

Opinion No. 2012-005

February 6, 2012

The Honorable John T. Vines  
State Representative  
123 Market Street  
Hot Springs, Arkansas 71901-5308

Dear Representative Vines:

I am writing in response to your request for my opinion on the following question concerning a county construction project:

May a county in Arkansas hire an agent without competitive bidding for the agent where the agent will provide design review, scheduling, cost control, value engineering, constructability evaluation, preparation and coordination of bid packages, and construction administration services and the construction work will be performed pursuant to trade contracts that will be awarded by the county after public bidding pursuant to applicable law?

By way of background, you report that a county intends to construct a jail and contemplates hiring “an entity knowledgeable in the area of construction” to act as the county’s agent in providing the services outlined in your question. You state that the agent will be selected on the basis of “qualifications, including experience, successful completion of projects, and reputation.” You further state that the agent will not be bonded, but “the trade contractors will be required to supply both performance and payment bonds as required for a public works project.”<sup>1</sup> You further explain, with regard to the project itself, that it “may be divided into phases and bids taken for various phases also known as trade packages.... Rather than

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<sup>1</sup> Pursuant to A.C.A. § 22-9-203(c)(2)(A)(i) (Supp. 2011), bids submitted on county construction contracts “shall be void unless accompanied by a cashier’s check drawn upon a bank or trust company doing business in this state or by a corporate bid bond.” *See also* A.C.A. § 18-44-502 (Repl. 2003).

wait for a complete design before submitting the entire project for public bidding, the county intends to commence construction on the initial phases while design of the remaining parts of the project continues.”

## **RESPONSE**

In my opinion, the answer to both parts of the general question you pose is “yes.” I must emphasize, however, that this opinion does not address the award of particular contracts. Application of the award procedure under the so-called “public works law”<sup>2</sup> may involve factual variables that are not within the limited scope of this opinion. Only a finder of fact could determine whether the county has observed the public works law in connection with particular contracts.

## **DISCUSSION**

With regard to the first part of your question concerning the hiring of an agent, I note that the agency services you have outlined are found in the description of “construction management” under A.C.A. § 19-11-801 (Repl. 2007).<sup>3</sup> This statute

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<sup>2</sup> A.C.A. §§ 22-9-201–204 (Supp. 2011). The competitive bidding requirements under this body of law apply to county contracts “for the making of major repairs or alterations, for the erection of buildings or other structures, or for making other permanent improvements...” *Id.* at -203(a). Article 19, Section 16, of the Arkansas Constitution similarly requires competitive bidding on “[a]ll contracts for erecting or repairing public buildings or bridges in any county...” Article 19, section 16’s application to county contracts was confirmed in *Gatzke v. Weiss*, 375 Ark. 207, 211, 289 S.W.3d 455 (2008) (interpreting the words “in any county” in Ark. Const, art. 19, § 16, to mean “county contracts.”)

<sup>3</sup> Subsection 19-11-801(d)(1) defines “construction management” as:

... a project delivery method based on an agreement in which a state agency, political subdivision, public school district, or institution of higher education acquires from a construction entity a series of services that include, but are not limited to, *design review, scheduling, cost control, value engineering, constructability evaluation, preparation and coordination of bid packages, and construction administration.*

(Emphasis added.) Counties are included in the definition of “political subdivision” under subsection 19-11-801(e)(1).

One court has described the “construction management concept” as follows:

Under this approach there is no general contract and the entire job is not awarded by means of a single bid. Rather [the public authority] employs a construction manager which, acting in concert with the architect and engineer employed by the agency, supervises and manages the sequence of construction. Under this process, individual contracts are offered for bid and awarded directly to those who will do the work as the

plainly contemplates that a county might use such services on a construction project. As far as securing the services is concerned, the state and its political subdivisions may not use competitive bidding to procure construction management services.<sup>4</sup> Rather, they must follow the procedures outlined in A.C.A. §§ 19-11-802–805 (Repl. 2007), which involve evaluating the entity’s qualifications and negotiating a contract.<sup>5</sup>

I assume from your reference to an “entity knowledgeable in the area of construction” that the agent at issue under your question would in fact be a “construction entity,” as contemplated under A.C.A. § 19-11-801(d)(1)’s definition of “construction management.” Given that the services to be performed by the agent plainly constitute “construction management” as so defined, it seems clear that hiring the agent without competitive bidding is not only authorized, but mandated by law.<sup>6</sup> Accordingly, the answer to the first part of your question is generally “yes,” in my opinion.

As for the second part of your question concerning the construction work, assuming that the county in fact follows all applicable procedures under the public works law and properly awards the trade contracts after competitive bidding,<sup>7</sup> then

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construction progresses. This permits certain phases of construction to commence while plans and preparations for later phases are still on the drawing board and, according to [the public authority], enables construction to be completed much faster and with less expense than was possible under the traditional proceeding of designing the entire project in advance and awarding a single contract to one general contractor who would then be responsible for the performance of much of the work through various subcontractors. In short, and perhaps overly simplified, construction management permits the owner to deal directly with those who would probably have been subcontractors under the traditional approach and to do so as their services become necessary.

*C & D Contractors v. Delaware Tech. & Col.*, 318 A.2d 142, 144 (Del.Ch. 1974).

<sup>4</sup> *Id.* at (b) (“It is the policy of the State of Arkansas and its political subdivisions that political subdivisions shall follow the procedures stated in this section, *except that competitive bidding shall not be used for the procurement of* legal, financial advisory, architectural, engineering, *construction management*, and land surveying professional consultant *services.*” (Emphasis added.)

<sup>5</sup> A.C.A. §§ 19-11-803 and -805.

<sup>6</sup> A.C.A. § 19-11-801(b), *supra* n. 3.

<sup>7</sup> Note 2, *supra*. It should be emphasized that the award decision rests with the “board, commission, officer, or other authority [of the county] in which or in whom authority is vested to award contracts....” A.C.A. § 22-9-203(d) (Supp. 2011). *Accord Quality Fixtures v. Multi-Purpose Facilities Board*, 337 Ark. 115, 120-21, 986 S.W.2d 865 (1999) (concerning the award procedure followed by the Pulaski County

in my opinion the answer to this part of your question is also “yes.”<sup>8</sup> I believe the decision whether to wait for a complete design or solicit bids for phases is one that generally rests with the county. I must note in closing, however, that I am not opining regarding the propriety or impropriety of any particular contract entered by the county. Only a finder of fact could determine whether the county has observed the public works law in connection with particular contracts.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

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Multi-Purpose Facility Board for certain construction work at the Alltel Arena in North Little Rock, where the court distinguished between the opening of the bids on the one hand – which was handled by the construction manager – and the “analysis, examination, and inspection” of the bids and the awarding of the contract, which could only be performed by the county’s Facility Board.) It should perhaps also be noted that competitive bidding requirements cannot be circumvented by splitting up a contract into several smaller contracts, where in reality the work must be regarded as included in one contract. *See* 53 A.L.R.2d 498 (1957).

<sup>8</sup> This also assumes that plans and specifications will be properly prepared by and executed under the observation of registered professionals in accordance with A.C.A. § 22-9-101(a) (Supp. 2011), which provides as follows: “[A] ... county ... shall not engage in the capital improvement of public works involving engineering or architecture for which the plans, specifications, and estimates have not been made by and the capital improvement executed under the observation of a professional engineer as defined in § 17-30-101 or architect as defined in § 17-15-102, in their respective areas of expertise.”