



**COUNTY JUDGES ASSOCIATION OF ARKANSAS**

**2023 CONSTRUCTION LAW GUIDEBOOK**

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**Presenters**

**Hon. Rusty McMillon, Greene County Judge**

**Hon. Marvin Day, Craighead County Judge**

**Little Rock, Arkansas**

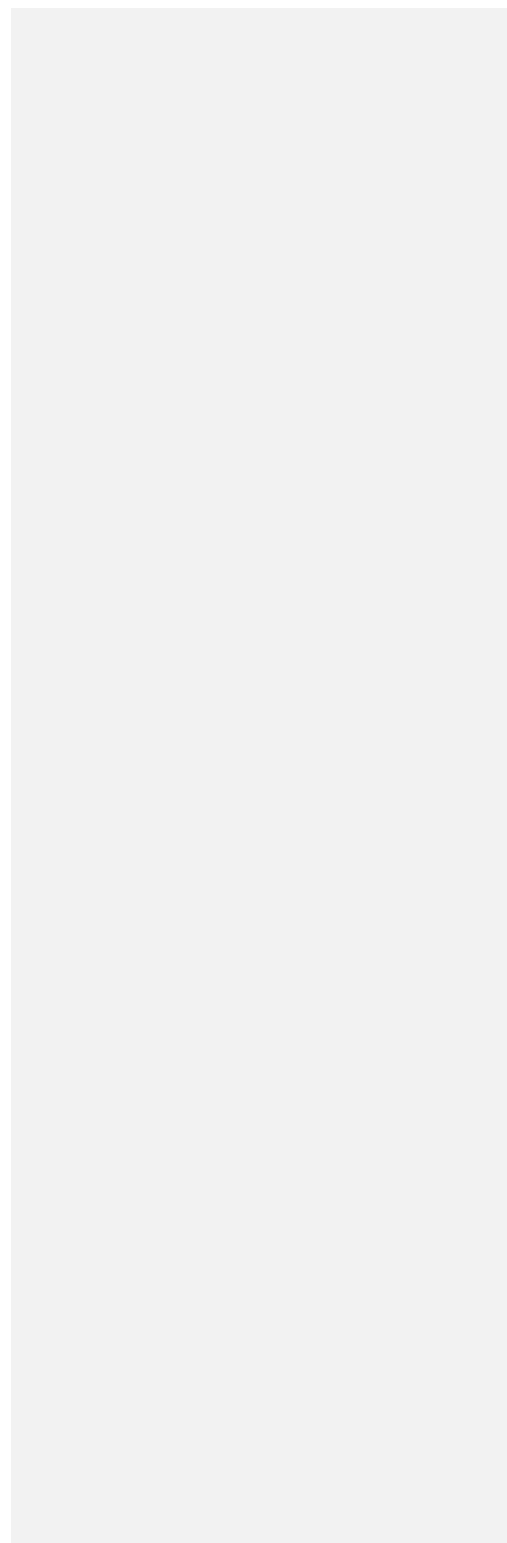
**February 9, 2023**

**TABLE OF CONTENTS**

**I. Arkansas Code on Public Works Construction Contracts...1-31**

**II. Attorney General Opinions and Caselaw.....32-35**

**III. Appendix ..... - -**



## CONSTRUCTION LAW & CONTRACTS

Counties are required under the Arkansas Constitution to award contracts for construction of public bridges and buildings to the “lowest responsible bidder”. **Article 9, § 16. Contracts for public buildings or bridges.** *“All contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor, or for providing for the care and keeping of paupers where there are no alms-houses, shall be given to the lowest responsible bidder under such regulations as may be provided by law.”*

Chapter 9 of Title 22 of the Arkansas Code sets forth other legal requirements for public works contracts of counties in Arkansas including:

- REQUIREMENT FOR PLANS, SPECIFICATIONS AND ESTIMATES TO BE PREPARED BY PROFESSIONAL AND LICENSED: ENGINEER FOR PROJECTS IN EXCESS OF \$50,000 OR ARCHITECT FOR PROJECTS IN EXCESS OF \$100,000. **MODIFIED TO \$250,000 AS PER**. {ACA 22-9-101}
- COUNTIES CAN PERFORM OWN CONSTRUCTION WORK WITH ITS OWN EMPLOYEES. {ACA 22-9-202}
- REQUIREMENT THAT CONTRACTS FOR PUBLIC WORKS IN EXCESS OF \$50,000 BE BID AND ADVERTISED IN A NEWSPAPER OF A GENERAL CIRCULATION IN THE COUNTY OR IN A TRADE JOURNAL REACHING THE CONSTRUCTION INDUSTRY. {ACA 22-9-203}
- FIVE PERCENT (5%) BID BOND OR CASHIER’S CHECK IS A PRUDENT INDUSTRY PRACTICE {ACA 22-9-203}
- AWARD TO “LOWEST RESPONSIBLE BIDDER” IF IN BEST INTERESTS {ACA 22-9-203}
- USE OF LICENSED SUBCONTRACTORS WHEN AMOUNT OF WORK SUBCONTRACTED EXCEEDS \$20,000 {ACA 22-9-204}
- INTERESTS ALLOWED ON DELINQUENT PAYMENTS, 90 DAYS FROM PRESENTATION OF CLAIM {ACA 22-9-205}
- HISTORIC SITE RENOVATION, ALTERNATION, REPAIR: AUTHORIZING COST PLUS, SELECTION BASED ON EXPERIENCE, AND TECHNIQUES, ETC. {ACA 22-9-208}
- COMPLIANCE WITH OSHA FOR TRENCHING OR EXCAVATING IN EXCESS OF 5 FEET DEPTH {ACA 22-9-212}
- SURETY PAYMENT BONDS {ACA 22-9-401 THROUGH 404}
- RETAINAGE EXCEPTIONS TO WITHHOLDING FIVE PERCENT (5%) RETAINAGE OF PROGRESS PAYMENTS.

