LOCAL GOVERNMENT PUBLIC WORKS AND PROCUREMENT LAW: THE BASICS AND BEYOND

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Public works and procurement are an essential functions of local governments.[1] Public works projects and procurement can account for a substantial portion of the local government's budget. As a result of their importance and use of public resources, public works procurement and contracting are subject to mandatory rules set by the General Assembly. These rules govern each step of the procurement and contracting processes. As a result, county and city attorneys should guide the local government to comply with these rules.

To assist local government attorneys, this article discusses important laws governing most public works projects and procurement. The failure to follow these laws can have severe consequences, ranging from void contracts to loss of funding to criminal proceedings.

I. PUBLIC WORKS: WHAT IS IT AND WHY DOES IT MATTER?

"Public works" is not defined in Georgia statutes. But it is generally regarded as any physical activity associated with public property.[2] Public works involves (i) the public – meaning the activity must "bear a relation to legitimate governmental interests or activities on behalf of the public at large" and (ii) "works" – meaning the activity must involve "physical action in connection with . . . physical subject matter."[3]

Certain public works projects are subject to particular statutory schemes. The scope of projects subject to each statutory scheme is set forth in the applicable statute. For example, public works projects that qualify as "public works construction" must adhere to the Georgia Local Government Public Works Construction Law.[4] Public works projects that involve the construction, maintenance, or repair of a "public road" must comply with the Georgia Public Road Construction Law.[5] These and other applicable statutes govern various aspects of the projects, including competitive procurement, selection, awarding, bonding, and contracting.

The following is a list of common statutes applicable to local government public works contracting and procurement:

- Georgia Local Government Public Works Construction Law, O.C.G.A. Title 36, Chapter 91 (Public Works Bidding) ("Public Works Construction Law")
- Georgia Local Government Road Construction Law, O.C.G.A. Title 32, Chapter 4, Articles 3 & 4 (County and Municipal Road Systems) ("Public Road Works Statute")

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[1] GA. CONST. Art. XI, § 2, ¶ III (Supplementary Powers of counties and cities to include providing for hospitals and public health facilities; construction and maintenance of roads and streets; parks and recreational facilities; storm water and sewage collection and disposal systems; water systems; public housing; public transportation; libraries and facilities for the arts; etc.); O.C.G.A. § 36-9-5(a) (county duty to construct, repair, and maintain buildings); O.C.G.A. § 32-4-41 (county duty to construct, repair, and maintain roads and bridges); O.C.G.A. § 36-34-3 (municipal authority to construct, operate, and improve streets, parks, recreational grounds, airports, parking facilities, educational buildings, libraries, etc.); O.C.G.A. § 36-34-5(a) (municipal authority to construct and improve water and sewer systems); O.C.G.A. § 32-4-91 (municipality duty to construct, repair, and maintain roads and bridges).

[2] Russell G. Donaldson, J.D., "What Constitutes 'Public Work' within Statute Relating to Contractor's Bond," 48 A.L.R. 4th 1170 at § 2(a) (2017).

[3] *Id*.

[4] O.C.G.A. Title 36, Chapter 91.

[5] O.C.G.A. Title 32, Chapter 4, Articles 3 & 4.

- Georgia Public Works Construction Law, O.C.G.A. Title 13, Chapter 10, Article 2 (Retainage Laws)
- Georgia Public Works Construction Law, O.C.G.A. Title 13, Chapter 10, Article 3 (E-Verify Law)
- Other authority statutes contained in O.C.G.A. Title 36 (Local Government), including Chapter 10 (County bidding rules) and Chapter 60 (County and municipality waste-water treatment, multi-year lease-purchase and installment contracts, and private toll roads and bridges)
- Guaranteed Energy Savings Performance Contracting Act, O.C.G.A. Title 50, Chapter 37
- Municipal Street Improvements Law, O.C.G.A. Title 36, Article 39
- Local Government Air Facilities Law, O.C.G.A. Title 6, Chapter 3
- P3 Projects, O.C.G.A. Title 36, Chapter 91, Article 5 (Partnership for Public Facilities and Infrastructure)
- Development Authorities Law, O.C.G.A. Title 36, Chapter 62
- Downtown Development Authorities Law, O.C.G.A. Title 36, Chapter 42

In addition, a few statutes govern purchases by local governments, including purchases incident to a public works project. These statutes include:

- Local Government Purchases, O.C.G.A. Title 50, Chapter 5, Article 3, Part 2
- Local Preferences, O.C.G.A. § 36-84-1
- Other Georgia Goods and Service Preferences and Mandates, O.C.G.A. Title 50, Article 5
- Multi-Year Lease-Purchase Contracts and Installment-Purchase Contracts, O.C.G.A. §§ 36-60-13 & 36-60-15

Pursuant to their constitutional or statutory authority, local governments enact local ordinances, rules, and regulations for public works and procurement. For local government officials and attorneys, these rules are just as important as the statutory schemes listed above. They should not be overlooked.

Some of the statutes listed above can be unclear, cumbersome, duplicative without explanation, and ambiguous. So why should a local government attorney bother reviewing them? Besides the fact that they are mandatory obligations imposed on local governments, a local government's failure to follow these statutes could render an improperly awarded contract as void. As discussed below, local governments and their contractors and suppliers are put in a precarious position when they discover a contract is void, especially when work has been performed, goods have been provided, and public money has been spent.

