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May 19, 2005

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Public Works Law – Competitive Bid Law –
Advertising – Contracts – Newspapers –
Transportation Department

Under the facts outlined, the Department of Transportation (“Department”) substantially complied with the Competitive Bid Law, and the Department may therefore proceed with the executed contract.

Dear Director McInnes:

This opinion of the Attorney General is issued in response to your request on behalf of the Alabama Department of Transportation.

QUESTION

Given the circumstances of letting and executing a contract for certain roadway improvements in Coffee and Covington Counties, where the required advertisement was not run in one local newspaper through inadvertence of the newspaper, has the Department “substantially complied” with Alabama’s Competitive Bid Law, and therefore, may it proceed with the executed contract as legally valid and binding?

FACTS AND ANALYSIS

Pursuant to section 39-2-2(a) of the Code of Alabama, the Department advertised for bids on four projects in Covington and Coffee Counties [Project Nos. STPAA-0009(507), STPAA-0012(515), STPAA-0134(500), and ST-020-134-001] for three consecutive weeks. Following standard procedures, the Department

timely ordered advertising of the projects in a newspaper of general circulation in each county.

In addition to the statutorily required methods of advertising, the Department employed the following additional methods of notice to potential bidders, which is regularly done by the Department:

1. Direct mailings to some 150 contractors, who typically perform the majority of public works throughout the state for the Department.
2. Posting of the invitation to bid on the Department website, which is frequented by potential bidders.
3. Delivery of the invitation to bid to the Alabama Associated General Contractors of America ("Alabama AGC") and the Alabama Road Builders Association, which posts it on their websites, and the Dodge Reports, all of which are frequently consulted by potential bidders for work.

As a result of this advertising and notice, the Department received three sealed bids, which is normally the number of bids the Department receives for work in this area. Bids were opened on December 3, 2004, and the low, responsible, and responsive bidder was selected. The Department had no question regarding the level of competition received, and the low bid was below the Department's estimate for the project.

On December 27, 2004, the Department awarded the contract, and on January 20, 2005, a written contract was executed, along with the required contractor bonds and insurance certificates. At the time of executing the contract, the Department certified that the Competitive Bid Law had been met, and no one was aware of any irregularity in the process. The contractor has already commenced performance of the contract and expended resources in support of the contract. Thereafter, the Department learned that, though the Department placed an order for a three-week advertisement in Coffee County, as required by the bid law, the newspaper somehow misplaced the order and did not run the advertisement.

Under the Alabama Public Works Law, section 39-2-2 of the Code of Alabama, the awarding authority must advertise for sealed bids before entering into a public works contract involving an amount in excess of \$50,000. In particular, "[i]f the awarding authority is the state or county, or an instrumentality thereof, it shall advertise for sealed bids at least once each week for three consecutive weeks in a newspaper of general circulation in the county or counties in which the improvement, or some part thereof, is to be made. . . ." ALA. CODE § 39-2-2(a) (Supp. 2004). The roadway improvements spanned two counties, Coffee and

Covington, and though the Department ordered advertisements in newspapers of general circulation in both counties, one newspaper misplaced the order and the local advertisement was not run.

This Office has previously considered the effect of not fully meeting the statutory advertising requirements under the "substantial compliance" standard articulated by Alabama's appellate courts. Opinion to Honorable Melba Patton, Mayor, Town of South Vinemont, dated October 31, 2003, A.G. No. 2004-018. The facts in the *Patton* opinion were that the town had advertised for bids in three newspapers, had 14 companies request plans and specifications, received six sealed bids, and awarded the contract to the lowest qualified bidder. After the bid was awarded, it was determined that one of the newspapers in which the advertisement ran, was not, in fact, a newspaper of general circulation in the state as required by the statute. This Office opined that, under the circumstances outlined, the town had substantially complied with the Public Works Law under the standard of substantial compliance and the town could proceed under the executed contract as legally valid and binding. *Id.*

The *Patton* opinion also distinguished the opinion to Honorable Paul Bowlin, Director, Alabama Department of Transportation, dated July 18, 2002, A.G. No. 2002-287, wherein this Office did not address the "substantial compliance" standard with respect to the Competitive Bid Law. The *Bowlin* opinion is modified to the extent that it is inconsistent with this opinion and the *Patton* opinion.

The *Patton* opinion relied upon previous opinions of the Alabama Supreme Court holding that the contract "must substantially comply with the requirements of the Competitive Bid Law. . . ." *Beavers v. County of Walker*, 645 So. 2d 1365, 1373 (Ala. 1994); *Kennedy v. City of Prichard*, 484 So. 2d 432, 434 (Ala. 1986). Furthermore, in *Owens v. Bentley*, 675 So. 2d 476 (Ala. Civ. App. 1996), the Court of Civil Appeals, citing *Kennedy*, rejected a challenge to a public contract for allegedly not meeting the Competitive Bid Law, finding that substantial compliance was sufficient under the facts presented.

In addition to statutorily required advertising, the Department regularly utilizes sophisticated methods of notice to potential bidders (direct mailings, internet postings, and Dodge Reports) aimed at the very audience interested in bidding these projects. Such were utilized in the instant case and generated the submission of three sealed bids (the normal level of participation for work in this area). At the time of executing its contract with the low bidder, Bullard Excavating, Inc., the Department was not aware of any irregularity in the process and had certified compliance with the Competitive Bid Law under section 39-5-1(b) of the Code of Alabama. Indeed, work under the contract was well under way before

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learning of the newspaper's misplacement of the advertising order. Under the facts, given the good faith efforts made to advertise for sealed bids and the open and competitive response received by the Department, it is the opinion of this Office that the Department substantially complied with Alabama's Public Works Law and the contract is legally valid and binding.

CONCLUSION

Under the facts outlined above, the Department has substantially complied with Alabama's Competitive Bid Law and may proceed with its executed contract.

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

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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