**Civil ENGINEER FOR PUBLIC WORKS PROJECTS IN EXCESS OF \$50,000; ARCHITECT FOR PUBLIC WORKS PROJECTS IN EXCESS OF \$100,000. **MODIFIED HB 1005 TO \$250,000, PENDING.****

#### § 22-9-101. Observation by registered professionals required

(a) The state or a township, county, municipality, village, or other political subdivision of the state 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.

(b) Nothing in this section shall be held to apply to any public works wherein the contemplated capital improvement expenditure:

(1) For an engineering project does not exceed twenty-five thousand dollars (\$50,000); or

(2) For an architectural project does not exceed one hundred thousand dollars (\$100,000).

MODIFIED HB 1005 TO \$250,000 PENDING.

(c) This section **does not** apply to:

(1) A school district, county, municipality, or township project that is planned and executed according to plans and specifications furnished by authorized state agencies; or

(2)(A) The design or construction of an unpaved trail project as defined under § 22-2-102.

(B) The State Parks, Recreation, and Travel Commission shall ensure that an unpaved trail project created under this subdivision (c)(2) meets the standards for observation by registered professionals as established by the Building Authority Division. **Credits:** Acts of 1939, Act 335, §§ 1, 2; Acts of 1985, Act 321, § 1; Acts of 1993, Act 284, § 1; Acts of 1995, Act 1108, § 3; Acts of 2007, Act 471, § 1, eff. July 31, 2007; Acts of 2011, Act 897, § 16, eff. July 27, 2011; Acts of 2018 (2nd Ex. Sess.), Act 5, § 4, eff. March 19, 2018; Acts of 2018 (2nd Ex. Sess.), Act 12, § 4, eff. March 19, 2018; Acts of 2019, Act 910, § 6235, eff. July 1, 2019.

#### § 17-15-302. Exemptions.

(a) The following shall be exempt from the provisions of this chapter: (1) Professional engineers duly licensed or registered, but only insofar as concerns work incidental to engineering practice, provided such persons do not use the designation "architect" or any term derived therefrom; (2) Employees of those lawfully practicing architecture who are acting under the instruction, control, or supervision of their employer; (3) Officers and employees of the government of the United States while engaged within this state in the practice of architecture for the government; (4) Residents of this state who do not use the title "architect" or any term derived therefrom who act as designers for: (A) Buildings that are to be constructed for personal use, such as residences, if the buildings are not intended or adaptable for public employment, assembly, or any other use under which they will be open to the public; (B) Single family detached, duplex, triplex, and

quadruplex dwellings; or (C) Buildings whose total cumulative and fair market value to complete, not including site, does not exceed one hundred thousand dollars (\$100,000); and (5) Owners and employees of planing mills, woodworking establishments, sash and door manufacturers, and jobbers in the designing, planning, detailing, and preparation of data on millwork, woodwork, and cabinetwork, provided they do not use the designation "architect" or any term derived therefrom. (b)(1) The terms of this chapter shall not apply to: (A) Any public school district exempted from the provisions of this chapter; or (B) Every public school district embracing a city with a population in excess of thirty thousand (30,000) which maintains a full-time superintendent of buildings with engineering and architectural experience. (2) This exception shall only apply: (A) If the total cumulative and fair market value to complete the repair and maintenance of buildings already constructed and alterations thereof does not exceed the sum of one hundred thousand dollars (\$100,000) **MODIFIED HB 1005 TO \$250,000 PENDING.** ; and (B) If the total cumulative and fair market value to complete the new structures will not exceed the sum of one hundred thousand dollars (\$100,000) **MODIFIED HB 1005 TO \$250,000 PENDING.** . (c) The provisions of this chapter shall not apply to any public school district, place of assembly, daycare, church, or building not more than one (1) story high where: (1) The total cumulative and fair market value to complete the building, alteration, or structure does not exceed the sum of one hundred thousand dollars (\$100,000) **MODIFIED HB 1005 TO \$250,000 PENDING.** ; and (2) The plans are approved by the State Fire Marshal.

#### **§ 17-25-103. Penalties — Enforcement.**

Any contractor shall be deemed guilty of a misdemeanor and shall be liable to a fine of not less than one hundred dollars (\$100) nor more than two hundred dollars (\$200) for each offense, with each day to constitute a separate offense, who:

(1)(A) For a fixed price, commission, fee, or wage attempts to or submits a bid or bids to construct or demolish or contracts to construct or demolish, or undertakes to construct or demolish, or assumes charge in a supervisory capacity or otherwise, or manages the construction, erection, alteration, demolition, or repair of, or has constructed, erected, altered, demolished, or repaired, under his or her or its direction, any building, apartment, condominium, highway, sewer, utility, grading, or any other improvement or structure, when the cost of the work to be done, or done, in the State of Arkansas by the contractor, including, but not limited to, labor and materials, is **fifty thousand dollars (\$50,000) or more**, without first having procured a license with the proper classification to engage in the business of contracting in this state.

(B) Subdivision (a)(1) of this section shall not apply to any demolition work or other work necessary to clean up a natural disaster within seventy-two (72) hours following the natural disaster;

(2) Shall present or file the license certificate of another;

(3) Shall give false or forged evidence of any kind to the Contractors Licensing Board or any member thereof in obtaining a certificate of license;

(4) Shall impersonate another; or

(5) Shall use an expired or revoked certificate of license.

(b) The doing of any act or thing herein prohibited by any applicant or licensee shall, in the discretion of the board, constitute sufficient grounds to refuse a license to an applicant or to revoke the license of a licensee.

