

Opinion No. 2013-051

August 5, 2013

The Honorable Jake Files
State Senator
300 Free Ferry Landing
Fort Smith, Arkansas 72903

Dear Senator Files:

This is in response to your request for my opinion on the following questions concerning construction management contracts:

1. In light of [*Gatzke v. Weiss*, 375 Ark. 207, 289 S.W.3d 455 (2008)], please offer me an opinion on how construction management contracts are able to be entered into by county government without advertising and selecting on lowest bid or if they are even able to be entered into at all.
2. If your opinion is that county government cannot enter into a construction management agreement, what is the remedy for those counties who are entering into those contracts illegally at this time, and what is the remedy for those that have been entered into previously and completed?

RESPONSE

Please note that I have enclosed two previous opinions of this office that address your apparent concern regarding a county's authority to procure construction management services without competitive bidding.¹ As noted in these opinions, A.C.A. § 19-11-801 prohibits the state and its political subdivisions from using

¹ Ark. Op. Att'y Gen. Nos. 2012-005 and 2009-033.

competitive bidding for professional services known as “construction management,” a term defined 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.²

In response to your first question, therefore, counties are not only authorized, but are required to contract for “construction management” services without competitive bidding. If a county wishes to procure these professional services, in other words, it must do so by following the procedures outlined in A.C.A. §§ 19-11-802–805, which involve evaluating the entity’s qualifications and negotiating a contract.³

It bears noting, however (as the enclosed opinions also point out), that both the so-called “public works law”⁴ and the Arkansas Constitution⁵ require competitive bidding on the construction work.⁶ The question whether a county has observed these laws in connection with any particular contract is one of fact, and thus outside the scope of an opinion from this office.

² A.C.A. § 19-11-801(d)(1) (Repl. 2007). “Political subdivision” means “counties, school districts, cities of the first class, cities of the second class, and incorporated towns[.]” *Id.* at (e)(1).

³ Section 19-11-801 also prohibits the use of competitive bidding for a project delivery method called “general contractor construction management.” *Id.* at (d)(2)(C). As explained in Opinion 2009-033, this subsection “might be interpreted as authority to forego competitive bidding for the construction contract.” *Id.* at 5. But as I also explained in this 2009 opinion, I believe this provision is properly construed to apply to school districts, and not to counties.

⁴ A.C.A. §§ 22-9-201–204 (Supp. 2011).

⁵ Ark. Const. art. 19, § 16. *See also Gatzke v. Weiss*, 375 Ark. 207, 211, 289 S.W.3d 455 (2008) (confirming art. 19, § 16’s application to county construction contracts).

⁶ Op. 2012-005 at 3 (opining that the decision whether to wait for a complete design or solicit bids for phases generally rests with the county “assuming that the county in fact follows all applicable procedures under the public works law and properly awards the trade contracts after competitive bidding.”); Op. 2009-033 at 6 (noting that while “a construction manager apparently can perform some preliminary tasks in connection with the bidding, such as the opening and initial comparison of bids[.]...the actual award decision rests solely with the county, acting through its board, officer, or other authority[.]” citing *Quality Fixtures v. Multi-Purpose Facilities Board*, 337 Ark. 115, 120-121, 986 S.W.2d 865 (1999)).

The Honorable Jake Files
State Senator
Opinion No. 2013-051
Page 3

A response to your second question is unnecessary in light of the foregoing.

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh

Enclosures