Additionally, the failure to obtain a payment bond or the failure to ensure it complies with the applicable statute may render the local government directly liable to laborers, subcontractors, and suppliers. This result can be extremely harsh, especially when public funds have already been paid out to the contractor.

II. PUBLIC WORKS AND PROCUREMENT LAWS

The two primary laws governing public works are the Public Works Construction Law and Public Road Works Statute. While these laws are similar in many ways, they have important distinctions. The best way to understand them is to track their similarities and differences.

Both laws authorize the local government to self-perform public works,[6] but the majority of their provisions are targeted toward contracting with private entities for the performance of such work. This article is focused on the latter.

A. Public Works Construction Law

1. Applicability

The Public Works Construction Law applies to "public works construction," which means the "building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property."[7] But it does not apply to projects under the Public Road Works Statute;[8] "routine operation, repair, or maintenance of existing structures, buildings, or real property"; projects costing less than $100,000;[9] self-performance; projects necessitated by emergencies;[10] legitimate sole-source contracts; and other exclusions.[11] Various rules under the Public Works Construction Law apply depending on the project details.

2. Competitive Selection

For contracting opportunities of public works construction contracts, local governments must advertise and award them on the basis of competitive selection when the offeror (i) is at risk for construction and (ii) will provide labor and building materials.[12] Except for delivery methods using construction management not-at-risk (or construction management agency), almost all larger public works construction projects will require advertising and competitive selection.

a) Advertisement

Contracting opportunities must be publicly advertised by (i) placing the advertisement in the governing authority's office and (ii) posting the advertisement in the local organ or local government's website.[13]

b) Competitive Selection Methods

Local governments may competitively select contractors by competitive bidding or competitive proposals.[14]

(i) Competitive Bidding

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[6] O.C.G.A. §§ 36-91-22(g) (local government public works self-performance) & 32-4-42 (county road self-performance) & 32-4-92(a)(6) (municipal road work self-performance).

[7] O.C.G.A. § 36-91-2(12).

[8] As discussed below, the Public Road Works Statute is very broad.

[9] Contracts may not be divided in an attempt to avoid the $100,000 threshold. O.C.G.A. § 36-91-22. Similarly, the use of change orders to avoid the $100,000 threshold or other requirements is prohibited. O.C.G.A. § 36-91-20(e).

[10] An emergency is any situation resulting in imminent danger to the public health or safety or the loss of an essential government service. O.C.G.A. § 36-91-2(7).

[11] *Id*.; O.C.G.A. § 36-91-22.

[12] O.C.G.A. § 36-91-20(c).

[13] O.C.G.A. § 36-91-20(b)(1).

[14] Under either method, no changes to the plans and specifications may occur within 72 hours (excluding weekends and holidays) prior to bid day, unless such time is extended. O.C.G.A. § 36-91-20(d).

Under the bidding method, the local government must obtain and make available plans and specifications by the first day of the advertisement.[15] The plans and specifications must include other information such as details concerning alternates, permitting, and rights of way and easements.[16]

Offerors must submit sealed bids that comply with the solicitation.[17] The local government must open the bids publicly and award the contract to the "lowest responsible and responsive bidder."[18] There is no negotiation; however, if the lowest bid exceeds the budget, the local government may negotiate with the lowest bidder.[19]

(ii) Competitive Proposals

Under the proposal method, the local government must prepare a request for proposal ("RFP"). The RFP must include the conceptual program information and details and specifications concerning the work, with the level of detail based on the type of delivery method.[20] It must also include notice of any pre-bid conferences and, to the extent prequalification (discussed below) is required, the RFP must include any mandatory prequalification requirements.[21]

Of particular importance to offerors, the RFP must include the "relative importance of evaluation factors."[22] On opening day, all proposals are opened without disclosing their contents to others.[23] The local government must award the contract to the "responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the" local government, based on the evaluation factor and their relative importance.[24]

If provided in the RFP, the local government may choose to negotiate with the offerors to obtain their best and final offers, keeping other offerors' proposals confidential.[25]

c) Prequalification

Local governments may require prequalification as a condition to submitting a bid or proposal. To do so, the prequalification criteria must be reasonably related to the work and must be made available to offerors upon request, and there must be a procedure to allow an offeror to respond to disqualification.[26] Notably, once qualified, an offeror cannot be disqualified without cause.[27]

d) Permissible and Impermissible Selection Criteria

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[15] O.C.G.A. § 36-91-20(b)(4).
[16] *Id*.
[17] O.C.G.A. § 36-91-21(b).
[18] *Id*.
[19] *Id*.
[20] O.C.G.A. § 36-91-20(b)(5).
[21] O.C.G.A. § 36-91-20(b)(7).
[22] O.C.G.A. § 36-91-21(c)(1)(A).
[23] O.C.G.A. § 36-91-21(c)(1)(B).
[24] O.C.G.A. § 36-91-21(c)(1)(C). The statute emphasizes the importance of written documentation. The basis of the award must be maintained in the contract file. *Id*.
[25] O.C.G.A. § 36-91-21(c)(2).
[26] O.C.G.A. § 36-91-20(f).
[27] O.C.G.A. § 36-91-20(f)(4).