(c) Regarding any violation of this chapter, the board shall have the power to issue subpoenas and bring before the board as a witness any person in the state and may require the witness to bring with him or her any book, writing, or other thing under his or her control which he or she is bound by law to produce in evidence.

(d) No action may be brought either at law or in equity to enforce any provision of any contract entered into in violation of this chapter. No action may be brought either at law or in equity for quantum meruit by any contractor in violation of this chapter.

(e)(1)(A) Any contractor who, after notice and hearing, is found by the board to have violated or used a contractor in violation of this chapter shall pay to the board a civil penalty of not less than one hundred dollars (\$100) nor more than four hundred dollars (\$400) per day for the activity. However, the penalty shall not exceed three percent (3%) of the total project being performed by the contractor.(B)(i) The penalty provided for in this chapter plus interest at ten percent (10%) per annum shall be paid to the board before the contractor can be issued a license to engage in the business of contracting in this state.(ii) In addition to the assessment of the penalty, the board, upon a finding of a violation of this chapter, may issue an order of abatement directing the contractor to cease all actions constituting a violation of this chapter.

(2) The board shall have the power to withhold approval for up to six (6) months of any application from any person who, prior to approval of the application, has been found in violation of this chapter.

(3) All hearings and appeals therefrom under this chapter shall be pursuant to the provisions of the Arkansas Administrative Procedure Act, [§ 25-15-201 et seq.](#)

(4) No proceedings under this chapter may be commenced by the board after three (3) years from the date on which the act or omission which is the basis for the proceeding occurred.

(5) The board shall have the power to file suit in the Pulaski County Circuit Court to obtain a judgment for the amount of any penalty not paid within thirty (30) days of service on the contractor of the order assessing the penalty, unless the circuit court enters a stay pursuant to the provisions of this chapter. (6)(A) The board shall have the power to file suit in the Pulaski County Circuit Court to enforce any order of abatement not complied with within fifteen (15)

days, excluding Saturdays, Sundays, and legal holidays, of service on the contractor of the order of abatement.

(B) If the circuit court finds the order of abatement to have been properly issued, it may enforce the order by any means by which injunctions are ordinarily enforced.

(C) However, nothing shall be construed herein to diminish the contractor's right to appeal and obtain a stay pursuant to the procedures provided for in this chapter. Acts of 1965, Act 150, § 14; Acts of 1985, Act 180, § 4; Acts of 1987, Act 495, § 3; Acts of 1989, Act 795, § 2; [Acts of 1999, Act 43, § 1, eff. July 30, 1999](#); [Acts of 2007, Act 275, § 2, eff. July 31, 2007](#); [Acts of 2015, Act 1048, § 2, eff. July 22, 2015](#).

#### **§ 17-25-103. Penalties--Enforcement**

<Text of section effective July 1, 2020. See, also, [section 17-25-103](#) effective until July 1, 2020.>

(a)(1) It is a violation of this chapter for any contractor to knowingly do any of the following:

(A)(i) For a fixed price, commission, fee, or wage attempts to or submits a bid or bids to construct or demolish or contracts to construct or demolish, or undertakes to construct or demolish, or assumes charge in a supervisory capacity or otherwise, or manages the construction, erection, alteration, demolition, or repair of, or has constructed, erected, altered, demolished, or repaired, under his or her or its direction, any building, apartment, condominium, highway, sewer, utility, grading, or any other improvement or structure, when the cost of the work to be done, or done, in the State of Arkansas by the contractor, including, but not limited to, labor and materials, is fifty thousand dollars (\$50,000) or more, without first having procured a license or registration with the proper classification to engage in the business of contracting in this state.

(ii) Subdivision (a)(1)(A)(i) of this section does not apply to any demolition work or other work necessary to clean up a natural disaster within seventy-two (72) hours following the natural disaster;

(B) Presents or files the license or registration certificate of another;

(C) Gives false or forged evidence of any kind to the Contractors Licensing Board or any member thereof in obtaining a certificate of license or registration;

(D) Impersonates another; or

(E) Uses an expired or revoked certificate of license or registration;

(2) A violation under subsection (a) of this section is a Class A misdemeanor, with each day of activity constituting a separate offense.

(b) The doing of any act or thing herein prohibited by any applicant, licensee, or registrant shall, in the discretion of the board, constitute sufficient grounds to refuse a license or registration to an applicant or to revoke the license of a licensee or the registration of a registrant.

(c) Regarding any violation of this chapter, the board shall have the power to issue subpoenas and bring before the board as a witness any person in the state and may require the witness to bring with him or her any book, writing, or other thing under his or her control which he or she is bound by law to produce in evidence.

(d) No action may be brought either at law or in equity to enforce any provision of any contract entered into in violation of this chapter. No action may be brought either at law or in equity for quantum meruit by any contractor in violation of this chapter.

(e)(1)(A) Any contractor who, after notice and hearing, is found by the board to have violated or used a contractor in violation of this chapter shall pay to the board a civil penalty of not less than one hundred dollars (\$100) nor more than four hundred dollars (\$400) per day for the activity. However, the penalty shall not exceed three percent (3%) of the total project being performed by the contractor.

(B)(i) The penalty provided for in this chapter plus interest at ten percent (10%) per annum shall be paid to the board before the contractor can be issued a license to engage in the business of contracting in this state.

(ii) In addition to the assessment of the penalty, the board, upon a finding of a violation of this chapter, may issue an order of abatement directing the contractor to cease all actions constituting a violation of this chapter.

(2) The board shall have the power to withhold approval for up to six (6) months of any application from any person who, before approval of the application, has been found in violation of this chapter.

