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**“RULES FOR CONSTRUCTING PROJECTS UNDER THE GEORGIA
LOCAL GOVERNMENT PUBLIC WORKS CONSTRUCTION LAW”**

JANUARY 1, 2011

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How A “Public Works” Law Impacts Private Projects

When a development authority or another public body is involved in the construction related to a project, the Georgia Local Government Public Works Construction Law¹ (the “**Construction Law**”, or the “**law**”) potentially applies. Some cities and counties are aware of the law, and are already taking advantage of it. After all, if followed properly it lets them use design/build and other construction delivery methods that were inaccessible to them previously. Under prior law, they were required to use competitive bidding, based on completed design documents.

The Construction Law applies to “governmental entities”, meaning “a county, municipal corporation, consolidated government, authority, board of education, or other public board, body, or commission.” The law carves out from this definition the state and state instrumentalities, as well as specified public transportation agencies. Both “statutory” and “Constitutional” development authorities. are subject to the law. If you are a development authority, how does this impact the bond deal you just promised you would do for a new industry, if you are using a sale-leaseback structure for *ad valorem* property tax savings purposes? And what if state or local cash or in-kind incentives are being invested in such a project?

If the law applies to a particular development authority project, the development authority has to go through a process involving competitive sealed bidding or competitive sealed proposals. The procurement has to be advertised, and the advertising process will take a minimum of four weeks. (Think of the complications that this poses for your project, if this period hasn’t been included in the schedule).

The law applies to “public works construction”, defined as “building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property.” State, county and municipal street, road and highway projects are excluded. The term does not include routine operation, repair, or maintenance of existing structures, buildings or real property.

Unfortunately, “public structure”, “public improvements” and “public real property” are not defined. Neither is “public works construction contract”, a critical phrase that also appears in the law.

With an economic development project, determining the scope of the law is very relevant.

¹ O.C.G.A. Sec. 36-91-1 *et seq.*

The law doesn't apply to the normal work of an architect or engineer, so the design work can proceed as planned in any event. Specifically, the competitive sealed bidding/competitive sealed proposals requirement applies to public works construction contracts that:

- (1) Place the bidder or offeror at risk for construction; and
- (2) Require labor or building materials in the execution of the contract.

Both Good And Bad Come From The Law

The law benefits local governments that can now use construction delivery methods other than hard bidding. However, this benefit may be offset by the detriment to local authorities, particularly development authorities, that now have to structure projects to comply, or so that compliance isn't necessary. So how did this law come to pass, and, overall- is it bad, or is it good?

In response to a perceived need for a uniform public works law, a number of stakeholders (ACCG, GMA, the Georgia School Board Association, the Georgia Utility Contractors Association, and the Associated General Contractors) formed a task force to work on the legislative project that led to the passage in 2002, of HB 1079. This bill was the predecessor to HB 513 that now forms the new Georgia law. State Representative Tom Shanahan and State Senator Billy Ray led this legislative effort.

In an ACCG report, the following was given as the logic behind this law: "Prior to the passage of HB 1079 [the predecessor to HB 513] there was little or no consistency with regard to regulations controlling the various local governments procuring construction services. In addition, the laws that were applicable to all local governments were very antiquated and spread throughout various sections of the Georgia Code. This has made it very difficult for contractors to know and understand the requirements in order to offer construction services from one governmental entity to another."

In the General Assembly, the result was cut and paste drafting that drew on definitions already contained in the Georgia Code, on similar laws in our sister states, and on the American Bar Association Model Procurement Code. As you might expect, this has created the potential for confusion and ambiguities. For example, certain ad separation is specified in terms of number of weeks, but does "week" mean a period of seven consecutive calendar days or a calendar week? Also, if a public body drafted a Georgia RFP so that it specifies a definite number of proposals that will be short-listed, the draftsman may have tracked the ABA Model Procurement Code or another state's law, but not the Georgia law, which has its own requirements.

So what's good about the Construction Law? It only requires competitive sealed bidding/competitive sealed proposals for public works construction contracts subject to its provisions that: (1) place the bidder or offeror at risk for construction; and (2) require labor or building materials in the execution of the contract. Among other things, this means that normal contracts with construction managers who are not at risk, architects/engineers, program managers, developers, consultants, etc, are not covered.

