



2009-100

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

August 25, 2009

TROY KING
ATTORNEY GENERAL

500 DEXTER AVENUE
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

Honorable Fred O. Ferguson
Chairman, Stewartville Water Authority
81 Stewartville Road
Sylacauga, Alabama 35151

Competitive Bid Law – Public Works
Law - Professional Services – Water
Authorities – Exemptions – Coosa
County – Talladega County

A tank maintenance contract that is
in excess of \$50,000 is subject to the
Public Works Law.

Dear Mr. Ferguson:

This opinion of the Attorney General is issued in response to your
request on behalf of the Stewartville Water Authority.

QUESTION

Would a tank maintenance contract be con-
sidered professional services and exempt from
the Alabama Bid Law, or would it fall under the
Alabama Bid Law for a contract amount in excess
of \$15,000?

FACTS AND ANALYSIS

In your letter of request, you stated the following:

The Stewartville Water Authority (“Authority”) has three water storage tanks. The Board of the Authority would like to consider a tank maintenance contract that would provide regular oversight of the tanks, including inspection, cleaning, regulation compliance, and maintenance when needed. This would be

a long-term relationship with a company with skills and expertise necessary to maintain storage tanks in accordance with regulations.

In a subsequent conversation, you informed this Office that the proposed contract with this company would have a yearly fee in excess of \$200,000. This particular company would perform maintenance, inspections, repairs, and monitor the facility for compliance with the rules and regulations of the Alabama Department of Environmental Management. Of particular concern for the Authority is the refurbishing of two of the water tanks. The contemplated company would step in and perform this maintenance, which entails the painting of these structures. To your knowledge, this company has one on-staff engineer and multiple lay persons that perform the welding and painting. The Authority has previously contracted with this company and is confident in the company's abilities.

Your initial question contemplates whether a tank maintenance contract would be exempt as a professional service under the competitive bid laws of the State of Alabama pursuant to section 41-16-51(3). Section 41-16-51(3) states that "[c]ontracts for securing services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, consultants, certified public accountants, public accountants, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part." ALA. CODE § 41-16-51(3) (Supp. 2008).

The Competitive Bid Law generally applies to expenditures of \$15,000 or more for "labor, services, work, or for the purchase of materials, equipment, supplies, or other property" made by public entities including "waterworks boards, sewer boards, gas boards and other like utility boards and commissions. ALA. CODE § 41-16-50 (Supp. 2008). This Office has previously determined that there is no exemption from the Competitive Bid Law for maintenance and construction services. Opinion to Honorable Michael E. Jones, Attorney, City of Luverne Electric Board, dated January 12, 1995, A.G. No. 95-00096 and opinion to Honorable Charles Thompson, Chairman, Colbert County Commission, dated March 7, 1983, A.G. No. 83-00216.

The Competitive Bid Law, which is codified in chapter 16 of title 41 of the Code, is not the only instance in which contracts are let by a bidding process. The Public Works Law also requires that certain contracts be let by the bidding process. The Public Works Law is codified at section 39-1-1, *et seq.*, of the Code of Alabama. Section 39-2-1(1)

defines an "awarding authority" as "[a]ny governmental board, commission, agency, body, authority, instrumentality, department or subdivision of the state, its counties and municipalities." ALA. CODE § 39-2-1(1) (Supp. 2008).

Section 39-2-1(5) defines "public works" as follows:

The construction, *repair*, renovation, *or maintenance of public* buildings, *structures, sewers, waterworks*, roads, bridges, docks, underpasses, and viaducts as well as *any other improvement to be* constructed, *repaired*, renovated, *or maintained on public property and to be paid, in whole or in part, with public funds* or with financing to be retired with public funds in the form of lease payments or otherwise.

ALA. CODE §39-2-1(5) (Supp. 2008).

The Public Works Law is applicable to public works contracts in excess of \$50,000. ALA. CODE § 39-2-2 (Supp. 2008). In an opinion issued to Honorable E. Shane Black, this Office noted that "maintenance" under the Public Works Law is "[t]he care and work put into property to keep it operating and productive; general repair and upkeep." Opinion to Honorable E. Shane Black, Attorney, City of Pinson, dated January 22, 2009, A.G. No. 2009-033, *citing* opinion to Honorable Renee Culverhouse, Interim Chancellor, Alabama Department of Postsecondary Education, dated May 3, 2007, A.G. No. 2007-089, at 3 (quoting Black's Law Dictionary 973 (1999)).

This Office has addressed a similar issue in an opinion to Craig Williams wherein Mr. Williams asked whether a contract by the Parrish Water and Sewer Board to repair, maintain, and improve a water storage tank was subject to the Competitive Bid Law or exempt as a professional service. In that opinion this Office determined that the contract was subject to the Public Works Law and stated, in pertinent part, as follows:

Contracts with persons who perform only architectural, engineering, construction management, program management, or project management services, and who do not actually engage in the construction, repair, renovation, or maintenance

of the work are exempted from the Public Works Law.

Based upon the facts provided in your request, the proposed contract for the repair, improvement, and maintenance of a water storage tank is subject to the bidding requirements of the Public Works Law. . . . A public works contract is not subject to a limitation on the length of the contract term.

Opinion to Honorable Craig L. Williams, Parrish Water and Sewer Board, dated November 29, 2001, A.G. No. 2002-72; *see also*, opinion to Honorable Winston V. Legge Jr., Attorney, Limestone County Water and Sewer Authority, dated March 30, 2001, A.G. No. 2001-139. The distinction expressed in the *Williams* opinion accurately reflects that management of a public facility is not subject to the Public Works Law and may be exempt from the Competitive Bid Law if it involves professional services. Maintenance, however, of a public facility or structure is defined as a public works and is subject to bid under the Public Works Law pursuant to section 39-2-1(5) of the Code of Alabama. ALA. CODE § 39-2-1(5) (Supp. 2008); *Black* at 6.

Here, the Stewartville Water Authority is established pursuant to section 11-88-1, *et seq.*, of the Code of Alabama, and thus would be considered an awarding authority. The contemplated contract is in excess of \$50,000; will be paid from public funds; and the work is occurring on public property. *See, generally*, opinion to Honorable Kenneth Vann, President, Smiths Water and Sewer Authority, dated October 24, 2006, A.G. No. 2007-007, at 3. The Authority seeks to engage a company to perform maintenance on its water tanks. Based on the facts presented, it is the opinion of this Office that the proposed contract for the repair, improvement, maintenance, and oversight of the water storage tanks must be let for open and competitive bidding pursuant to the Public Works Law of the State of Alabama.

CONCLUSION

A tank maintenance contract that is in excess of \$50,000 is subject to the Public Works Law.

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I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

TROY KING
Attorney General
By:


BRENDA F. SMITH
Chief, Opinions Division

TK/MMG
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