(3) All hearings and appeals therefrom under this chapter shall be pursuant to the provisions of the Arkansas Administrative Procedure Act, [§ 25-15-201 et seq.](#)

(4) No proceedings under this chapter may be commenced by the board after three (3) years from the date on which the act or omission which is the basis for the proceeding occurred.

(5) The board shall have the power to file suit in the Pulaski County Circuit Court to obtain a judgment for the amount of any penalty not paid within thirty (30) days of service on the contractor of the order assessing the penalty, unless the circuit court enters a stay pursuant to the provisions of this chapter.

(6)(A) The board shall have the power to file suit in the Pulaski County Circuit Court to enforce any order of abatement not complied with within fifteen (15) days, excluding Saturdays, Sundays, and legal holidays, of service on the contractor of the order of abatement.



(B) If the circuit court finds the order of abatement to have been properly issued, it may enforce the order by any means by which injunctions are ordinarily enforced.

(C) However, nothing shall be construed herein to diminish the contractor's right to appeal and obtain a stay pursuant to the procedures provided for in this chapter. **Credits:** Acts of 1965, Act 150, § 14; Acts of 1985, Act 180, § 4; Acts of 1987, Act 495, § 3; Acts of 1989, Act 795, § 2; Acts of 1999, Act 43, § 1, eff. July 30, 1999; Acts of 2007, Act 275, § 2, eff. July 31, 2007; Acts of 2015, Act 1048, § 2, eff. July 22, 2015; Acts of 2019, Act 805, §§ 3, 4, eff. July 1, 2020.

## **BIDDING PROCEDURE FOR PERMANENT IMPROVEMENTS OVER \$50,000.00**

### **§ 22-9-201. Applicability of §§ 22-9-202--22-9-204**

(a) The provisions of §§ 22-9-202--22-9-204 shall not apply to contracts awarded by the State Highway Commission for construction or maintenance of public highways, roads, or streets under the provisions of §§ 27-67-206 and 27-67-207.

(b) The provisions of § 22-9-204 shall not apply to projects designed to provide utility needs of the state or any agency thereof, a municipality, or a county. Those projects shall include, but shall not be limited to, pipeline installation, sanitation projects, light earth work and foundation work, local flood control, sanitary landfills, drainage projects, site clearing, water lines, streets, roads, alleys, sidewalks, water channelization, light construction sewage, water works, and improvements to street and highway construction.

(c)(1)(A) The notice and bid security provisions of §§ 19-4-1401, 19-4-1405, and 22-9-203 pertaining to the project amount and the time frames of the advertisement shall not apply to contracts for the performance of any work or the making of any capital improvements due to emergency contracting procedures.

(B) Nothing shall prohibit the contracting authority from requiring a bid security if the contracting authority determines to require a bid security.

(2)(A) The percentage requirements of § 22-9-203(e) shall not apply to contracts for the performance of any work or the making of any capital improvements due to emergency contracting procedures.

(B) If negotiations are unsuccessful and the contracting authority determines further negotiations with the lowest responsible bidder are not in the contracting authority's best interests, nothing shall prohibit the contracting authority from terminating negotiations and negotiating the award of the contract to the next lowest responsible bidder.

(3) "Emergency contracting procedures" means the acquisition of services and materials for capital improvements, including without limitation acquisitions funded in whole or in part with insurance proceeds, that are in accordance with the minimum standards and criteria of the Building Authority Division.

(4) Emergency contracting procedures may include sole sourcing or competitive quote bids.

(5) The Secretary of the Department of Transformation and Shared Services or a designee may make or authorize others to make emergency contracting procedures as defined in subdivision (c)(3) of this section and in accordance with the minimum standards and criteria of the division.

(6) An emergency contract made under emergency contracting procedures under this section shall not be authorized by a county or municipality unless:

(A) The emergency contract is to address an unforeseen and unavoidable emergency in which human life, health, or public property is in jeopardy; and

(B) A written statement is attached to the emergency contract that describes the emergency necessitating the emergency contract being entered into without compliance under § 22-9-203.

(d) To the extent that federal purchasing laws or bidding preferences conflict, this subchapter does not apply to projects related to supplying water or wastewater utility services, operations, or maintenance to a federal military installation by a municipality of the state. **Credits** Acts of 1949, Act 159, § 5; Acts of 1977, Act 370, § 2; Acts of 1999, Act 776, § 2, eff. July 30, 1999; Acts of 2001, Act 162, § 1, eff. Aug. 13, 2001; Acts of 2007, Act 471, § 2, eff. July 31, 2007; Acts of 2011, Act 782, § 1, eff. July 27, 2011; Acts of 2015, Act 147, § 3, eff. Feb. 23, 2015; Acts of 2019, Act 910, §§ 6236, 6237, eff. July 1, 2019; Acts of 2021, Act 440, § 2, eff. July 28, 2021. **Formerly** A.S.A. 1947, § 14-614n.A.C.A. § 22-9-201, AR ST § 22-9-201 The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.

#### § 22-9-202. Construction of this section and §§ 22-9-203 and 22-9-204

(a) It is the intent of this section and §§ 22-9-203 and 22-9-204 to provide a uniform procedure that a taxing unit shall follow when work is done under formal contract.

(b)(1) This section and §§ 22-9-203 and 22-9-204 do not:

(A) Prevent a taxing unit from performing any of the work or making any of the improvements referred to in this section and §§ 22-9-203 and 22-9-204 by the use of its own employees; or

(B) Require that bids must be received from a contractor as a condition precedent to the right to use the taxing unit's own employees.

(2) This section and §§ 22-9-203 and 22-9-204 do not prevent a county government from separately procuring:

(A) Commodities in accordance with § 14-22-101 et seq.;

(B) Professional services in accordance with § 19-11-801 et seq.; or

(C) Construction work from one (1) or more separate contractors under separate contract or invoice so that the work is not included in calculating the bid requirement threshold of fifty thousand dollars (\$50,000).