Effective in April 2013, local governments cannot disqualify offerors based on their lack of experience with a job of the same size – scope or cost – as the job being advertised.[28] In other words, if the offeror has never performed a contract of the same size as the contract opportunity, the local government cannot disqualify it on that basis. This rule applies only when the job is 30% or less in size than the offeror's previous experience, the offeror has previous experience with the type of job being advertised, and the offeror can secure bonding for the job.[29] So if the job is greater than 30% in size that the offeror's experience, the local government may consider such lack of experience in making an award or in prequalifying offerors.

3. Bonds: Bid Bonds, Performance Bonds, and Payment Bonds

The Public Works Construction Law requires bid bonds, performance bonds, and payment bonds on all bids and contracts over $100,000. All bonds must be issued by an acceptable surety and must be approved as to form and as to the surety's solvency by the local government's contracting officer.[30]

When required, no bid or proposal is valid without a bid bond[31] in the amount of at least 5% of the proposed contract price. A bid bond must remain valid (i) for bids, until 60 days after opening day, unless the offeror agrees to an extension, or (ii) for proposals, for the period stated in the RFP, but after 60 days, the local government must release the bid bond of any offeror who is not likely to be selected.[32] Under certain circumstances, a bid bond may be withdrawn by the offeror due to an "appreciable error in calculation."[33]

When performance and payment bonds are required, no contract is valid unless the contractor has provided them.[34] Often overlooked, the definition of a performance bond requires the surety to commit to: (i) faithful performance of the contract and (ii) indemnification for damages arising from default.[35]

As discussed below, if the local government fails to obtain a payment bond, if required, then it is liable to all laborers, subcontractors, and suppliers for nonpayment.[36]

4. Contracts

Public works construction contracts must be in writing and on file and available for public inspection.[37] In addition, they must be expressly entered into the minutes of the governing authority.[38]

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[28] O.C.G.A. § 36-91-23.
[29] *Id*.
[30] O.C.G.A. § 36-91-40(a).
[31] The statute authorizes other forms of security in lieu of a bid bond, such as a cashier's check, certified check, cash, or irrevocable letter of credit. O.C.G.A. § 36-91-51.
[32] O.C.G.A. § 36-91-50(b).
[33] O.C.G.A. § 36-91-51.
[34] O.C.G.A. §§ 36-91-70 & 36-91-90. In certain circumstances, an irrevocable letter of credit is acceptable in lieu of a performance bond, O.C.G.A. § 36-91-71, and a cashier's check, certified check, or cash are acceptable in lieu of a payment bond, O.C.G.A. § 36-91-90.
[35] O.C.G.A. § 36-91-2(11).
[36] O.C.G.A. § 36-91-91.
[37] O.C.G.A. § 36-91-20
[38] O.C.G.A. § 36-10-1.

Before beginning performance, the contractor must submit an oath in writing that it has not engaged in anti-competitive behavior.[39] Effective May 2013, local governments are expressly authorized to include provisions in public works construction contracts that impose liquidated damages for delayed completion or require incentive payments for early completion, as long as the project schedule is deemed to have value.[40]

B. Public Road Works Statute

Local governments are responsible for the construction and maintenance of their public road systems.[41] With this responsibility comes the authority to enter into contracts with private entities or governmental entities to accomplish these goals.[42] As always, with the authority comes rules and restrictions, which are set forth in the Public Road Works Statute.

1. Applicability

The Public Road Works Statute is extremely broad. It governs contracts for the "construction, reconstruction, or maintenance of all or part of a public road," and includes the purchase of materials and hiring of labor and professional services.[43] A "public road" is defined broadly to include highways, roads, and similar ways intended for public transportation; bridges, causeways, ferries, overpasses and underpasses, railroad grade crossings, and signs, signals, markings, and other traffic control devices; and building for public equipment and personnel engaged in the public road system; parking facilities, drainage ditches, rest areas, truck-weighing stations, and other similar facilities.[44] In this context, "construction" means "location, surveying, designing, supervising, inspecting, and actual building of a new road; or the paving, striping, restriping, modifying for safety purposes, grading, widening, relocation, reconstruction, or other major improvement of a substantial portion of an existing public road together with all activities incident to any of the foregoing."[45] "Maintenance" includes all other activities for the preservation of public roads.[46]

Whereas the Public Works Construction Law applies to contracts costing $100,000 or more, the Public Road Works Statute does not grant complete exemption based on the contract price. Instead, as discussed below, it exempts particular requirements based on the contract price.