At the cost of compliance with the law's requirements, it allows local governments to use the design/build method of project delivery, which the private sector has long enjoyed (one estimate is that 30%-50% of new private sector projects are carried out using that method). This allows for "fast track" projects, which often can be as important in the public sector as in the private sector. "Cost-plus with a guaranteed maximum" contracts (that can incorporate construction incentives through savings-sharing arrangements) are also now possible under the Construction Law. And some public owners might prefer to use a construction manager who is "at-risk" (i.e., who will actually issue subcontracts and purchase orders), in an effort to align the construction manager's interests with their own.

Finally, in a competitive sealed proposals procurement, price may be a factor, but it does not have to be the only factor. The local government can use evaluation factors weighted to reflect their true relative importance to the government, as part of the process of selecting the contractor whose proposal it deems "most advantageous" to the government.

So, there is some good, and there is some bad. The bad falls mainly on the project where the economic interest really lies in the private sector.

How Can A Private Company Stay Outside The Law's Requirements?

Competitive sealed proposals and competitive sealed bidding are now available to public bodies under the Construction Law. To a local government that can now use construction delivery methods other than hard bidding, this law is a benefit.

Now, suppose that you are a private sector company with a project that qualifies for tax-exempt financing with low interest rates, and that the community is also offering such incentives as *ad valorem* property tax savings, and cash and in-kind incentives. A bond-financed sale-leaseback structure is a must. This means that the development authority will hold title to your facility. However does this mean that you, the private sector company, have now lost the right to choose your architect and builder?

The answer to that question lies in discerning what the law does, and does not, require.

First of all, a normal owner-architect arrangement would not be subject to the competitive sealed proposals/competitive sealed bidding requirement. The law only applies to "public works construction contracts."

For the next leg of the analysis, let's start by looking at the interested parties.

The public bidding/competitive proposal provisions of the Construction Law apply only to contracts entered into by a "governmental entity," and appear not to apply to contracts between a private entity lessee of property from a governmental entity and a private construction contractor. See O.C.G.A. § 36-91-20, which requires "all public works construction contracts subject to this chapter *entered into by a governmental entity with private persons or entities*" [emphasis

supplied] to be in writing and provides for competitive bids or proposals. If the participants in a Georgia development authority project don't want the public bidding/competitive proposal provisions of the law to apply, it is important to have the private company sign the construction contract. If this is done, the private company should do so as a principal and not as the agent of the development authority. The provisions in the bond lease and other bond documents, such as the inducement resolution, and any agency agreement, should make it clear that the private company is not acting as an agent of the development authority in connection with any construction activities.

In any event, the development authority should always be mindful of compliance issues in this area, particularly if the transaction involves beneficial ownership of the project on the part of the development authority or another public body. In that case, additional structuring might be needed. In some cases, for example, it might be possible to structure the transaction as the financing of the purchase by the development authority of a completed facility.

Changes to Advertising Requirements

The advertising requirements were changed by the 2007 amendments to the Construction Law, including provisions to the effect that:

1. The Georgia Procurement Registry² is now one of the authorized means for electronic advertising.
2. Contract opportunities that are advertised solely on the Internet must be posted continuously for at least four weeks prior to the opening of sealed bids or proposals. However, inadvertent or unintentional loss of Internet service during the advertisement period does not require the contract award or bid or proposal opening to be delayed.
3. Contract opportunities that will be awarded by competitive sealed bids must have plans and specifications available on the first day of the advertisement and shall be open to inspection by the public. The plans and specifications must indicate if the project will be awarded by base bid or base bid plus selected alternates and:
 - (A) A statement listing whether all anticipated federal, state, or local permits required for the project have been obtained or an indication of the status of the application for each such permit including when it is expected to be obtained; and
 - (B) A statement listing whether all anticipated rights of way and easements required for the project have been obtained or an indication of the status as to when each such rights of way or easements are expected to be obtained.
4. Contract opportunities that will be awarded by competitive sealed proposals must be publicly advertised with a request for proposals which request shall include conceptual program

² See O.C.G.A. Sec. 50-5-69.

information in the request for proposals describing the requested services in a level of detail appropriate to the project delivery method selected for the project.

Surety Bond Requirements

Bid bonds are required for all public works construction contracts with estimated bids or proposals over \$100,000; provided, however, that a governmental entity may require a bid bond for projects with estimated bids or proposals of \$100,000 or less. If a governmental entity requires a bid bond for any public works construction contract, no bid or proposal for a contract with the governmental entity shall be valid for any purpose unless the contractor shall give a bid bond with good and sufficient surety or sureties approved by the governing authority. The bid bond shall be in the amount of not less than 5 percent of the total amount payable by the terms of the contract. No bid or proposal shall be considered if a proper bid bond or other security authorized in O.C.G.A. Sec. 36-91-51 has not been submitted. In lieu of the bid bond, the governmental entity may accept a cashier's check, certified check, or cash in the amount of not less than 5 percent of the total amount payable by the terms of the contract payable to and for the protection of the governmental entity for which the contract is to be awarded. When the amount of any bid bond does not exceed \$750,000, the governmental entity may, in its sole discretion, accept an irrevocable letter of credit issued by a bank or savings and loan association in the amount of and in lieu of the bid bond.

