

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

June 7, 2019

Holmes S. Adams, Esq.
Attorney, Madison County School District
1018 Highland Colony Parkway, Suite 800
Ridgeland, Mississippi 39157

Re: Legal questions relating to state purchasing laws

Dear Mr. Adams:

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 method of procurement proposed in your opinion request violates the public purchasing statutes. Specifically, you provide the following:

This firm represents the Board of Education (the "Board") of the Madison County School District (the "District"). On behalf of the Board, we seek an opinion on the legal questions, set out below, relating to state purchasing laws.

The District has twenty-three schools of which four are high schools, one ninth-grade school, and four middle schools. The District currently purchases athletic uniforms and athletic equipment from a rapidly dwindling number of suppliers in the state. The suppliers generally approach the high schools on a school by school basis, proposing contracts to supply athletic products for a particular school. All the products are "commodities" as defined by Miss. Code Ann. Section 31-7-1 ("goods, merchandise, ... equipment, ... and other personal property"). The high school often desires a specific brand because such selection guarantees uniformity in styles and school colors across all sports teams and easily supplements and matches existing inventory. The actual purchase price of the products is the catalogue list price but with significant discounts (up to 30% or 40%), additional rebates, and other

consideration such as free goods. To make my point clear, the catalogue list price is not the actual purchase price of the product for the District. Catalogue prices change annually or more often as reflected in the current product catalogue, but discounts, rebates and other consideration continue to apply. The District's separate purchase orders will vary from less than \$5,000 to more than \$50,000.

The District believes that it can achieve considerably more favorable price terms and resulting significant costs savings, including larger discounts, larger rebates, and other consideration, if the District advertised for request for proposals (RFP) before entering into a contract for the global procurement of all athletic products for all schools in the entire District.

My first question is whether advertising for, assessing, and accepting a proposal based on the best catalogue discounted schedule and rebate program to supply the District schools on a global basis violates state purchasing laws.

Second, if the District awards a contract through the RFP process and based on discounts, rebates, and other consideration, would the awarded contract alleviate the need to obtain quotes and/or bids for the purchase of commodities during the life of the contract?

Third, may the District enter into a non-exclusive contract with the successful proposer for a term of three years when the District will not know the future catalogue list price past the first year of the contract but will be certain of discounts, rebates and other consideration on future purchases?

Response

Barring application of the statutory exemption found in Section 31-7-13(m)(i) or the alternative procurement manner outlined in Section 31-7-13(d)(ii), the Madison County School District must comply with the provisions of Section 31-7-13 of the Mississippi Code when purchasing athletic equipment and uniforms.

Applicable Law and Discussion

Purchases of commodities made by governing authorities are required to comply with Section 31-7-13 of the Mississippi Code unless otherwise exempted. The term "governing authority", as defined in Section 31-7-1(b), specifically includes "governing boards of all school districts." Furthermore, Section 31-7-1(e) defines the term "commodities" to include:

[t]he various commodities, goods, merchandise, furniture, equipment, automotive equipment of every kind, and other personal property purchased by the agencies of the state and governing authorities, but not

commodities purchased for resale or raw materials converted into products for resale.

Without question, the referenced athletic uniforms and athletic equipment are commodities as contemplated in Section 31-7-1(e). Thus, the school district would be required to comply with the provisions of Section 31-7-13 when purchasing said athletic equipment and uniforms. With regard to the method of procurement, Section 31-7-13 provides a detailed process for purchases not over \$5,000.00, purchases over \$5,000.00 but not over \$50,000.00 and purchases over \$50,000.00. Barring a statutory exemption, the school district would be required to comply with the methods of procurement outlined in Section 31-7-13. Absent a statutory exemption, the procedure you describe appears to result in a violation of Section 31-7-13(c) when the school district is making purchases of commodities over \$50,000.00.¹

Having said that, we note that Section 31-7-13(m)(i) provides the following exemption:

(i) Purchasing agreements approved by department. Purchasing agreements, contracts and maximum price regulations executed or approved by the Department of Finance and Administration.

Assuming that the proposed contract constitutes a contract "approved by the Department of Finance and Administration" in accordance with Section 31-7-13(m)(i), the procurement of the subject athletic uniforms and equipment would be exempt from the competitive bidding requirements set forth in Section 31-7-13.

The statute also provides an alternative method of procurement when the purchasing entity is a "Certified purchasing office" as defined in Section 31-7-1(i). Section 31-7-13(d)(ii) authorizes certified purchasing offices to use a Request For Proposal process when purchasing commodities. Your request did not specify whether the subject purchasing entity constitutes a "certified purchasing office."

As an alternative, we note that Section 31-7-12 requires the Department of Finance and Administration to establish a state contract "to ensure that the prices of commodities on the state contract are the lowest and best prices available from any source offering that commodity at the same level of quality or service...." Because Section 31-7-12 grants governing authorities the ability to purchase commodities from the state contract, the school district may wish to purchase its athletic uniforms and equipment in this manner if the subject commodities are either on the state contract or can be added thereto.

As to your final inquiry, we question the ability of a public entity to enter into a contract

¹ In the event that the school district did not receive at least two (2) requests for proposals, such purchase would violate Section 31-7-13(b) when making purchases over \$5,000.00 but not over \$50,000.00.

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in which the terms, including essential terms such as price, are unknown. Whether the "discount off catalogue list price" method described in your request letter is appropriate or not is not a question of law and cannot be addressed by official opinion. In addition, a public entity may not bind successor boards to contracts unless statutorily-authorized. Given the various options discussed above, we suggest you discuss this issue with the Department of Finance and Administration.

If this office may be of further assistance, please let us know.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Leigh Triche Janous
Special Assistant Attorney General

OFFICIAL OPINION