2. Competitive Selection

Under the Public Road Works Statute, a local government must competitively bid projects except:[47]

- Contracts costing less than $200,000;[48]

[39] O.C.G.A. § 36-91-21(e).
[40] O.C.G.A. § 36-91-24.
[41] O.C.G.A. §§ 32-4-41 & 32-4-91.
[42] O.C.G.A. §§ 32-4-42 & 32-4-92.
[43] O.C.G.A. §§ 32-4-60 & 32-4-110.
[44] O.C.G.A. § 32-1-3(24).
[45] O.C.G.A. § 32-1-3(6).
[46] O.C.G.A. § 32-1-3(15).
[47] O.C.G.A. §§ 32-4-63 & 32-4-113.
[48] Note this dollar threshold was increased in 2014 from $20,000 to $200,000. 2014 Ga. Laws Act 665 (H.B. 774) (2014). Also note, local governments must receive at least two estimates for contracts less than $200,000 but more than $20,000. O.C.G.A. §§ 32-4-63(b) & 32-4-113(b).

- Contracts with other governmental entities;
- Contracts for engineering and other professional services;
- Contracts for emergency maintenance requiring immediate repairs;
- Other exceptions.[49]

Unlike the Public Works Construction Law, the Public Road Works Statute requires local governments to publicly bid contract opportunities.[50] There is no option for competitive proposals.

The local government must award the contract to the "lowest reliable bidder."[51]

a) Advertisement

The Public Road Works Statute requires advertising similar to the Public Works Construction Law.[52] The advertisement must include a description of the project, time for performance, terms of payment, how to obtain plans and specifications, the amount of a proposal guaranty, the right of the local government to reject bids, and other information.[53]

b) Prequalification

Under Public Road Works Statute, there is no express provision for prequalification.

3. Bond: Bid Bonds, Performance Bonds, and Payment Bonds

In contrast to the Public Works Construction Law's requirement of a bid bond, the Public Road Works Statute contemplates a "proposal guaranty." A proposal guaranty is a form of guaranty from an acceptable surety securing the bidder's commitment to enter into a contract, if awarded, and to furnish payment and performance bonds.[54] Without a proposal guaranty, when required, no competitive bid will be considered by a county.[55] Unlike the Public Works Construction Law, the Public Road Works Statute permits withdrawal of a proposal guaranty only before opening day.[56] Another distinction is that the Public Road Works Statute requires proposal guaranties to remain valid for 30 days, unless the bidder agrees in writing.[57]

Whereas the Public Works Construction Law requires performance and payment bonds for contracts in excess of $100,000, the Public Road Works Statute requires them for construction contracts of $5,000 or more.[58] The statute incorporates the specific bond requirements set forth in the Public Works

[49] In contrast to municipalities, counties need not competitively bid contracts for the purchase of materials, supplies, and equipment necessary for construction and maintenance of public roads and for the support and maintenance of the county's forces used in such work. O.C.G.A. § 32-4-63(a)(3).
[50] O.C.G.A. §§ 32-4-64 & 32-4-114.
[51] O.C.G.A. §§ 32-4-68 & 32-4-118.
[52] O.C.G.A. §§ 32-4-65 & 32-4-115. There are some differences in the duration of the advertisements.
[53] *Id*.
[54] O.C.G.A. § 32-1-3(22).
[55] O.C.G.A. §§ 32-4-67(a) (mandatory for counties) & 32-4-117 ("A municipality *may* require . . . .") (emphasis added).
[56] O.C.G.A. §§ 32-4-67(b) & 32-4-117.
[57] *Id*.
[58] O.C.G.A. §§ 32-4-69 & 32-4-119.

Construction Law.[59] It also incorporates the rule that local governments are directly liable to laborers, subcontractors, and suppliers if they fail to obtain a payment bond, when required.[60]

If a county contract calls for the construction or reconstruction of a bridge, it may require the performance bond to secure the contractor's obligation to maintain the bridge in good repair for a period of seven years or more.[61] If a county requires such a provision in the performance bond but fails to obtain it, the county is "primarily liable for all injuries caused by reason of a defective bridge for damages occurring within seven years of the contractor's work."[62]

4. Contracts

All public road construction contracts must be in writing, approved by resolution, and entered on the minutes of the local government.[63] Before commencing any work, the contractor must provide a contractor's oath as provided in the Public Works Construction Law.[64]

C. Other Georgia Public Works Laws

There are many statutes that impose additional or varying obligations on public works contracts, including those primarily governed by the Public Works Construction Law or Public Road Works Statute. For instance, O.C.G.A. Title 13, Chapter 10, Article 2 ("Payment and Retainage Law") requires period progress payments and imposes restrictions on withholding retainage. Rules governing progress payments apply to public works construction contracts (i.e., contracts under the Public Works Construction Law), unless they do not exceed $150,000 or 45 days in duration.[65]

In addition, O.C.G.A. Title 13, Chapter 10, Article 3 ("E-Verify Law") imposes certain requirements for E-Verify. It requires public works contractors and subcontractors to register and participate in E-Verify and to verify such compliance by affidavit.[66] The E-Verify Law applies to contracts for the "physical performance of services" in excess of $2,499.99.[67]

Another peculiar set of statutes governing only certain counties is O.C.G.A. §§ 36-10-2.1 & 36-10-2.2. These statutes require that "contracts for building or repairing any courthouse or other public building, jail, bridge, causeway, or other public works or public property shall be let to the lowest responsible bidder." But in determining whether the bidder is "responsible," it may consider "the bidder's quality of work, general reputation in the community, financial responsibility, previous employment on public works, and compliance with a minority business enterprise participation plan or making a good faith effort to comply with the goals of such a plan."