(c) This section and §§ 22-9-203 and 22-9-204 do not amend or repeal any law that requires the publication of notice in those instances in which the estimated amount of the cost of the proposed improvements within the scope of the contract is more than fifty thousand dollars (\$50,000) **Credits** Acts of 1949, Act 159, § 4; Acts of 2011, Act 618, § 1, eff. July 27, 2011; Acts of 2013, Act 494, § 1, eff. Aug. 16, 2013; Acts of 2017, Act 725, §§ 1, 2, eff. Aug. 1, 2017; Acts of 2021, Act 440, §§ 3, 4, eff. July 28, 2021.

**§ 22-9-203. Contract requirements**

(a) Except as provided under [§ 14-58-105](#), a contract providing for the making of major repairs or alterations, for the erection of buildings or other structures, or for making other permanent improvements shall not be entered into by the state or an agency of the state or by a county, municipality, school district, or other local taxing unit with any contractor in instances in which all estimated costs of the work exceed the sum of fifty thousand dollars (\$50,000) unless:

(1) The state or any agency of the state shall have first published notice of its intention to receive bids one (1) time each week for not less than two (2) consecutive weeks for projects more than the amount of fifty thousand dollars (\$50,000) and published notice of its intention to receive bids one (1) time each week for not less than one (1) week for projects more than the quote bid limit, as provided under the minimum standards and criteria of the Building Authority Division, but less than or equal to fifty thousand dollars (\$50,000) in a newspaper of general circulation published in the county in which the proposed improvements are to be made or in a trade journal reaching the construction industry; and

(2)(A) The county, municipality, school district, or other local taxing unit shall have first published notice of its intention to receive bids one (1) time each week for not less than two (2) consecutive weeks in a newspaper of general circulation published in the county in which the proposed improvements are to be made.

(B) In addition to the publication of notice required under subdivision (a)(2)(A) of this section, the county, municipality, school district, or other local taxing unit:

(i) May also publish notice in a trade journal reaching the construction industry; and

(ii) If the county, municipality, school district, or other local taxing unit is accepting electronically submitted bids, shall also post notice on the website of a vendor selected under the Fair Notice and Efficiency in Public Works Act, [§ 22-9-901 et seq.](#)

(b)(1) The date of publication of the last notice shall be not less than one (1) week before the day fixed therein for the receipt of bids.

(2)(A) If there is not a newspaper regularly published in the county in which the proposed work is to be done, the notices may be published in any newspaper having a general circulation in the county.

(B) In addition to the publication of notice required under subdivision (b)(2)(A) of this section, the county, municipality, school district, or other local taxing unit:

(i) May also publish notice in a trade journal reaching the construction industry; and

(ii) If the county, municipality, school district, or other local taxing unit is accepting electronically submitted bids, shall also post notice on the website of a vendor selected under the Fair Notice and Efficiency in Public Works Act, [§ 22-9-901 et seq.](#)

(3) This section does not limit to two (2) the number of weeks the notices may be published for projects over fifty thousand dollars (\$50,000), limit to one (1) the number of weeks the notices may be published for projects more than the quote bid limit, as provided under subsection (a) of this section, and less than or equal to fifty thousand dollars (\$50,000), or limit to two (2) the number of weeks the notices may be published for all other projects.

(c)(1) All notices shall contain:

(A) A brief description of the kind or type of work contemplated;

(B) The approximate location of the work contemplated;

(C) The place at which prospective bidders may obtain plans and specifications, including any websites on which a county, municipality, or school district is posting notice of its intention to receive bids under the Fair Notice and Efficiency in Public Works Act, [§ 22-9-901 et seq.](#);

(D) The date, time, and place at which sealed bids shall be received;

(E) The amount, which may be stated in a percentage, of the bid bond required;

(F) A statement of the taxing unit's reservation of the right to reject any or all bids and to waive any formalities; and

(G) Such other pertinent facts or information which to it may appear necessary or desirable.

(2)(A)(i) Every bid submitted on public construction contracts for any political subdivision of the state is 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.

(ii) Every bid submitted on public construction contracts for the state or any agency or department of the state is 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, except for projects under fifty thousand dollars (\$50,000).

(iii) A bid bond is not required for public construction contracts for the state or any agency or department of the state under or equal to fifty thousand dollars (\$50,000).

(B) This bid security shall indemnify the public against failure of the contractor to execute and deliver the contract and necessary bonds for faithful performance of the contract.

(C) The bid security shall provide that the contractor or surety must pay the damage, loss, cost, and expense subject to the amount of the bid security directly arising out of the contractor's default in failing to execute and deliver the contract and bonds.

(D) Liability under this bid security shall be limited to five percent (5%) of the amount of the bid.

(d) On the date and time fixed in the notice, the board, commission, officer, or other authority in which or in whom authority is vested to award contracts shall open and compare the bids and thereafter award the contract to the lowest responsible bidder but only if it is the opinion of the authority that the best interests of the taxing unit would be served thereby.

(e) In the event that all bids submitted exceed the amount appropriated for the award of the contract, the state agency or its designated representatives shall have the authority to negotiate an award with the apparent responsible low bidder but only if the low bid is within twenty-five percent (25%) of the amount appropriated.

(f)(1) In the event that all bids submitted exceed the amount appropriated for the award of the contract and if bidding on alternates was not required by the plans and specifications, the county, municipality, school district, other local taxing unit, or institution of higher education shall have the authority to negotiate an award with the apparent responsible low bidder but only if the low bid is within twenty-five percent (25%) of the amount appropriated.

