

1 SB68
2 125481-1
3 By Senator Holley
4 RFD: Fiscal Responsibility and Accountability
5 First Read: 01-MAR-11

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8 SYNOPSIS: Under existing law, state government may
9 purchase goods and services through vendors with a
10 current and valid contract with the Government
11 Services Administration without further competitive
12 bidding.

13 This bill would allow local governments to
14 purchase goods and services through vendors with a
15 current and valid contract with the Government
16 Services Administration without further competitive
17 bidding.

18 Competitive bid law for public works
19 projects currently does not provide for the
20 consideration of life cycle costs in determining
21 the lowest responsible and responsive bidder for
22 such projects. Also, competitive bid law for public
23 contracts currently does not specify that the term
24 "personal property" includes goods that are, or are
25 to become, fixtures.

26 This bill would specify that life cycle
27 costs may be considered in determining the lowest

1 responsible and responsive bidder for water and
2 sewer public works projects, would define the term
3 "life cycle costs" and clarify the definition of
4 "water and sewer public works projects," and would
5 specify that the term "personal property" under
6 competitive bid law for public contracts includes
7 goods that are, or are to become, fixtures.

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9 A BILL
10 TO BE ENTITLED
11 AN ACT

12
13 Relating to competitive bidding for public works
14 projects under Title 39 and public contracts under Title 41 of
15 the Code of Alabama 1975; to amend Sections 39-2-1, 39-2-6,
16 41-16-51, and 41-16-57, Code of Alabama 1975, to define the
17 term "life cycle costs" and to clarify the definition of a
18 "public works project"; to allow local governments to purchase
19 goods and services through vendors with a current and valid
20 contract with the Government Services Administration without
21 further competitive bidding; to provide that life cycle costs
22 may be considered by the awarding authority in determining the
23 lowest responsible and responsive bidder; and to clarify that
24 the definition of personal property includes goods that are,
25 or are to become, fixtures.

26 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

1 Section 1. Sections 39-2-1, 39-2-6, 41-16-51, and
2 41-16-57, Code of Alabama 1975, are amended to read as
3 follows:

4 "§39-2-1.

5 "As used in this title, the following words shall
6 have the meanings ascribed to them as follows:

7 "(1) AWARDING AUTHORITY. Any governmental board,
8 commission, agency, body, authority, instrumentality,
9 department, or subdivision of the state, its counties and
10 municipalities. This term includes, but shall not be limited
11 to, the Department of Transportation, the State Building
12 Commission, the State Board of Education, and any other entity
13 contracting for public works. This term shall exclude the
14 State Docks Department and any entity exempted from the
15 competitive bid laws of the state by statute.

16 "(2) FORCE ACCOUNT WORK. Work paid for by
17 reimbursing for the actual costs for labor, materials, and
18 equipment usage incurred in the performance of the work, as
19 directed, including a percentage for overhead and profit,
20 where appropriate.

21 "(3) LIFE CYCLE COSTS. The total costs of ownership
22 over the expected life of a water or sewer public works
23 project, taking into consideration the costs of construction,
24 operation, and maintenance, less any value obtained from
25 salvage and quantifiable environmental benefits.

1 "~~(3)~~(4) PERSON. Natural persons, partnerships,
2 limited liability companies, corporations, and other legal
3 entities.

4 "~~(4)~~(5) PUBLIC PROPERTY. Real property which the
5 state, county, municipality, or awarding authority thereof
6 owns or has a contractual right to own or purchase, including
7 easements, rights-of-way, or otherwise.

8 "~~(5)~~(6) PUBLIC WORKS. The construction,
9 installation, repair, renovation, or maintenance of public
10 buildings, structures, sewers, waterworks, roads, curbs,
11 gutters, side walls, bridges, docks, underpasses, and viaducts
12 as well as any other improvement to be constructed, installed,
13 repaired, renovated, or maintained on public property and to
14 be paid, in whole or in part, with public funds or with
15 financing to be retired with public funds in the form of lease
16 payments or otherwise.