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[59] *Id*.
[60] O.C.G.A. §§ 32-4-71 & 32-4-120.
[61] O.C.G.A. § 32-4-70.
[62] O.C.G.A. § 32-4-71.
[63] O.C.G.A. §§ 32-4-61 & 32-4-111.
[64] O.C.G.A. §§ 32-4-73 & 32-4-122.
[65] O.C.G.A. § 13-10-80(c)(2). For similar rules governing contracts affecting water and sewer facilities, see O.C.G.A. §§ 13-10-81 & 13-10-82.
[66] O.C.G.A. § 13-10-91(b).
[67] O.C.G.A. § 13-10-90(4).

For Guaranteed Energy Savings Performance Contracts, see the attached article: "Energy Savings Performance Contracts: Risks and Rewards for Local Governments," Georgia County Government Magazine, August 2012.

D. Local Government Purchasing Laws

In addition to public works, local governments procure goods, supplies, and equipment for the benefit of the public and their own needs. Local government purchasing is generally governed by local ordinances, rules, and regulations. There are, however, a number of statutory provisions that affect local government purchasing.

In the direct purchasing of goods, or in conjunction with a public works contract, local governments are subject to various mandatory or preferential source rules for the acquisition of goods. These rules either require local governments to give preference or mandate them to acquire goods from certain sources, which may include products produced by the Georgia Department of Corrections or Georgia-based providers. For example, O.C.G.A. § 50-5-63 states: "No contract for the construction of, addition to, or repair of any facility, the cost of which is borne by the state or any department, agency, commission, authority, or political subdivision thereof, shall be let unless the contract contains a stipulation therein providing that the contractor or any subcontractor shall use exclusively Georgia forest products in the construction thereof, when forest products are to be used in such construction, addition, or repair, and if Georgia forest products are available." Additionally, local governments must give preference (as far as reasonable and practicable) to products manufactured or produced in Georgia.[68]

Under Title 50, the Georgia Department of Administrative Services is authorized to provide assistance to local governments, which can include purchasing goods on behalf of the local government.[69]

III. PROBLEMS AND PITFALLS

Our job as local government attorneys is to keep our clients out of trouble, and we can learn from the experience of others who have run afoul of the public works and procurement laws. This section discusses some of the common pitfalls encountered by local governments.

A. Effect of Failure to Follow Public Works and Procurement Laws

One of the more common problems is the failure to follow the public works statutes, and its implication on the recovery of public funds improperly expended. Several cases address this very issue. They arise when a local government or its staff enters into a contract without proper authorization or without following the procurement rules. The resulting litigation involves the local government's attempt to recover public funds or the contractor's or supplier's attempt to recover compensation for the benefits provided.

In many cases, the contractors or suppliers seek recovery of amounts for services or goods previously provided under a contract declared void for failure to comply with procurement rules. Since contract claims are no help, contractors and suppliers seek recovery under implied contract theories. But as against local governments, these equitable claims run up against sovereign immunity.

[68] O.C.G.A. § 36-84-1.
[69] O.C.G.A. §§ 50-5-100 & 50-5-103.

A recent example is found in the Georgia Supreme Court case of *City of Baldwin v. Woodard & Curran, Inc.,*[70] in which an engineering company sued a city for compensation allegedly due for engineering services and related work in connection with a wastewater treatment plant. After the city's mayor signed the firm's proposal, the city determined that federal funds were unavailable, and it declined to pay the engineering firm.

The city relied on the following provision of its charter:

> No contract with the city shall be binding on the city unless the contract is in writing, is signed after review by the city attorney, and is approved by the city council subsequent to its signature by the city attorney, with such council approval entered on the council journal.

Since neither the city attorney nor the city council approved the contract, the city argued the purported agreement between the city's mayor and the engineering firm was ultra vires and void. The court agreed.

When the contractor argued for recovery under implied contract theories based on work actually performed for the city, the court again denied recovery. City charters, just like statutory provisions, must be followed, and equitable principles like quantum meruit will not permit recovery when they are not.

While the court handed local governments a victory, it also left open the possibility of recovery when contracts are "imperfectly or irregularly executed." The court explained the exception:

> The exact status of a defective contract ... depends upon the type of limitation which the local government has ignored in making it. If the contract was imperfectly or irregularly executed, it may not necessarily be completely ineffective, as long as it was the type of contract within the power of the local government to make. But if the limitation ignored was one which placed the contract completely beyond the power or competence of the local government, then the contract will be termed ultra vires, and its status is an absolute nullity.

This distinction was noted in *HG Brown Family Ltd. Partnership v. City of Villa Rica*,[71] in which a plaintiff brought a mandamus action to compel the city to approve and record a putative contract. The putative contract did not comply with the city charter because it was not approved by the city council and was not recorded in the minutes. As a result, the contract was ultra vires, null, and void. But the court went on further to say the plaintiff could not indirectly enforce the contract "through mandamus or other means" or through equitable principles or estoppel.

