

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

July 19, 2019

James C. Simpson, Jr., Esq.
Attorney, Long Beach School District
P.O. Box 651
Jackson, Mississippi 39205-0651

Re: Question regarding bidding of Cost-Per-Image Agreement

Dear Mr. Simpson:

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 school district is required to solicit bids for the procurement of a print services agreement and, if so, must the school district implement the reverse auction method of procurement outlined in Section 31-7-13(c)(i)(2) when doing so. Specifically, you provide the following:

Our firm serves as the Board attorney for the Long Beach School District (the "District"). I am requesting on behalf of the District your official opinion on whether the District must solicit bids for a Cost-Per-Image Agreement (the "Agreement") pursuant to Section 31-7-13 of the Mississippi Code of 1972 (the "Code"), and if so, must the District solicit bids for the Agreement through the reverse auction requirements of Section 31-7-13(c)(i)(2) of the Code.

Background

The Agreement is in essence a managed print services agreement pursuant to which the selected contractor is to provide, among other things:

1. A service that allows and readily provides images to the District in the form of mono and/or color images for a set rate per image. The District will pay for this service at a flat monthly rate for a designated number of images.

2. The services provided by the contractor will include, among other things, the installation and maintenance of copiers, printers and a print server in the District schools, furnishing necessary toner and other supplies for the operation of devices (the District will use paper it purchases outside of the Agreement), training, remote monitoring, quarterly report-review meetings, supply/parts fulfillment and equipment repair services (collectively, the "Services"). The Agreement will not require the District to purchase, lease or rent the copiers, printers or related software supplies. The copiers, printers, print server and software for monitoring/remote monitoring will be owned by the contractor.
3. For providing the Services under the Agreement (installation and use of the copiers and printers, ongoing maintenance, monitoring, training and reporting) the contractor will charge the District a cost per image made.

The District intends to solicit proposals from qualified vendors for the Services under the Agreement. The Agreement price is expected to exceed \$50,000 over the term of the Agreement.

The District respectfully requests your official opinion regarding the following questions:

1. Is the District required to solicit bids for the Agreement pursuant to Section 31-7-13 of the Code?
2. If the District is required to solicit bids for the Services under the Agreement, is it required to solicit the bids through a reverse auction pursuant to Section 31-7-13(c)(i)(2) of the Code?

Response

Pursuant to the provisions of Section 7-5-25 of the Mississippi Code, 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.

Assuming the school district determines that it will be procuring a "printing" contract, it is required to comply with the bidding mandates contained in Section 31-7-13 when doing so, barring some statutory exemption found in Section 31-7-13(m). Should the school district determine that the contract it is seeking to procure is purely a service contract, it would not be required to comply with the bidding mandates of Section 31-7-13. In the event that the subject contract encompasses services, as well as commodities, equipment or supplies which are more than incidental to the services provided, its procurement must comply with the competitive bidding requirements provided in Section

31-7-13, unless otherwise exempt. Once the school district determines that the procurement of the subject contract must comply with the bidding requirements outlined in Section 31-7-13(c), it would be required to utilize the reverse auction method of procurement in accordance with Section 31-7-13(c)(i)(2), unless an alternative process has been approved by the Public Procurement Review Board.

Applicable Law and Discussion

You describe the type of contract that the school district is seeking to procure as "a managed print services agreement." However, you include other descriptions, in some instances, which indicate that the subject contract may be purely a service contract or may involve the purchase of commodities based on the description of the compensation of the contract, i.e., cost per image. Because this office is prohibited from making factual determinations, it is incumbent upon the school district to determine the type of the contract it seeks to procure. For example, the school district must determine whether it is seeking to procure a printing contract, a pure service contract or a service contract that includes the acquisition of commodities and/or equipment that are more than incidental to the services being provided in the contract.