The law contains two other bonding provisions of concern. O.C.G.A. Sec. 36-91-70 requires a performance bond on any public works construction contract with an estimated amount greater than \$100,000 and O.C.G.A. Sec. 36-91-90 requires a payment bond for any public works construction contract with an estimated amount greater than \$100,000.

"Payment bond" means a bond with good and sufficient surety or sureties payable to the governmental entity for which the work is to be done and intended for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of the work provided for in the public works construction contract. The law provides that no public works construction contract requiring a payment bond shall be valid for any purpose, unless the contractor shall give such payment bond; provided, however, that, in lieu of such payment bond, the governmental entity, in its discretion, may accept a cashier's check, certified check, or cash for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of work provided in the contract. The payment bond or other security accepted in lieu of a payment bond shall be in the amount of at least the total amount payable by the terms of the initial contract and shall be increased if requested by the governmental entity as the contract amount is increased.

"Performance bond" means a bond with good and sufficient surety or sureties for the faithful performance of the contract and to indemnify the governmental entity for any damages occasioned by a failure to perform the same within the prescribed time. Such bond shall be payable to, in favor of, and for the protection of the governmental entity for which the work is to be done. No public works construction contract requiring a performance bond shall be valid for any purpose unless the contractor shall give such performance bond. The performance bond shall

be in the amount of at least the total amount payable by the terms of the contract and shall be increased as the contract amount is increased. When the amount of the performance bond required does not exceed \$750,000, the governmental entity may, in its sole discretion, accept an irrevocable letter of credit by a bank or savings and loan association in the amount of and in lieu of the bond otherwise required.

The payment and performance bond requirements discussed above are substantially the same as the bonding provisions of the old Little Miller Act.³ O.C.G.A. Sec. 36-91-91 provides: “If a payment bond or security deposit is not taken in the manner and form required in this article, the corporation or body for which work is done under the contract shall be liable to all subcontractors and to all persons furnishing labor, skill, tools, machinery, or materials to the contractor or subcontractor thereunder for any loss resulting to them from such failure.”

Neither O.C.G.A. Sec. 36-91-70, requiring a performance bond, nor O.C.G.A. Sec. 36-91-91, requiring a payment bond on public works construction contracts of \$100,000 or more, expressly limit the bonding requirements to contracts to which a governmental entity is a party. *But see*, O.C.G.A. § 36-91-21(g), which provides:

(g) No public works construction contract *with a governing authority* [emphasis supplied] shall be valid for any purpose unless the contractor shall comply with all bonding requirements of this chapter. No such contract shall be valid if *any governmental entity* [emphasis supplied] lets out any public works construction contract subject to the requirements of this chapter without complying with the requirements of this chapter.”⁴

The “Do’s” and “Don’t s”

As discussed above, there are circumstances in which the Construction Law will not apply. Then, a private company that will be the beneficial owner of the project can choose its contractor, without the necessity of competitive sealed bidding or competitive sealed proposals.

Structuring can play an important role in determining whether compliance with the law is necessary. But there are some “bright line” rules that project participants can always cling to for guidance.

Here are the basic “Do’s” and “Don’t s” under the Construction Law.

³ Georgia’s Little Miller Act” was previously contained in O.C.G.A. § 36-82-100 *et seq.*. Those sections have been repealed, but their provisions relating to performance and payment bonds have been moved to other code sections. Old O.C.G.A. § 36-82-101 provided that: “No contract with this state or with a county, municipal corporation, or any other public board or body thereof for the doing of any public work shall be valid for any purpose unless the contractor shall comply with Code Section 13-10-1.” O.C.G.A. § 13-10-1, as it existed prior to its amendment in 2001, required the posting of performance and payment bonds, and it tracked the language of O.C.G.A. § 36-82-101 as to the entities that were required to obtain such bonds and the nature of the projects contemplated by the statute. The repealed O.C.G.A. § 36-82-100, *et seq.* and pre-amendment O.C.G.A. § 13-10-1 applied to public works contracts of both state and local entities.