As an example of a local government being estopped from asserting the illegality of a contract when it had the authority to contract but failed to comply with some procedural requirement, see *City of Summerville v. Georgia Power Co*.[72] In that case, the city had the authority to grant a franchise right (i.e., a contract), but it granted the franchise without first complying with a charter provision requiring notice

[70] 293 Ga. 19 (2013).
[71] 278 Ga. 819 (2005).
[72] 205 Ga. 843 (1949).

and publication of the proposed franchise. Since the city had the authority, but did not comply with the notice requirement, the court estopped the city from denying the franchise right.

The reverse scenario – when the county seeks recovery of payments under an invalid contract – occurred in *Howard v. Brantley County*,[73] in which the contract was deemed invalid due to the county's failure to comply with the Public Road Works Statute's bidding requirement. Such a violation rendered the contract void as beyond the county's authority. As such, the county was permitted to recover funds paid out under the void contract.

In *Twiggs County v. Oconee Elec. Membership Corp.*,[74] the court denied the county's attempt to recoup payments made without a contract to a utility that had performed utility relocation work. In denying the county's claim, presumably based on the voluntary payment doctrine, the court focused on the following controlling factors: the EMC had performed all the work, the county waited two years before attempting to recover the payments, no fraud or mistake had induced the county's prior payments, and most importantly, the county had the authority to enter into contracts for utility relocation.

> Read a more about these ultra vires cases on AHC's Construction and Procurement Law Blog – www.ahclaw.com/construction.

Older cases impose direct liability on local government staff when they do not follow the proper procedures. For example, in *Knight v. Troup County Bd. Of Ed.*,[75] a school superintendent entered into a contract with an industrial maintenance company, either on his own behalf or on behalf of the school board, which was not a legal entity anyway. Though the superintendent was absolved of any official liability, because he had no authority to bind the county board of education, the court found he could be individually liable if the jury found he acted outside his scope of authority.

Similarly, in *Dixie Drive It Yourself System v. Lewis*,[76] a principal entered into a contract, purportedly on behalf of a school, for the rental of vehicles. When one of the vehicles was damaged, the plaintiff sought recovery from the principal, as the school itself was not subject to suit. The Court ruled that the principal was liable because "[o]One who professes to contract as agent for another, when his purported principal is actually nonexistent, may be held personally liable on the contract, unless the other contracting party agrees to look to some other person for performance." Because the school was not a legal entity, the principal could not be its agent. As a result, the court found the principal personally liable on the contract.

B. New Debt and Multi-Year Contracts

Many public works contracts extend beyond the local government's current fiscal year. When these contracts are not funded by existing funds in the local government's treasury, they can implicate the constitutional limitation on new indebtedness by local governments (the "Constitutional Debt Limitation"), which requires voter approval for new debt. Georgia courts have ruled that a contractual obligation that extends beyond a fiscal year constitutes a debt of the local government, unless the liability is to be discharged by money already in the treasury or taxes to be levied during the year in which the contract was made.

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[73] 260 Ga. App. 330 (2003).
[74] 245 Ga. App. 231 (2000).
[75] 144 Ga. App. 634 (1978).
[76] 78 Ga. App. 236 (1948).

The Constitutional Debt Limitation was discussed in a 2012 Georgia Supreme Court case of *Green County School District v. Circle Y Construction, Inc.*[77] The Court addressed the impact of a school district's failure to comply with the school district law governing multi-year contracts (the "Multi-Year Contracting Statute").[78] The case involved a contract between a school district and a contractor for construction management services for construction of the school district's facilities. County voters approved the project funding through an Educational Local Option Sales Tax (ELOST). After eleven months, the school district terminated the contract, and the contractor filed suit.

The school district moved to dismiss the lawsuit, arguing that the contract was void as a matter of law because it did not comply with the Multi-Year Contracting Statute. The contract was unquestionably an open-ended, multi-year contract, yet it did not contain the provisions required by the Multi-Year Contract Statute to be incorporated into multi-year contracts.

The Multi-Year Contracting Statute, however, provides that as long as the multi-year contract contains certain provisions (e.g., an annual renewal provision), the contract will not be considered a debt of the local government. As a result, to be constitutionally valid, multi-year contracts constituting "New Debt" must either (i) receive voter approval or (ii) comply with the Multi-Year Contracting Statute.

The Georgia Court of Appeals previously upheld the contract's enforceability under two alternative bases. First, because the voters approved the funding source, the contract need not comply with the Multi-Year Contracting Statute. Second, it relied on an exception contained in the Multi-Year Contracting Statute -- the Proprietary-Function Exception. The Proprietary-Function Exception provides that "reasonable contracts arising out of [local governments'] proprietary functions" are not subject to the Multi-Year Contracting Statute.

> See more analysis of the Green County School District Case at www.ahclaw.com/construction.

The Supreme Court accepted the first basis for upholding the enforceability of the contract – i.e., it was approved by the voters and did not need to comply with the Multi-Year Contracting Statute. But it vacated the appellate court's holding under the Proprietary-Function Exemption. It held that the Proprietary-Function Exception was not pertinent because the multi-year contract's funding source was approved by the voters. In other words, when the voters approve a multi-year contract, it need not contain the provisions of the Multi-Year Contracting Statute, nor did it need to fit within the Proprietary-Function Exception. Accordingly, the Court of Appeal's alternative ruling was unnecessary and, therefore, vacated.