(2) If the plans and specifications for the project require bids on alternates in addition to a base bid, there shall be no more than three (3) alternates, and the alternates shall:

(A) Be deductive; and

(B) Be set forth in the plans and specifications in numerical order.

(3) If all bids submitted exceed the amount appropriated for the award of the contract, then the county, municipality, school district, other local taxing unit, or institution of higher education may determine the apparent responsible low bidder by deducting the alternates in numerical order.

(4) After making the deductions, if the cost of the project is less than twenty-five percent (25%) above the amount appropriated, then and only in that event, the county, municipality, school district, other local taxing unit, or institution of higher education may negotiate an award with the low bidder so determined.

(g) Whenever it is obvious from examination of the bid document that it was the intent of a bidder to submit a responsive bid and that the bid, if accepted, would create a serious financial loss to the bidder because of scrivener error, such as the transposition of figures, the board, commission, officer, or other authority in which or in whom authority is vested has the authority to relieve the bidder from responsibility under the bond and may reject the bid.

(h) For projects of this state or any agency of the state, "amount appropriated" within this section means funds currently available for the project as determined by the state or any agency or department of the state or any county, municipality, school district, or other local taxing unit prior to the opening of any bids.

(i) No contract providing for the making of major repairs or alterations, for the erection of buildings or other structures, or for making other permanent improvements shall be entered into by the state, any agency of the state, any county, municipality, school district, or other local taxing unit with any contractor in instances where all estimated costs of the work shall exceed the sum of seventy-five thousand dollars (\$75,000) unless the bid documents contain statements which encourage the participation of small, minority, and women's business enterprises.

(j)(1) Notwithstanding any other provision of law to the contrary, a municipality, sanitation authority, water system, or consolidated waterworks system may enter into contracts with private persons, firms, associations, corporations, joint ventures, or other legal entities, including a combination of any of those entities, to provide for the design, building, operation, or maintenance, including a combination of those activities, of all or any portion of its wastewater system, stormwater system, water system, solar energy generation equipment and facilities, other capital asset, or any combination of those systems and assets.

(2) The contracts may include provisions for design, financing, construction, repair, reconditioning, replacement, operation, and maintenance of a system or asset, or any combination of those services and functions.

(3) Prior to entering into a contract under this section, the governing authority shall solicit qualifications-based competitive sealed proposals.

(4) The governing authority shall first establish criteria for evaluation of any entity submitting proposals on the contracts for the purpose of assisting the governing authority in making a review of the entity's previous performance on projects of comparable nature and magnitude and the environmental compliance record of the entity during the five (5) years immediately preceding the execution of the contract.

(5) The governing authority shall take into consideration the information to assist in determining the eligibility of any entity.

(6) The award of a contract under this section shall be made to the responsible and responsive entity whose proposal is determined in writing to be the most advantageous to the governmental authority, taking into consideration the evaluation factors set forth in the request for proposals.

(7) The governing authority of the municipality or the sanitation authority shall employ an appropriately licensed professional who is independent of the contractor to monitor and perform an independent review and inspection of the design-build-operate-maintenance contract, or any part thereof, during its performance.

(8) Before soliciting proposals for a design-build-operation-maintenance project, the governing authority of the municipality or the sanitation authority shall employ an appropriate licensed professional to perform the necessary studies and preliminary design to clearly establish the parameters for the project, including:

(A) Acceptable processes and structural alternatives; and

(B) Cost estimates for the acceptable alternatives.

(k)(1) The state, an agency of the state, a county, a municipality, a school district, or other local taxing unit shall not require in plans or specifications that a bidder or supplier:

(A) Hold membership in any professional or industry associations, societies, trade groups, or similar organizations;

(B) Possess certification from any professional or industry associations, societies, trade groups, or similar organizations as steel building fabricators; or

(C) Be endorsed by any professional or industry associations, societies, trade groups, or similar organizations.

(2) However, plans and specifications may include or reference standards adopted by professional or industry associations, societies, trade groups, or similar organizations.

(l) To the extent that the division includes minimum experience as part of the evaluation of a bidder's responsiveness, the standard being applied to the bidder's experience shall be stated in the invitation for bids.

(m) A sealed bid under this section shall be submitted in one (1) of the following formats:

(1) Written; or

(2) Electronic media. **Credits** Acts of 1949, Act 159, §§ 1, 2; Acts of 1977, Act 370, § 1; Acts of 1981, Act 266, § 1; Acts of 1987, Act 758, § 4; Acts of 1995, Act 1319, § 2; Acts of 1997, Act 1193, § 1; Acts of 1999, Act 219, § 3, eff. July 30, 1999; Acts of 1999, Act 675, §§ 1, 2, eff. July 30, 1999; Acts of 1999, Act 1309, § 1, eff. July 30, 1999; Acts of 1999, Act 1310, § 1, eff. July 30, 1999; Acts of 2001, Act 921, § 1, eff. Aug. 13, 2001; Acts of 2001, Act 1051, § 1, eff. Aug. 13, 2001; Acts of 2003, Act 1297, § 1, eff. July 16, 2003; Acts of 2005, Act 859, § 4, eff. March 15, 2005; Acts of 2009, Act 813, § 1, eff. July 31, 2009; Acts of 2015, Act 1059, § 2, eff. July 22, 2015; Acts of 2017, Act 725, §§ 3, 4, eff. Aug. 1, 2017; Acts of 2019, Act 910, § 6238, eff. July 1, 2019; Acts of 2019, Act 422, § 3, eff. July 24, 2019; Acts of 2019, Act 612, § 1, eff. July 24, 2019; Acts of 2019, Act 1075, §§ 3 to 6, eff. July 24, 2019; Acts of 2021, Act 440, §§ 5, 6, eff. July 28, 2021. **Formerly** A.S.A. 1947, §§ 14-611, 14-612.