⁴ Compare *City of Atlanta v. United Elec. Co. Inc.*, 202 Ga. App 239, 414 S.E.2d 251 (Ga. App. 1991)

“Do’s”

In its report to the counties on the new legislation, ACCG focused on the benefits of providing uniformity and consistency, but touted that the Construction Law: “recognizes current industry practices that provide flexibility for the governmental entity while insuring that public works contracts are awarded in an open and competitive manner.”

So these are the first “do’s”-

- Do take advantage when appropriate of such construction delivery methods as design/build contracts that allow for fast track projects.
- At the same time, do be sure to insure compliance with the law’s requirements for openness and competitiveness.
- When the beneficial owner of the project is a private company (for example, in a sale-leaseback structure involving a development authority), do be aware of the structuring opportunities that are available, so that the Construction Law does not frustrate the expectations of the company.
- In a bidding situation, do realize that the contract must be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. Also realize that there is an exception- if the bid from the lowest responsible and responsive bidder exceeds the funds budgeted for the contract, the governmental entity may negotiate with such apparent low bidder to obtain a contract price within the budgeted amount. Such negotiations may include changes in the scope of work and other bid requirements.
- Competitive sealed proposals in many cases will be the procurement method of choice. In that case, do realize that the purpose is to make an award to the offeror whose proposal the governmental entity determines to be most advantageous to it, taking into consideration the evaluation factors set forth in the request for proposals.
- Particularly in the case of public-private projects, typically those that involve development authorities, do be aware of the exemption that the law added to the Georgia laws governing open records. The exemption applies to engineers' cost estimates and pending, rejected, or deferred bids or proposals until such time as the final award of the contract is made, or the project is terminated or abandoned.

“Don’t s”

With all these good “do’s”, there have to be some bad “don’t s”. There are, particularly these-

- If you are the governmental entity, don’t think that you can use change orders to circumvent or manipulate legal requirements. The Construction Law specifically states that change orders cannot be used to evade its purposes.
- In the same vein, don’t think, if you are the public owner, that prior “bad blood” between your governmental entity and a would-be bidder or offeror, alone, can be used as a basis to disqualify the bidder or offeror in the course of a mandatory pre-

qualification process. The criteria for prequalification must be reasonably related to the project or the quality of the work. A prequalified bidder or offeror cannot be later disqualified without cause.

- Don't think, if you are the governmental entity, that the law's prohibition of preventing, or attempts to prevent, competition in bids or proposals applies just to third parties- it applies to the governmental entity, as well. In fact, it applies to all persons.
- Don't think that the drafters of the Construction Law overlooked members of the governmental entity. A member of the governmental entity is guilty of a misdemeanor if the member takes, or contracts to receive or take, either directly or indirectly, any part of the pay or profit arising out of a contract subject to the law.
- Don't think, if you are a member of the governmental entity, that there is any new exemption under the law for your participation in the decision-making process. A new exemption was added for open records, not for open meetings.

In addition, a number of "don't s" are aimed directly at the contractor, including these-

- If you are the contractor and knew that the construction contract was let out without compliance with the notice and competitive award requirements of the law, don't think you are going to get paid. The law specifically states that a contractor under those circumstances shall not be entitled to receive any payment for such work.
- Don't think, if you are a contractor, that you were overlooked in the law's "anti-circumvention" provisions. Under the law, no person who desires to procure such work for himself or herself or for another shall prevent or endeavor to prevent anyone from making a bid or proposal therefor by any means whatever, nor shall such person so desiring the work cause or induce another to withdraw a bid or proposal for the work. In fact, before commencing the work, any person who procures such public work by bidding or proposal has to give an affidavit that such person has not violated these provisions.

Conclusion

Life is what you make it, and so is the Construction Law. The law can be an impediment to certain projects unless the project participants recognize and take advantage of its structuring possibilities. On the other hand, to a governmental entity that previously could only use hard bidding for its construction projects, the law opens up a whole new world previously reserved for the private sector. Used wisely, time and budget savings can be the result.

More Information

This paper is a quick-reference guide for company executives and managers, elected and appointed public officials, economic developers, participants in the real estate and financial industries, and their advisors. The information in this paper is general in nature. Various points which could be important in a particular case have been condensed or omitted in the interest of readability. Specific professional advice should be obtained before this information is applied to

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Additional information concerning this topic, as well as White Papers and references on other topics, can be found at <http://danmcræ.info/>.

If you have any questions or comments, we would be pleased to provide more information. Please contact:

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