

WELCOME

We hope you enjoy this edition of our newsletter. If you have any comments or questions about any of the articles, please feel free to contact the attorneys in our [construction law group](#). Autry, Horton & Cole, LLP is a construction and energy law firm located in Atlanta, Georgia. With nine experienced attorneys, we provide exceptional service at small-firm rates. For more information about our attorneys or our construction and energy practice groups, please visit our website at www.ahclaw.com.

CURRENT EDITION

This edition of our newsletter focuses on an important segment of our construction law practice: public owners. Public owners require specialized advice, particularly with respect to construction and procurement. Their legal authority and limitations arise from constitutional and statutory provisions that must be analyzed regularly. This edition of our newsletter provides public owners with relevant, practical, and current information concerning public-works construction.

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SB 447 FOR PUBLIC OWNERS

NEW LEGISLATION AFFECTS PUBLIC OWNERS

The Georgia General Assembly recently passed legislation that imposes new requirements on the state and its agencies and authorities (collectively, "state public owners") when procuring public work. The new laws impose an obligation on state public owners to apply an in-state preference to Georgia residents in certain circumstances. Also, in an attempt to set construction-project standards for public works, the new laws require adherence to the State Construction Manual. Finally, with respect to state and local public owners, the new laws prohibit consideration of bids unless they contain an affidavit attesting to the bidder's employment-verification compliance.

Reciprocal In-State Preference For State Public Work

Leading up to the 2009-2010 legislative session, the construction industry sought to fix a problem that resulted in inequitable treatment of Georgia-resident contractors, suppliers, architects, and engineers in bidding for public work. Those in the industry argued that when Georgia residents compete or bid for work against non-residents (or minimal residents) whose home states provide in-state preferences, state public owners should apply that same in-state preference to Georgia residents. In other words, Georgia residents should receive the same in-state preference that non-residents receive in their home states.

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What Does the Reciprocal In-State Preference Rule Require?

The new laws neutralize this inequity by establishing a reciprocal in-state preference. Under the new rule, if a non-resident's home state applies an in-state preference, state public owners in Georgia must apply a similar in-state preference in selecting the successful bidder.

Who is a Georgia Resident Under the New Rule?

The new laws set a higher standard for qualifying as a Georgia resident. To qualify, an existing business must regularly maintain a permanent place from which business is physically conducted for at least one year prior to any bid. Also, to become domiciled in Georgia, new businesses must regularly maintain a permanent place from which business is physically conducted. In no event does a post office box, site trailer, or temporary structure qualify as a place of business.

What Are the Limits of the New Reciprocal In-State Preference Rule?

The in-state preference will not require state public owners to apply the preference without considering certain important qualities of bidders. The new law expressly provides that it does not prevent state public owners from considering the qualifications, character, responsibility, and fitness of bidders, or the quality of materials. The law is silent, however, on the weight to be given to these other factors in relation to the in-state preference. Additionally, the in-state preference does not apply to transportation projects for which federal aid funds are available.

Construction Standards For Public Work

The new laws also require state agencies, authorities, departments, commissions, boards and similar entities to adhere to the policies and procedures in the State Construction Manual. The Manual will apply to project management and procurement of, and contracting for, design, construction, and other project-related professional services for all state-owned or state-funded building in Georgia. The Manual is available online.

Employment Verification

While the majority of the changes related to employment verification will affect contractors and subcontractors, certain parts of the new law require the attention of public owners at both the local and state levels. The new laws expand the documentation and audit requirements for state departments, agencies, instrumentalities, and political subdivisions, and they prohibit consideration of bids unless they contain an affidavit that certifies the bidder's compliance with employment-verification rules.

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What Existing Laws Were Affected by the New Laws?

The new laws expand the existing employment-verification requirements established by the 2006 Georgia Security and Immigration Compliance Act (the "2006 Act"). The 2006 Act prohibited public owners from entering contracts for public work unless the contractor registered and participated in the federal work authorization program (E-Verify) to verify legal employment status for all newly hired employees and subcontractors.

How Do the New Laws Change Existing Rules for Public Owners?

The new laws' employment-verification rules primarily affect contractors and subcontractors. The revisions expand the E-Verify requirements to cover subcontractors at any tier and impose new criminal penalties for certain violations. The revisions also add new rules for public owners. Specifically, they prohibit public owners from even considering a bid unless the bid contains a notarized affidavit from the contractor certifying the contractor's compliance with and use of E-Verify throughout the contract period. Public owners must maintain the affidavit on file for five years from the date of receipt. Additionally, public owners must permanently post their E-Verify information on their website or another state-maintained website, or publish it annually in the local newspaper. Finally, the Department of Labor will conduct no fewer than 100 random audits of public owners and contractors to ensure compliance with these new requirements.