**§ 22-9-204. Subcontractors exceeding \$50,000--Penalty**

(a) As a condition to performing construction work for and in the State of Arkansas, all prime contractors shall use no other subcontractors when the subcontractors' portion of the project is fifty thousand dollars (\$50,000) or more, except those licensed by the Contractors Licensing Board and qualified in:

- (1) Mechanical, indicative of heating, air conditioning, ventilation, and refrigeration;
- (2) Plumbing;
- (3) Electrical; and
- (4) Roofing.

(b)(1) In the event the prime contractor is qualified and licensed by the board, he or she may use his or her own forces to perform those tasks listed in this section as subcontractors in one (1) or more of the trades listed.

(2)(A) A subcontractor, including the situation stated in subdivision (b)(1) of this section, may subcontract a portion of the listed work.

(B) However, a subcontractor is prohibited from subcontracting the work in its entirety.

(c)(1) When the prime contractor makes a definite decision regarding the subcontractors he or she intends to use, he or she shall place the name of each subcontractor in a blank space provided on the form of proposal of his or her bid.

(2) In the event that one (1) or more of the subcontractors named by the prime contractor in his or her successful bid thereafter refuses to perform his or her contract or offered contract, the prime contractor may substitute another subcontractor licensed by the board after having obtained prior approval from the architect or engineer and the owner. Additional approval must be obtained from the Building Authority Division for capital improvement projects under its jurisdiction.

(d) The prime contractor shall submit written evidence that the substituted contractor is costing the same amount of money or less and, if costing less, that the savings will be deducted from the total contract of the prime contractor and rebated to the owner.

(e) It shall be mandatory that the mechanical, plumbing, electrical, and roofing subcontractors named on the form of proposal by the prime contractor awarded a contract under the provisions of this subchapter be given contracts by the prime contractor in keeping with their proposals to perform the items for which they were named.

(f)(1) It shall be a violation of this section for any prime contractor to submit a bid listing unlicensed contractors or to use unlicensed contractors on a public works project if the listed work of the unlicensed contractors or portion of the unlicensed contractors' work is fifty thousand dollars (\$50,000) or more.

(2) It shall be a violation of this section for any subcontractor who is not licensed by the board to contract to perform work on a public works project if the listed work of the subcontractor or portion of the subcontractor's work is fifty thousand dollars (\$50,000) or more.

(3) The board has jurisdiction over violations of this subsection under [§ 17-25-103](#).

**Credits** Acts of 1949, Act 159, § 3; Acts of 1957, Act 183, § 1; Acts of 1961, Act 477, § 1; Acts of 1983, Act 871, § 1; Acts of 1987, Act 759, § 1; Acts of 1989, Act 936, § 1; [Acts of 1991, Act 728, § 1](#); [Acts of 1993, Act 645, § 1](#); [Acts of 1999, Act 1250, § 1, eff. July 30, 1999](#); [Acts of 1999, Act](#)

1496, § 1, eff. July 30, 1999; Acts of 2001, Act 989, § 1, eff. Aug. 13, 2001; Acts of 2003, Act 364, § 18, eff. July 16, 2003; Acts of 2009, Act 193, § 9, eff. July 31, 2009; Acts of 2011, Act 782, § 2, eff. July 27, 2011; Acts of 2015 (1st Ex. Sess.), Act 7, § 55, eff. July 1, 2015; Acts of 2015 (1st Ex. Sess.), Act 8, § 55, eff. July 1, 2015; Acts of 2015, Act 1048, § 7, eff. July 22, 2015; Acts of 2019, Act 910, § 6239, eff. July 1, 2019. **Formerly** A.S.A. 1947, § 14-613. A.C.A. § **22-9-204**, AR ST § **22-9-204** The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.

#### § **22-9-205**. Public improvements--Delinquent payments

Whenever any agency of this state or of any county, municipality, or school district, or other local taxing unit or improvement district enters into a contract covered by the provisions of §§ **22-9-202 -- 22-9-204** for the making of repairs or alterations or the erection of buildings or for the making of any other improvements, or for the construction or improvement of highways, roads, streets, sidewalks, curbs, gutters, drainage or sewer projects, or for any other construction project, and the contract provides that payment therefor shall be made upon completion and acceptance of the project, and the contractor, upon completion and approval of the project, presents a claim for payment of the amount due thereon in accordance with the terms of the contract, and the claim is not paid by the public authority within ninety (90) days from the date of presentation of the claim, then the public authority shall pay to the contractor interest at the rate of ten percent (10%) per annum on the unpaid amount due for all periods of time that the payment under the contract is not made subsequent to ninety (90) days after presentation of the claim. **Credits** Acts of 1969, Act 135, § 1. **Formerly** A.S.A. 1947, § 14-614.1. A.C.A. § **22-9-205**, AR ST § **22-9-205** The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.

#### § **22-9-207**. Construction or purchase of memorial, statue, bust, monument

Any state agency, department, board, commission, or other body having the authority to construct or purchase, or negotiate for the construction or purchase of, any memorial, statue, bust, monument, or other similar article which is to be paid for from public funds shall establish specifications for the object, take competitive bids on the cost of constructing or furnishing the object, and award the contract to furnish or construct the object to the lowest responsible bidder meeting the established specifications. **Credits** Acts of 1967, Act 354, § 1. **Formerly** A.S.A. 1947, § 14-626. A.C.A. § **22-9-207**, AR ST § **22-9-207** The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.