17 "§39-2-6.

18 "(a) The contract shall be awarded to the lowest
19 responsible and responsive bidder, unless the awarding
20 authority finds that all the bids are unreasonable or that it
21 is not to the interest of the awarding authority to accept any
22 of the bids. A responsible bidder is one who, among other
23 qualities determined necessary for performance, is competent,
24 experienced, and financially able to perform the contract. A
25 responsive bidder is one who submits a bid that complies with
26 the terms and conditions of the invitation for bids. Minor
27 irregularities in the bid shall not defeat responsiveness. The

1 bidder to whom the award is made shall be notified by
2 telegram, confirmed facsimile, or letter at the earliest
3 possible date. If the successful bidder fails or refuses to
4 sign the contract, to make bond as provided in this chapter or
5 to provide evidence of insurance as required by the bid
6 documents, the awarding authority may award the contract to
7 the second lowest responsible and responsive bidder. If the
8 second lowest bidder fails or refuses to sign the contract,
9 make bond as provided in this chapter or to provide evidence
10 of insurance as required by the bid documents, the awarding
11 authority may award the contract to the third lowest
12 responsible and responsive bidder.

13 "(b) If no bids or only one bid is received at the
14 time stated in the advertisement for bids, the awarding
15 authority may advertise for and seek other competitive bids,
16 or the awarding authority may direct that the work shall be
17 done by force account under its direction and control or, with
18 the exception of the Department of Transportation, the
19 awarding authority may negotiate for the work through the
20 receipt of informal bids not subject to the requirements of
21 this section. Where only one responsible and responsive bid
22 has been received, any negotiation for the work shall be for a
23 price lower than that bid.

24 "(c) If the awarding authority finds that all bids
25 received are unreasonable or that it is not to the interest of
26 the awarding authority to accept any of the bids, the awarding

1 authority may direct that the work shall be done by force
2 account under its direction and control.

3 "(d) On any construction project on which the
4 awarding authority has prepared plans and specifications,
5 received bids, and has determined to do by force account or by
6 negotiation, the awarding authority shall make available the
7 plans and specifications, an itemized estimate of cost and any
8 informal bids for review by the Department of Examiners of
9 Public Accounts and, upon completion of the project by an
10 awarding authority, the final total costs together with an
11 itemized list of cost of any and all changes made in the
12 original plans and specifications shall also be made available
13 for review by the Department of Examiners of Public Accounts.
14 Furthermore, the above described information shall be made
15 public by the awarding authority upon request. Upon the
16 approval of the awarding authority, its duly authorized
17 officer or officers may, when proceeding upon the basis of
18 force account, let any subdivision or unit of work by contract
19 on informal bids.

20 "(e) No provision of this section shall be
21 interpreted as precluding the use of convict labor by the
22 awarding authority. This section shall not apply to routine
23 maintenance and repair jobs done by maintenance personnel who
24 are regular employees of the awarding authority, nor shall it
25 apply to road or bridge construction work performed by an
26 awarding authority's regular employees and own equipment.

1 "(f) No contract awarded to the lowest responsible
2 and responsive bidder shall be assignable by the successful
3 bidder without written consent of the awarding authority, and
4 in no event shall a contract be assigned to an unsuccessful
5 bidder whose bid was rejected because he or she was not a
6 responsible or responsive bidder.

7 "(g) Any agreement or collusion among bidders or
8 prospective bidders in restraint of freedom of competition to
9 bid at a fixed price or to refrain from bidding or otherwise
10 shall render the bids void and shall cause the bidders or
11 prospective bidders to be disqualified from submitting further
12 bids to the awarding authority on future lettings. Any bidder
13 or prospective bidder who willfully participates in any
14 agreement or collusion in restraint of freedom of competition
15 shall be guilty of a felony and, on conviction thereof, shall
16 be fined not less than five thousand dollars (\$5,000) nor more
17 than fifty thousand dollars (\$50,000) or, at the discretion of
18 the jury, shall be imprisoned in the penitentiary for not less
19 than one nor more than three years.