What Should Public Owners Do Now?

Public owners should review their compliance with the public works statute in Title 13, as amended by the new laws. Among other things, they should

- Revise existing policies and procedures to implement the new in-state preference rules, while still accounting for other factors such as the quality and skill of bidders;
- When initiating and during procurement of a public works project, determine whether in-state preference rules may be implicated and, if so, properly define and identify bidders that qualify as Georgia residents for purposes of the in-state preference;
- Review the State Construction Manual to ensure compliance with its requirements and to confirm compliance with stated best practices and policies with respect to public works;
- Ensure contractors have registered for and use the federal employment-verification program (E-Verify);
- Review existing policies to require (1) that all bids contain the required contractor's affidavit and (2) maintenance of the affidavit for five years from receipt; and
- For local public owners, see the other article in this newsletter: "Local Government Requests For Proposals."

LOCAL GOVERNMENT REQUESTS FOR PROPOSALS

As a result of the recent economic stimulus funding, many local governments have received incentives to kick-start public infrastructure construction and other necessary projects. In procuring construction services and materials, local governments may consider using requests for proposals (“RFPs,” also known as “competitive sealed proposals”) in determining an appropriate contractor, supplier, engineer, or architect. Advantages of RFPs include an early focus on the skill set and qualities of offerors and greater flexibility in negotiation and revision of proposals.

However, the use of RFPs for public work is subject to certain restrictions. Specifically, local governments – including counties, municipalities, school boards, and other authorities – must comply with the Georgia Local Government Public Works Construction Law (the “PWC Law”). The PWC Law imposes specific requirements on RFPs to ensure a fair and open procurement process. And, importantly, it imposes very harsh penalties for noncompliance.

What are RFPs and When Can They Be Used?

The PWC Law – which applies to most contracts for greater than \$100,000 – provides two different options for competitive awards: (1) competitive sealed bidding and (2) RFPs. To utilize the second option, local governments must do the following:

- Advertise the RFP: publicly advertise the RFP, which must include certain project-related information;
- Open and Review Proposals: open all proposals at the time and place designated in the RFP; and
- Award: based on the weighted evaluation factors, award the project to the responsible and responsive offeror whose proposal is most advantageous to the local government.

At this point, a few important rules are worth mentioning. First, the RFP should include a list of project-related factors along with each factor’s relative importance. Second, the RFP should also include sufficient information about the project to assist prospective offerors in developing their proposals. The detail of information should be appropriate with respect to the project delivery method.

Second, as set forth in the RFP, local governments may provide offerors an opportunity for discussion, negotiation, and revision of their proposals. The goal should be to obtain their “best and final offers.” In any discussion or negotiation, however, local government shall not disclose information about other proposals. In other words, local governments cannot open and announce the original proposals in public.

Third, with respect to both RFPs and bidding, no member of a local government may receive any pay or profit, directly or indirectly, from the public works contract. Failure to comply with this provision is considered a misdemeanor criminal offense.

LOCAL GOVERNMENT REQUESTS FOR PROPOSALS

Effect of Violations

The PWC Law is “designed to protect the public coffers from waste and to assure that taxpayers receive quality work and goods for the lowest possible price.” As a result, in the event that a local government fails to comply with the competitive award procedures, the PWC Law imposes harsh penalties on the “successful” bidder or offeror. Where a local government enters a contract without complying with the PWC Law, the contract is not valid. Further, when a contractor knows that a public works contract was developed without complying with the PWC Law, that contractor is not entitled to payment from the local government.

Practice Pointers

For your next public works project, consider taking the following steps to ensure compliance with the PWC Law:

- Before initiating the project or procurement, determine whether it is subject to the PWC Law, or whether an exception applies.
- Determine whether the intended project is one that requires a highly skilled contractor with specific qualities. If so, consider using a RFP as opposed to competitive bidding.
- Ensure that the RFP is sufficiently detailed for the delivery method selected for the project.
- Ensure that the RFP contains sufficient evaluation factors that allocate relative importance to each factor. By providing specific evaluation factors, and detailed project-related information, public owners may convince unqualified or unskilled offerors to avoid applying in the first place.
- Ensure that the RFP specifies the time and location for opening and reviewing proposals.
- Ensure that policies and procedures are established and put into practice that prevent disclosure of proposals to other offerors.
- Ensure that the basis of the project award is accurately and properly documented.
- Consider implementing a program or questionnaire to ensure that no member of your project team receives payment or profit from the project or procurement, whether inadvertently or otherwise.
- Involve local counsel if questions or concerns arise and initiate involvement early enough to avoid problems before they result in violations of the PWC Law.