this Contract which meets the technical and performance requirements of the Contract Documents. This Declaration of Equipment Manufacturers indicates the named equipment manufacturer listed in the Specifications for the selected equipment items shown on the following pages. For each equipment item, there is one (1) space provided for the Bidder to list an additional equipment manufacturer which the Bidder would propose to utilize on this Project. Only one manufacturer may be written in by the Bidder for each equipment item. If the Bidder does not list an additional manufacturer in the space provided, equipment from the named manufacturer shall be provided. If, after the completion of the evaluation procedure outlined below, the ENGINEER determines that equipment from the listed manufacturer does not meet the requirements of the specifications, the Bidder shall provide equipment from the named equipment manufacturer. Bidder must provide equipment from the named manufacturer if the Bidder's listed manufacturer, if any, is not approved. No additional manufacturers may be submitted for consideration after receipt of bids. The Bidder shall enter a DEDUCT AMOUNT for each listed equipment manufacturer entered. This DEDUCT AMOUNT will be the amount deducted from the Contract Amount if the ENGINEER's evaluation determines that the equipment from the Bidder's proposed listed manufacturer meets the requirements of the Specifications.
- B. The DEDUCT AMOUNTS for approved listed manufacturers SHALL NOT be used in the evaluation and award of the Contract. Bidder shall use costs from the named manufacturer in developing his Bid. After award and execution of the Contract, the DEDUCT AMOUNTS for the approved listed manufacturers shall be summarized and a deduct change order shall be executed between the OWNER and CONTRACTOR to incorporate the equipment into the Work.
- C. [not relevant to the questions presented herein]
- D. If a listed [i.e., non-named] manufacturer is approved for use on the Project, the successful Bidder maintains responsibility for coordination of the proposed equipment item into the Work and shall make any changes as may be required for the Work to be complete in all respects without additional costs to the OWNER. The successful Bidder shall reimburse the OWNER for any costs

incurred by the ENGINEER to redesign or otherwise modify the Contract Documents to incorporate any listed equipment item.

E. thru G. [not relevant to the questions presented herein]

(Emphasis in original.) The bidding procedures reflected in the above-quoted proposed language give rise to four questions on the Authority's part, with which we request your Office's assistance.

Question 1: The type of procedure reflected in the proposed language requires all bidders to use the named manufacturer's product costs in their bids, disallowing any possible savings from using comparable equipment from being considered as part of a bid. It further provides that the engineer would make a determination about the suitability of any comparable equipment proposed by the successful bidder only after a contract is awarded, and that the named manufacturer's equipment would be used if the engineer disapproves the proposed comparable equipment; i.e., the engineer would consider only one comparable alternative before defaulting to the named manufacturer. Finally, the procedure would require the successful bidder to reimburse the government entity for any project changes that may be required due to the use of any comparable equipment not produced by the named manufacturer. In practice, this requirement means the successful bidder would have to pay the engineer for the use of cost-saving comparable equipment.

Miss. Code Ann. Section 31-7-13(m)(viii) provides an exception to competitive bidding requirements where an item is available from one source only. Use of this exception requires prior approval from the Department of Finance and Administration and/or the applicable governing authority. Your Office has previously opined that to be covered by the exception, an item must be sufficiently unique and said uniqueness must be certified by the appropriate authority before authorizing the purchase. Brian A. Montague, Esq., Atty. Gen. Opn. No. 2001-0392, 2001 WL 880485 at *1-2 (A.G. Ofc. July 13, 2001). "To declare an item single source only after the desired product is not the low bid is anathema to the purpose of the exception." *Id.* at *2.

Would a government entity subject to Section 31-7-13 impermissibly attempt to circumvent the process for properly utilizing the single-source exemption if it: A) ignores cost differentials brought about by bidders' proposed use of comparable equipment; B) does not consider the suitability of comparable equipment during the bid-selection process; and/or C) requires that the successful bidder pay the engineer in the event comparable equipment is used, thereby discouraging the use of other manufacturers and giving undue preference to the named manufacturer?

Question 2: Miss. Code Ann. Section 31-7-13(c)(iv)(1) requires in part that "Specifications pertinent to such bidding shall be written so as not to exclude comparable equipment of domestic manufacture." Interpreting this section of the statute, your Office has previously opined that a public entity may use specifications from a certain product's literature as a starting point for its bid-request specifications, but "Specifications written so as to destroy the competitive atmosphere are not in the best interest of any public body." Montague at *1.

The procedure reflected in the proposed language would prohibit bids from including potential savings derived from using equipment other than those from the named manufacturer. By disallowing bidders from differentiating themselves based on potentially lower-cost, comparable equipment, would this prohibition impermissibly "exclude comparable equipment of domestic manufacture" from the bidding process? Would it "destroy the competitive atmosphere" by requiring all bidders to use the same equipment costs in their bids?

Question 3: Miss. Code Ann. Section 31-7-13(d)(i) requires determination of the "lowest and best bidder." The procedure reflected in the proposed language would require bidders to use the named manufacturer's costs in all bids, regardless of whether they would propose in practice to use lower-cost, comparable equipment. By using such a procedure, would a government entity subject to Section 31-7-13 run afoul of this statutory requirement by excluding differences in equipment costs from bids, thereby inhibiting its ability to discern which bid is "lowest and best" in practice?