C. Failure to Obtain Payment Bond

As noted above, local governments that fail to obtain payment bonds on public works projects are directly liable to subcontractors and suppliers. As an example, in *City of Atlanta v. United Electric Co., Inc.*,[79] the city obtained a payment bond for one portion of the project but did not obtain one for another. After a contractor filed bankruptcy leaving a subcontractor unpaid, the subcontractor sued the city.

[77] 291 Ga. 111 (2012).
[78] O.C.G.A. § 20-2-506.
[79] 202 Ga. App. 239 (1991).

The portion of the project at issue involved completion of the commercial facilities. So the city argued that the project was not a public works project. The court disagreed, citing the underlying contracts and the fact that the project was constructed under the Downtown Development Authorities Act. "As the city failed to require payment and performance bonds in accordance with [the Public Works Construction Law], [the subcontractor] has a direct right of action to recover for any resulting loss."

In a more recent case, *City of College Park v. Sekisui SPR Americas, LLC*,[80] a city did not obtain a payment bond, but fortunately, it qualified under the "emergency exception" of the Public Works Construction Law. Accordingly, it was not directly liable to an unpaid subcontractor.

D. Failure to Consider the Statute of Limitations on Performance Bond Claims

While most written contracts are subject to a six-year statute of limitations, performance bonds under the Public Works Construction Law are subject to a one-year limitations period, accruing upon completion and acceptance of the project.[81] Sometimes local governments seek to work with a struggling contractor, attempting to cajole a reluctant contractor to remedy problems. To the chagrin of local government staff, when these efforts prove futile, it may be too late to bring in the surety.

In many cases, there is no clear delineation of when the project is completed[82] or accepted.[83] In those cases, sureties are reluctant to perform or offer substantial amounts for settlement. As a result, when problems arise, it is best to engage the contractor and its surety early enough to comply with the statute with more than adequate time.

IV. Additional Resources on Local Government Public Works and Procurement Law

For more resources on local government public works and construction law, please visit our blog at www.ahclaw.com/construction and the following topics:

- Local Governments – www.ahclaw.com/construction-category/local-governments/
- Public Works – www.ahclaw.com/construction-category/public-works/
- Attorney David Cook – www.ahclaw.com/cook-construction-law/
- "Energy Savings Performance Contracts: Risks and Rewards for Local Governments," Georgia County Government Magazine, August 2012. (Attached)

[80] 331 Ga. App. 404 (2015).
[81] O.C.G.A. § 36-91-72.
[82] "'Completion of the contract,' for purposes of one-year statute of limitations for actions on performance and payment bond, occurs when general contractor has completed its work, and not when appropriate public authority has completed all its functions in connection with the contract." *U.S. Fidelity & Guaranty Co. v. Rome Concrete Pipe Co., Inc*., 256 Ga. 661, 353 S.E.2d 15 (1987).
[83] *Southern Electric Supply Co. v. Trend Const., Inc*., 259 Ga. App. 666, 578 S.E.2d 279 (2003) (listing factors of acceptance).

V. HELPFUL CHARTS OF PUBLIC WORKS LAWS

A. Dollar Thresholds

	Public Works Construction Law	Public Road Works Law
Applicability (subject to other exceptions)	$100,000 or more	No $ threshold, but certain requirements are exempted based on $ amount
Bid Bonds / Proposal Guaranty	Greater than $100,000	No $ limit, but amount of bond is set by local government (For municipalities, see text above.)
Performance Bond	Greater than $100,000	$5,000 or more
Payment Bond	Greater than $100,000	$5,000 or more

B. Contract Award Bases

	Public Works Construction Law	Public Road Works Law
Bidding	Lowest responsible and responsive bidder	Lowest reliable bidder
Proposals	Responsible and responsive offeror whose proposal is determined to be most advantageous based on the evaluation factors	N/A

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Feature

Energy Savings Performance Contracts: Risks and Rewards for Local Governments

By David R. Cook, Jr.

Energy efficiency has received increased attention as the public begins to recognize the tremendous benefits it provides. Among other things, energy efficiency reduces utility consumption, which ultimately reduces utility costs.

Georgia governments, including counties, recently acquired new authority to enter into energy efficiency contracts, called "energy savings performance contracts" under the Guaranteed Energy Savings Performance Contracting Act (the Act). These contracts may provide a politically attractive way to replace old utility systems in county buildings or property (i.e., lighting systems, HVAC, etc.) or to install or replace energy efficient projects (i.e., installing new insulation, storm windows or weather stripping) funded by future utility cost savings. Even so, before executing an energy savings performance contract, counties should review the risks involved.

Energy savings performance contracts are agreements where energy service companies install or implement utility conservation measures and guarantee an agreed-upon level of utility cost savings. Georgia governments, including counties, recently acquired new authority to enter into such contracts.

What are energy savings performance contracts?

Energy savings performance contracts are agreements where energy service companies install or implement utility conservation measures and guarantee an agreed-upon level of utility cost savings. The amount of utility cost savings should cover the cost of installation and the company's fee. After all costs have been recovered through savings, all future savings accrue to the benefit of the county.