20 "(h) Any disclosure in advance of the terms of a bid
21 submitted in response to an advertisement for bids shall
22 render the proceedings void and require advertisement and
23 award anew.

24 "(i) The lowest responsible and responsive bidder on
25 a water or sewer public works project may be determined to be
26 the bidder offering the lowest life cycle costs. The lowest
27 responsible and responsive bidder shall otherwise meet all of

1 the conditions and specifications contained in the invitation
2 to bid, except that a bidder may still be considered
3 responsive if he or she responds with a bid using different
4 construction materials than those specified in the invitation
5 to bid if the materials' use would result in lower lifecycle
6 costs for the water or sewer public works project. To utilize
7 this provision to determine the lowest responsible and
8 responsive bidder, the awarding authority must include a
9 notice in the invitation to bid that the lowest responsible
10 and responsive bidder may be determined by using life cycle
11 costs.

12 "§41-16-51.

13 "(a) Competitive bids shall not be required for
14 utility services, the rates for which are fixed by law,
15 regulation, or ordinance, and the competitive bidding
16 requirements of this article shall not apply to:

17 "(1) The purchase of insurance.

18 "(2) The purchase of ballots and supplies for
19 conducting any primary, general, special, or municipal
20 election.

21 "(3) Contracts for securing services of attorneys,
22 physicians, architects, teachers, superintendents of
23 construction, artists, appraisers, engineers, consultants,
24 certified public accountants, public accountants, or other
25 individuals possessing a high degree of professional skill
26 where the personality of the individual plays a decisive part.

1 "(4) Contracts of employment in the regular civil
2 service.

3 "(5) Contracts for fiscal or financial advice or
4 services.

5 "(6) Purchases of products made or manufactured by
6 the blind or visually handicapped under the direction or
7 supervision of the Alabama Institute for Deaf and Blind in
8 accordance with Sections 21-2-1 to 21-2-4, inclusive.

9 "(7) Purchases of maps or photographs from any
10 federal agency.

11 "(8) Purchases of manuscripts, books, maps,
12 pamphlets, or periodicals.

13 "(9) The selection of paying agents and trustees for
14 any security issued by a public body.

15 "(10) Existing contracts up for renewal for
16 sanitation or solid waste collection, recycling, and disposal
17 between municipalities or counties, or both, and those
18 providing the service.

19 "(11) Purchases of computer and word processing
20 hardware when the hardware is the only type that is compatible
21 with hardware already owned by the entity taking bids and
22 custom software.

23 "(12) Professional services contracts for
24 codification and publication of the laws and ordinances of
25 municipalities and counties.

26 "(13) Contractual services and purchases of
27 commodities for which there is only one vendor or supplier and

1 contractual services and purchases of personal property which
2 by their very nature are impossible to award by competitive
3 bidding.

4 "(14) Purchases of dirt, sand, or gravel by a county
5 governing body from in-county property owners in order to
6 supply a county road or bridge project in which the materials
7 will be used. The material shall be delivered to the project
8 site by county employees and equipment used only on projects
9 conducted exclusively by county employees.

10 "(15) Contractual services and purchases of products
11 related to, or having an impact upon, security plans,
12 procedures, assessments, measures, or systems, or the security
13 or safety of persons, structures, facilities, or
14 infrastructures.

15 "(16) Subject to the limitations in this
16 subdivision, purchases of goods made as a part of the
17 purchasing cooperative sponsored by the National Association
18 of Counties, or its successor organization. This subdivision
19 shall not apply to goods for which a service or service
20 contract, whether subject to competitive bidding under this
21 article or not, is necessary to utilize the goods. Such
22 purchases may only be made if all of the following occur:

23 "a. The goods being purchased are available as a
24 result of a competitive bid process approved by the Alabama
25 Department of Examiners of Public Accounts for each bid.

26 "b. The goods are either not at the time available
27 to counties on the state purchasing program or are available

1 at a price equal to or less than that on the state purchasing
2 program.