Section 31-7-13 of the Mississippi Code Annotated specifically provides the following:

OFFICIAL OPINION

All agencies and governing authorities shall purchase their commodities and **printing**; contract for garbage collection or disposal; contract for solid waste collection or disposal; contract for sewage collection or disposal; contract for public construction; and contract for rentals as herein provided.

(a) **Bidding procedure for purchases not over \$5,000.00.** Purchases which do not involve an expenditure of more than Five Thousand Dollars (\$5,000.00), exclusive of freight or shipping charges, may be made without advertising or otherwise requesting competitive bids. However, nothing contained in this paragraph (a) shall be construed to prohibit any agency or governing authority from establishing procedures which require competitive bids on purchases of Five Thousand Dollars (\$5,000.00) or less.

(b) **Bidding procedure for purchases over \$5,000.00 but not over \$50,000.00.** Purchases which involve an expenditure of more than Five Thousand Dollars (\$5,000.00) but not more than Fifty Thousand Dollars (\$50,000.00), exclusive of freight and shipping charges, may be made from the lowest and best bidder without publishing or posting advertisement for bids, provided at least two (2) competitive written bids have been obtained. Any state agency or community/junior college purchasing commodities or procuring construction pursuant to this paragraph (b) may authorize its purchasing agent, or his designee, to accept the lowest competitive written bid under Fifty Thousand Dollars (\$50,000.00). Any governing authority purchasing commodities pursuant to this paragraph (b) may authorize its purchasing agent, or his designee, with regard to governing authorities other than counties, or its purchase

clerk, or his designee, with regard to counties, to accept the lowest and best competitive written bid. Such authorization shall be made in writing by the governing authority and shall be maintained on file in the primary office of the agency and recorded in the official minutes of the governing authority, as appropriate. The purchasing agent or the purchase clerk, or their designee, as the case may be, and not the governing authority, shall be liable for any penalties and/or damages as may be imposed by law for any act or omission of the purchasing agent or purchase clerk, or their designee, constituting a violation of law in accepting any bid without approval by the governing authority. The term "competitive written bid" shall mean a bid submitted on a bid form furnished by the buying agency or governing authority and signed by authorized personnel representing the vendor, or a bid submitted on a vendor's letterhead or identifiable bid form and signed by authorized personnel representing the vendor. "Competitive" shall mean that the bids are developed based upon comparable identification of the needs and are developed independently and without knowledge of other bids or prospective bids. Any bid item for construction in excess of Five Thousand Dollars (\$5,000.00) shall be broken down by components to provide detail of component description and pricing. These details shall be submitted with the written bids and become part of the bid evaluation criteria. Bids may be submitted by facsimile, electronic mail or other generally accepted method of information distribution. Bids submitted by electronic transmission shall not require the signature of the vendor's representative unless required by agencies or governing authorities.

(c) Bidding procedure for purchases over \$50,000.00.

(i) Publication requirement.

1. Purchases which involve an expenditure of more than Fifty Thousand Dollars (\$50,000.00), exclusive of freight and shipping charges, may be made from the lowest and best bidder after advertising for competitive bids once each week for two (2) consecutive weeks in a regular newspaper published in the county or municipality in which such agency or governing authority is located. However, all American Recovery and Reinvestment Act projects in excess of Twenty-five Thousand Dollars (\$25,000.00) shall be bid. All references to American Recovery and Reinvestment Act projects in this section shall not apply to programs identified in Division B of the American Recovery and Reinvestment Act.
2. ***Reverse auctions shall be the primary method for receiving bids during the bidding process.*** If a purchasing entity determines that a reverse auction is not in the best interest of the state, then that determination must be approved by the Public

Procurement Review Board. The purchasing entity shall submit a detailed explanation of why a reverse auction would not be in the best interest of the state and present an alternative process to be approved by the Public Procurement Review Board. If the Public Procurement Review Board authorizes the purchasing entity to solicit bids with a method other than reverse auction, then the purchasing entity may designate the other methods by which the bids will be received, including, but not limited to, bids sealed in an envelope, bids received electronically in a secure system, or bids received by any other method that promotes open competition and has been approved by the Office of Purchasing and Travel. However, reverse auction shall not be used for any public contract for design or construction of public facilities, including buildings, roads and bridges. The Public Procurement Review Board must approve any contract entered into by alternative process. The provisions of this item 2 shall not apply to the individual state institutions of higher learning.