These contracts are typically long-term agreements (ten, fifteen or twenty years) to provide ample time for the county to realize sufficient savings. While the installation and implementation phase may last only a few months, the guaranty phase (the period during which savings accrue) lasts much longer to ensure that all costs are recovered.

The projects usually involve physical construction, such as installing new insulation, storm windows or weather stripping, or upgrading or replacing HVAC systems and lighting fixtures. They also may involve services, such as utility rate analysis, labor studies or efficiency training programs. In addition to utility cost savings, they also may result in increased revenues, such as income from distributed generation (i.e., the production of energy at the county's premises) or billing equipment upgrades.

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Benefits of energy savings performance contracts

Energy savings performance contracts provide two primary types of benefits to local governments: **cost savings** and **public goodwill.**

Utility Cost Savings: Utility cost savings are measurable reductions in utility costs resulting from utility conservation measures. To quantify utility cost savings, counties must compare their utility usage *after* installation with a baseline that accurately represents their utility usage *before* installation. By comparing pre- and post-installation utility usage, counties can determine the level of utility cost savings that is attributable to the energy savings performance contract project.

Energy saving performance contracts typically require companies to measure and verify savings by using generally accepted methodology and sound engineering techniques. For example, under "whole facility measurement," companies collect data from a facility's electric meter or sub-meter. Other techniques involve the measurement of utility usage by specific equipment, or stipulated savings based on the owner's normal operating hours or other valid assumptions.

In addition to reducing energy usage, these projects can result in energy generation. The Act authorizes counties to install renewable energy generation systems that use solar sources. On-site power generation obviously reduces the need to purchase power, thereby directly reducing utility cost. Furthermore, where onsite power generation exceeds demand, the excess may, in certain circumstances, be sold to the utility.

Public Goodwill: Another benefit of energy savings performance contracts is intangible in nature: public goodwill. While it is intangible, public goodwill is nevertheless a valuable asset derived from utility savings projects. Several attributes make these contracts very attractive to counties.

First, they result in net zero cost over the life of the contract. This attribute is especially attractive due to the need to cut costs. For instance, some facilities desperately need improvements that may be paid for, in whole or in part, by utility cost savings resulting from energy savings performance contracts. Some local governments can find creative ways to acquire these necessary capital improvements at a net zero cost.

Second, these contracts promote sustainability. In a global survey conducted by *The Economist,* social responsibility was given as the second-most-important factor driving energy efficiency projects. In another survey by the U.S. Department of Energy, 65 percent of respondents cited public relations as a primary driver in energy efficiency efforts.

Third, energy savings performance contracts provide long-lasting benefits to the local government, extending years after the initial cost has been recovered. In other words, when the contract term ends, utility cost savings continue for the service life of the utility conservation measures.

Risks of energy savings performance contracts

Energy savings performance contracts clearly provide tremendous benefits to local governments. They do, however, come with significant risks that must be addressed and mitigated. These risks are significant because the contracts typically involve expensive capital improvements, complicated engineering and technical expertise, and long-term

obligations. Moreover, they are usually performed in occupied facilities, adding a layer of complexity to the work.

Construction Risks: Because energy savings performance contracts normally require significant capital improvements and heavy construction, they give rise to many of the same risks as large construction projects. Construction risks include, for example, defective equipment or products and defective installation, which may or may not surface until long after installation.

Delay is also concern. The work is normally performed in occupied facilities, which may impact employees, administrators, and public events and services. Similarly, the contract may demand extra compensation for excessive delay caused by the owner, possibly resulting from interference from occupants and facility usage during installation.

Finally, construction projects are unpredictable. As a result, construction claims that include claims for additional work, changes in the work, or unexpected conditions uncovered at the facility, may occur.

Savings Deficiency Risk: Another risk is the failure to generate the required level of savings. When the contract fails to produce the required savings, the owner does not receive its benefit of the bargain. The potential also exists that project costs will not be recovered through utility cost savings. To some extent, however, the savings guaranty (the company's promise to pay for any savings deficiency) mitigates against the risk of savings deficiency. Unless the company provides additional security, the guaranty is only as good as the company's creditworthiness.

Risk of Material Changes: After installation occurs, certain events can materially increase utility consumption – decreasing the amount of utility savings – at no fault of the company performing the work. For example, an owner may increase utility consumption by increasing the number of employees or hours of operation, setting the thermostat at an unreasonable or unanticipated level, or failing to properly service and maintain HVAC equipment. Such events may diminish the amount of savings the company would otherwise achieve. In these circumstances, most contracts provide for an adjustment to the baseline (the benchmark used to measure savings) to account for the owner's impact on savings. Such events should be addressed by contract and with preventative measures.

Conclusion

Energy efficiency projects can provide the combined benefits of capital improvements along with long-lasting utility cost savings. Furthermore, with their political attractiveness, counties should certainly consider them. Despite their benefits, however, energy savings performance contracts need to be approached with caution to mitigate the associated risk.

For additional information on energy savings contracts, the Georgia Energy Savings Performance Contracting Act, and other public works resources for public owners, visit AHC's Construction Law Blog at: www.ahclaw.com/construction. ■

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