Question 4: Miss. Code Ann. Section 31-7-13(o) provides that "No contract or purchase as herein authorized shall be made for the purpose of circumventing the provisions of this section requiring competitive bids." The procedures reflected in the proposed language would require all bidders to use the named manufacturer's equipment cost in their bids, rather than differentiate their bids based on the possibility of using lower-cost comparable equipment. Would such a procedure inevitably lead a government entity subject to Section 31-7-13 to enter into a contract which violates Section 31-7-13(o), because it would be based on bids that were insufficiently competitive under the statute?

Finally, the Authority asks your Office not only to consider its four questions individually, but also to consider whether these issues taken collectively would result in a bidding process that runs afoul of the competitiveness requirements of Mississippi law. On behalf of the Authority, I appreciate your Office's time and attention to these questions.

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. Opinions of this office may not be issued which require our office to make factual determinations. 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 to your individual inquiries by way of official opinion and provide the following for future guidance.

The determination as to whether publication of the proposed specifications and subsequent award based on said specifications is proper is ultimately one to be made by the governing authority. In our opinion, however, the proposed procurement process violates the provisions of Section 31-7-13 and appears to circumvent the competitive spirit of the public purchasing statutes.

Applicable Law and Discussion

The ultimate purpose of the public purchasing statutes is to ensure efficiency and economy in purchases made by public entities as provided in Section 31-7-3. In other words, the primary purpose of the public purchasing laws is to permit public entities to procure quality commodities, equipment and construction contracts at the lowest possible price. In its enactment of the public purchasing laws found in Sections 31-7-1 *et seq.*, the Legislature outlined the distinct methods to be used when making qualified purchases.

Your request references the single source items exception to the competitive bidding requirements imposed in Section 31-7-13. This exception is found in subsection (m)(viii) and exempts the purchase of items that are available from only one source. In addition to making a determination that the purchase is only available from one source, Section 31-7-13(m)(viii) requires that "a certification of the conditions and circumstances requiring the purchase shall be filed...by the governing authority with the board of the governing authority." In regard to the nature of "single source items," we have previously opined that:

[i]t is obvious by the language of the statute that an item declared 'single source' is one which is so unique as to be exempt from bidding requirements. To be deemed 'single source,' a certification of the conditions and circumstances must be filed with the appropriate authority. To declare an item single source only after the desired product is not the low bid is anathema to the purpose of the exception.

MS AG Op., Montague (July 13, 2001). Only if the public entity has made the requisite factual findings and filing, may it rely on this method to procure a specific item without having to solicit competitive bids.

In addition, you reference Section 31-7-13(c)(iv)(1) in your request which states the following:

iv) Specification restrictions.

1. Specifications pertinent to such bidding shall be written so as not to exclude comparable equipment of domestic manufacture.

However, **if valid justification is presented, the Department of Finance and Administration or the board of a governing authority may approve a request for specific equipment necessary to perform a specific job. Further, such justification, when placed on the minutes of the board of a governing authority, may serve as authority for that governing authority to write specifications to require a specific item of equipment needed to perform a specific job.** In addition to these requirements, from and after July 1, 1990, vendors of relocatable classrooms and the specifications for the purchase of such relocatable classrooms published by local school boards shall meet all pertinent regulations of the State Board of Education, including prior approval of such bid by the State Department of Education.

(Emphasis added.) Clearly, the Legislature, as a general rule, intended to prohibit the writing of bid specifications that exclude comparable equipment. See Section 31-7-13(c)(iv)(1). Having said that, the Legislature did carve out an exception to the prohibition of writing restrictive specifications in its enactment of Section 31-7-13(c)(iv)(1) when valid justification has been presented and approved by the governing authority. In our opinion to Bobby R. Long concerning specification restrictions, we opined that:

[a] bid specification serves the primary purpose of providing a basis for obtaining a product that will satisfy a particular need. As a result, bid specifications often have the effect of eliminating those items that fall outside the terms of the bid specifications. However, the ultimate goal of the public purchasing statutes is to encourage competition to ensure efficiency and economy in purchases made by public entities. In fact, Section 31-7-13(c)(iv)(1) specifically prohibits a public entity from writing bid specifications that exclude comparable equipment. Having said that, the Legislature recognized, in its passage of said section, that in some instances it might be appropriate for a public entity to issue restrictive bid specifications because a public entity "must be able to determine how its needs may be fulfilled and which features are indispensable to fulfilling those needs.

MS AG Op., Long (June 11, 2010). See also MS AG Op., Mitchell (April 18, 2012). Therefore, a public entity may write and issue restrictive specifications which seek a particular item of equipment only when the specific equipment is "necessary to perform

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a specific job" and valid justification is presented to the board of a governing authority.

Based on the information provided in your request, the proposed procurement process, namely the writing of restrictive specifications, is, in our opinion, inconsistent with the provisions of Section 31-7-13(c)(iv)(1). Furthermore, the proposed procurement process appears to circumvent the competitive spirit and purpose of the public purchasing laws.

If we may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Leigh Triche Janous
Special Assistant Attorney General

OFFICIAL OPINION