(Emphasis added).

As evidenced by the express language in the first sentence of Section 31-7-13 of the Mississippi Code, it is clear that the procurement of printing contracts by agencies and governing authorities is subject to the bidding mandates contained in Section 31-7-13. A school district fits squarely within the definition of the term "governing authority" as defined in Section 31-7-1(b), which specifically includes "governing boards of all school districts" in its definition. See MS AG Op., Bryant (May 5, 2000); MS AG Op., Boyd (September 17, 1987).

In regard to what constitutes a "printing" contract, unfortunately, Sections 31-7-1 and 31-7-13 do not include a definition. In the absence of a definition, Mississippi Code Annotated Section 1-3-65 requires "[a]ll words and phrases contained in the statutes are used according to their common and ordinary acceptance and meaning; but technical words and phrases according to their technical meaning." The term "printing" is commonly associated with a "printed state or form...printed publications...a copy made by printing...." according to Merriam-Webster's Collegiate Dictionary (10th Ed. 2001). Assuming that the school district determines that it will be procuring a "printing" contract, it will be required to comply with the bidding mandates contained in Section 31-7-13 when doing so, barring some statutory exemption found in Section 31-7-13(m). Should the school district determine that the contract it is seeking to procure is purely a service contract, it would not be required to comply with the bidding mandates of Section 31-7-13. We have consistently recognized that contracts for personal or professional services are not subject to the provisions of Section 31-7-13 when such contract does not include the purchase of commodities, equipment, furniture or construction. See MS AG Op., Bracey (August 24, 2018); MS AG Op., Dillard (January 27, 2012); MS AG Op., McCain (May 7, 2010). Compare MS AG Op., Upchurch (February 5, 2016)(contracts for services which include procurement of commodities incidental to services provided under the contract are not subject to the bidding requirements). If the subject contract encompasses services, as well as commodities,

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equipment or supplies which are more than incidental to the services provided, its procurement must comply with the competitive bidding requirements provided in Section 31-7-13, unless otherwise exempt. See MS AG Op., Treadway (July 8, 2016).

As to your second inquiry, pursuant to Section 31-7-13(c)(i)(2), the primary method for receiving bids for purchases exceeding \$50,000.00 is via a reverse auction. In a prior opinion to Anthony Nowak, we opined that Section 31-7-13(c)(i)(2) applies to governing authorities. MS AG Op., Nowak (June 9, 2017). See also MS AG Op., Smith (September 29, 2017)(due to the plain and unambiguous language contained in the statute, Section 31-7-13(c)(i)(2) applies to governing authorities); MS AG Op., Nowak (October 13, 2017)(request for reconsideration of prior opinion resulted in affirmation that Section 31-7-13(c)(i)(2) applies to governing authorities). Thus, assuming that the school district determines that the procurement of the subject contract must comply with the bidding requirements outlined in Section 31-7-13(c), it is required to utilize the reverse auction method of procurement in accordance with Section 31-7-13(c)(i)(2). We note, however, that Section 31-7-13(c)(i)(2) expressly states that "[i]f a purchasing entity determines that a reverse auction is not in the best interest of the state, then that determination must be approved by the Public Procurement Review Board." A detailed explanation of why a reverse auction process would not be in the best interest of the state, including a proposed alternative process, must be submitted to the Public Procurement Review Board (PPRB). If the PPRB approves the alternative process, the purchasing entity may designate the other methods by which the bids will be received.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Leigh Triche Janous
Special Assistant Attorney General