3 "c. The purchase is made through a participating
4 Alabama vendor holding an Alabama business license if such a
5 vendor exists.

6 "(17) Purchase of goods or services, other than
7 wireless communication services, whether voice or data, from
8 vendors that have been awarded a current and valid Government
9 Services Administration contract. Any purchase made pursuant
10 to this subdivision shall be under the same terms and
11 conditions as provided in the Government Services
12 Administration contract. Prices paid for such goods and
13 services, other than wireless communication services, whether
14 voice or data, may not exceed the amount provided in the
15 Government Services Administration contract.

16 "(b) This article shall not apply to:

17 "(1) Any purchases of products where the price of
18 the products is already regulated and established by state
19 law.

20 "(2) Purchases made by individual schools of the
21 county or municipal public school systems from moneys other
22 than those raised by taxation or received through
23 appropriations from state or county sources.

24 "(3) The purchase, lease, sale, construction,
25 installation, acquisition, improvement, enlargement, or
26 expansion of any building or structure or other facility

1 designed or intended for lease or sale by a medical clinic
2 board organized under Sections 11-58-1 to 11-58-14, inclusive.

3 "(4) The purchase, lease, or other acquisition of
4 machinery, equipment, supplies, and other personal property or
5 services by a medical clinic board organized under Sections
6 11-58-1 to 11-58-14, inclusive.

7 "(5) Purchases for public hospitals and nursing
8 homes operated by the governing boards of instrumentalities of
9 the state, counties, and municipalities.

10 "(6) Contracts for the purchase, lease, sale,
11 construction, installation, acquisition, improvement,
12 enlargement, or extension of any plant, building, structure,
13 or other facility or any machinery, equipment, furniture, or
14 furnishings therefor designed or intended for lease or sale
15 for industrial development, other than public utilities, under
16 Sections 11-54-80 to 11-54-99, inclusive, or Sections 11-54-20
17 to 11-54-28, inclusive, or any other statute or amendment to
18 the Constitution of Alabama authorizing the construction of
19 plants or other facilities for industrial development or for
20 the construction and equipment of buildings for public
21 building authorities under Sections 11-56-1 to 11-56-22,
22 inclusive.

23 "(7) The purchase of equipment, supplies, or
24 materials needed, used, and consumed in the normal and routine
25 operation of any waterworks system, sanitary sewer system, gas
26 system, or electric system, or any two or more thereof, that
27 are owned by municipalities, counties, or public corporations,

1 boards, or authorities that are agencies, departments, or
2 instrumentalities of municipalities or counties and no part of
3 the operating expenses of which system or systems have, during
4 the then current fiscal year, been paid from revenues derived
5 from taxes or from appropriations of the state, a county, or a
6 municipality.

7 "(8) Purchases made by local housing authorities,
8 organized and existing under Chapter 1 of Title 24, from
9 moneys other than those raised by state, county, or city
10 taxation or received through appropriations from state,
11 county, or city sources.

12 "(c) The state trade schools, state junior colleges,
13 state colleges, and universities under the supervision and
14 control of the State Board of Education, the district boards
15 of education of independent school districts, the county
16 commissions, and the governing bodies of the municipalities of
17 the state shall establish and maintain such purchasing
18 facilities and procedures as may be necessary to carry out the
19 intent and purpose of this article by complying with the
20 requirements for competitive bidding in the operation and
21 management of each state trade school, state junior college,
22 state college, or university under the supervision and control
23 of the State Board of Education, the district boards of
24 education of independent school districts, the county
25 commissions, and the governing bodies of the municipalities of
26 the state and the governing boards of instrumentalities of
27 counties and municipalities, including waterworks boards,

1 sewer boards, gas boards, and other like utility boards and
2 commissions.

3 "(d) Contracts entered into in violation of this
4 article shall be void and anyone who violates the provisions
5 of this article shall be guilty of a Class C felony.

6 "§41-16-57.

