



2010-040

STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

January 26, 2010

TROY KING  
ATTORNEY GENERAL

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

Honorable Jeffrey M. Sewell  
County Attorney  
Jefferson County Commission  
280 Courthouse  
Birmingham, Alabama 35203

Public Works Law – Resident  
Responsible Bidders – Construction

The preference to resident contractors over out-of-state contractors, found in section 39-3-5(a) of the Code of Alabama, applies if the contract is under the Public Works Law; if the contract utilizes any state, county, or municipal funds, except if funded in whole or in part with federal funds; and if the law of the state of the out-of-state contractor gives preference to its resident contractors.

The Jefferson County Commission may not give preference to Alabama contractors over Florida contractors because Florida law does not provide a preference to resident contractors in public works contracts.

Dear Mr. Sewell:

This opinion of the Attorney General is issued in response to your request on behalf of the Jefferson County Commission.

QUESTIONS

1. Does section 39-3-5 of the Code of Alabama apply to the bids described herein?

2. If so, should Jefferson County award the contract to the Florida or Alabama contractor?

FACTS AND ANALYSIS

Your request states as follows:

Jefferson County has received bids for a public construction contract for the Five Mile Waste Water Treatment Plant-Intermediate Substation. The low bidder is a company incorporated in Florida, with a principal place of business in Okaloosa County, Florida. The next lowest bidder is a company incorporated in Alabama, with a principal place of business in Pell City, Alabama.

...

No federal funds are to be used for this project.

Section 39-3-5(a) of the Code of Alabama provides a bidder preference for resident contractors over *certain* out-of-state contractors in public contracts. ALA. CODE § 39-3-5(a) (Supp. 2009). The preference applies under three conditions. First, it applies to contracts under the Public Works Law, not the other competitive bidding statute regulating governmental contracts in Alabama, the Competitive Bid Law. Opinion to Honorable Perry Hand, State Senator, dated February 11, 1988, A.G. No. 88-00180. Second, the preference applies if state, county, or municipal funds are utilized, except if funded in whole or in part with federal funds. *Id.*; opinions to Dr. Fred M. Scoggins, Superintendent, Washington County Board of Education, dated May 15, 1985, A.G. No. 85-00354; and to Honorable Perry Hand, State Senator, dated December 7, 1984, A.G. No. 85-00115.

The earlier *Hand* opinion, A.G. No. 85-00115, explained, as follows, the third condition that must be met for the preference to apply:

*The clear purpose of this Act is to treat out-of-state companies in the same manner that*

*other states in which such companies are domiciled treat Alabama companies in the awarding of public contracts.* If a company from another state submits a bid in Alabama then that company will face the same obstacles faced by Alabama companies in that state. For example, in the event a company from a state giving a 5% preference to in-state bidders submits a bid in Alabama then the Alabama bidders will be given a 5% preference over that particular out-of-state bidder.

*Id.* at 2 (emphasis added).

The *Scroggins* opinion reiterated that the statute gives preference to resident contractors “only to the extent that the state of a nonresident bidder gives preference to its resident contractors.” *Scroggins* at 3. The title of an act that amended the statute provides further support for this reading. The title of Act 2001-637, which removed a subsection requiring the nonresident bidder to provide the opinion of an attorney as to the preference law in the bidder’s home state, states that the purpose of the act is “to provide a preference in bidding to resident contractors based upon any preferences nonresident contractors enjoy in their home states.” 2001 Ala. Acts No. 2001-637, 1245, 1245.

The *Scroggins* opinion considered a contract in which a Mississippi contractor was the low bidder. That opinion construed a Mississippi bidder preference statute. The *Scroggins* opinion, after acknowledging that opinions of this Office are ordinarily limited to matters of Alabama law, reasoned that because section 39-3-5(a) conditions the preference on the law of the home state of the nonresident bidder, examination of the law of the other state was appropriate. The Mississippi statute was virtually identical to section 39-3-5(a). Therefore, the *Scroggins* opinion concluded that “the Washington County Board of Education is not required to give preference to resident Alabama contractors over Mississippi contractors because the Mississippi law treats Alabama contractors in the same manner that Alabama law treats Mississippi contractors.” *Scroggins* at 6.

Section 255.20 of the Florida Statutes (2009), the Florida competitive bidding statute for public works contracts by counties, does not provide a preference for resident contractors. FLA. STAT. § 255.20 (2009). Nor does research reveal any other Florida statute providing such a

Honorable Jeffrey M. Sewell  
Page 4

preference in a contract similar to the one at issue. Consistent with the *Scroggins* opinion and earlier *Hand* opinion, the Jefferson County Commission may not give preference to Alabama contractors over Florida contractors.

CONCLUSION

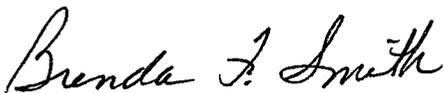
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The Jefferson County Commission may not give preference to Alabama contractors over Florida contractors because Florida law does not provide a preference to resident contractors in public works contracts.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING  
Attorney General  
By:

  
BRENDA F. SMITH  
Chief, Opinions Division

TK/GWB

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