7 "(a) When purchases are required to be made through
8 competitive bidding, awards shall be made to the lowest
9 responsible bidder taking into consideration the qualities of
10 the commodities proposed to be supplied, their conformity with
11 specifications, the purposes for which required, the terms of
12 delivery, transportation charges, and the dates of delivery.
13 If at any time after the award has been made the lowest
14 responsible bidder notifies the awarding authority in writing
15 that the bidder will no longer comply with the terms of the
16 award to provide the goods or services to the awarding
17 authority under the terms and conditions of the original
18 award, or the awarding authority documents that the lowest
19 responsible bidder defaults under the terms of the original
20 award, the awarding authority may terminate the award to the
21 defaulting bidder and make an award to the second lowest
22 responsible bidder for the remainder of the award period
23 without rebidding, provided the award to the second lowest
24 responsible bidder is in all respects made under the terms and
25 conditions contained in the original bid specifications and is
26 for the same or a lower price than the bid originally

1 submitted to the awarding authority by the second lowest
2 responsible bidder.

3 "(b) The awarding authority in the purchase of or
4 contract for personal property or contractual services shall
5 give preference, provided there is no sacrifice or loss in
6 price or quality, to commodities produced in Alabama or sold
7 by Alabama persons, firms, or corporations. Notwithstanding
8 the foregoing, no county official, county commission, school
9 board, city council or city councilmen, or other public
10 official, state board, or state agency charged with the
11 letting of contracts or purchase of materials for the
12 construction, modification, alteration, or repair of any
13 publicly owned facility may specify the use of materials or
14 systems by a sole source, unless:

15 "(1) The governmental body can document to the
16 satisfaction of the State of Alabama Building Commission that
17 the sole source product or service is of an indispensable
18 nature, all other viable alternatives have been explored, and
19 it has been determined that only this product or service will
20 fulfill the function for which the product is needed.
21 Frivolous features will not be considered.

22 "(2) The sole source specification has been
23 recommended by the architect or engineer of record and who
24 also documents that there is no other product available and
25 that the use of the requirement is of an indispensable nature
26 and why.

1 "(3) All information substantiating the use of a
2 sole source specification is documented in writing and is
3 filed into the project file.

4 "(c) (1) Beginning January 1, 2009, for purchases of
5 personal property, including on or after the effective date of
6 this amendatory act, goods which are, or are to become,
7 fixtures, in instances where the awarding authority determines
8 that the total cost of ownership over the expected life of the
9 item or items, including acquisition costs plus sustaining
10 costs or life cycle costs, can be reasonably ascertained from
11 industry recognized and accepted sources, the lowest
12 responsible bid may be determined to be the bid offering the
13 lowest life cycle costs and otherwise meeting all of the
14 conditions and specifications contained in the invitation to
15 bid. To utilize this subdivision to determine the lowest
16 responsible bidder, the awarding authority shall include a
17 notice in the invitation to bid that the lowest responsible
18 bid may be determined by using life cycle costs and identify
19 the industry recognized and accepted sources that will be
20 applicable to such an evaluation.

21 "(2) No later than November 30, 2008, the Department
22 of Examiners of Public Accounts shall establish procedures for
23 the use of life cycle costs, which shall be distributed to all
24 contracting agencies and shall be used in conducting any
25 audits of the purchasing agency.

1 "(d) The awarding authority or requisitioning agency
2 may reject any bid if the price is deemed excessive or quality
3 of product inferior.

4 "(e) Each record, with the successful bid indicated
5 thereon, and with the reasons for the award if not awarded to
6 the lowest bidder, shall, after award of the order or
7 contract, be open to public inspection.

8 "(f) Contracts for the purchase of personal property
9 or contractual services shall be let for periods not greater
10 than three years. Contracts for the leasing of motor vehicles
11 by local governing bodies shall be let for periods not greater
12 than five years. Lease-purchase contracts for capital
13 improvements and repairs to real property shall be let for
14 periods not greater than 10 years and all other lease-purchase
15 contracts shall be let for periods not greater than 10 years."

16 Section 2. This act shall become effective
17 immediately following its passage and approval by the
18 Governor, or its otherwise becoming law.