**§ 22-9-208. Renovation of historic sites--Legislative intent and construction**

(a) The General Assembly finds and determines that:

(1) The mandatory adherence to competitive bidding of all costs in altering, repairing, or renovating historic sites and structures has resulted in increased costs due to the inability of bidders to accurately determine on the basis of only an external examination of the historic sites and structures the exact quantity of labor, materials, and supplies necessary to meet the restoration standards;

(2) The State of Arkansas would conserve state revenues by giving agencies charged with restoring or maintaining historic properties authority to select the contractors on the basis of the lowest responsible bid price, the bidder's experience in like work, and the techniques he or she proposes to employ, and by giving the agencies authority to reimburse contractors on an actual cost basis for those cost components which cannot be accurately predetermined before undertaking the project; and

(3) The procedures provided in subdivision (a)(2) of this section should be applicable for specific projects only after review and approval by the Chief Fiscal Officer of the State, the Secretary of the Department of Transformation and Shared Services, and the Legislative Council. Provided, however, projects undertaken by public institutions of higher education exempt from review and approval of the Department of Transformation and Shared Services shall not require review and approval by the secretary.

(b) In the event there is conflict between the provisions of this section and §§ 22-9-209--22-9-211 and the provisions of any other act insofar as the restoration of historic structures is concerned, the procedures set forth in this section and §§ 22-9-209--22-9-211 shall govern.

**Credits** Acts of 1977, Act 869, §§ 1, 5; Acts of 1999, Act 776, § 4, eff. July 30, 1999; Acts of 2001, Act 961, § 10, eff. Aug. 13, 2001; Acts of 2015 (1st Ex. Sess.), Act 7, § 56, eff. July 1, 2015; Acts of 2015 (1st Ex. Sess.), Act 8, § 56, eff. July 1, 2015; Acts of 2016 (3rd Ex. Sess.), Act 2, § 81, eff. May 23, 2016; Acts of 2016 (3rd Ex. Sess.), Act 3, § 81, eff. May 23, 2016; Acts of 2019, Act 910, § 6240, eff. July 1, 2019. **Formerly** A.S.A. 1947, §§ 14-654, 14-654.3n.A.C.A. § 22-9-208, AR ST § 22-9-208. The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.

**§ 22-9-209. Renovation of historic sites--Publication requirements**

(a)(1) A contract for the altering, repairing, or renovation of a recognized historic site or structure owned by the state or with title vested in the name of a state agency or of another taxing authority in which the estimated cost of the work equals or exceeds the sum of fifty thousand dollars (\$50,000) shall not be entered into between the state agency or taxing authority and any contractor unless the state agency or taxing authority has first published notice of intention to receive bids for improvements one (1) time each week for not less than two (2) consecutive

weeks in a newspaper of general circulation published in the county in which the proposed improvements are to be made.

(2) In addition to the publication of notice required under subdivision (a)(1) of this section, the state agency or taxing authority:

(A) May also publish notice in a trade journal reaching the construction industry; and

(B) If the state agency or taxing authority is accepting electronically submitted bids, shall also post notice on the website of a vendor selected under the Fair Notice and Efficiency in Public Works Act, [§ 22-9-901 et seq.](#)

(b)(1) The date of publication of the last notice shall be not less than one (1) week before the date affixed therein for the receipt of bids.

(2)(A) If there is not a newspaper regularly published in the county in which the proposed work is to be done, the notices may be published in any newspaper having a general circulation in the county.

(B) In addition to the publication of notice required under subdivision (b)(2)(A) of this section, the state agency or taxing authority:

(i) May also publish notice in a trade journal reaching the construction industry; and

(ii) If the state agency or taxing authority is accepting electronically submitted bids, shall also post notice on the website of a vendor selected under the Fair Notice and Efficiency in Public Works Act, [§ 22-9-901 et seq.](#)

(3) Nothing in this section shall be construed as limiting to two (2) the number of weeks the notices may be published.

(c)(1) All notices shall contain:

(A) A brief description of the kind or type of work contemplated;

(B) The approximate location of the work contemplated;

(C) The place at which prospective contractors may obtain plans and specifications, including any websites on which a state agency or taxing authority is posting notice of its intention to receive bids under the Fair Notice and Efficiency in Public Works Act, [§ 22-9-901 et seq.](#);

(D) The date, time, and place at which sealed bids shall be received; and

(E) The amount, which may be stated in a percentage, of bond required.

(2) A statement shall be included notifying bidders that the proposed renovation will be contracted under the authority of this section and [§§ 22-9-208, 22-9-210, and 22-9-211.](#)

(3) The invitation for bids shall include a required resumé of similar restorative work performed by the contractor.

(d)(1) No agency shall advertise for bids under the provisions of this section and [§§ 22-9-208, 22-9-210, and 22-9-211](#) without seeking the advice of the Legislative Council.

(2) Provided further, nothing in this section shall prevent an institution of higher education exempt from review and approval of the Building Authority Division from entering into an agreement with the division to provide such advice.

(e) A sealed bid under this section shall be submitted in one (1) of the following formats:

(1) Written; or

(2) Electronic media. **Credits** Acts of 1977, Act 869, § 2; Acts of 2001, Act 961, § 11, eff. Aug. 13, 2001; Acts of 2013, Act 494, § 2, eff. Aug. 16, 2013; Acts of 2016 (3rd Ex. Sess.), Act 2, § 82, eff. May 23, 2016; Acts of 2016 (3rd Ex. Sess.), Act 3, § 82, eff. May 23, 2016; Acts of 2017, Act 725, § 5, eff. Aug. 1, 2017; Acts of 2019, Act 910, § 6241, eff. July 1, 2019; Acts of 2019, Act 1075, §§

7 to 10, eff. July 24, 2019; Acts of 2021, Act 440, § 7, eff. July 28, 2021. Formerly A.S.A. 1947, § 14-654.1.A.C.A. § 22-9-209, AR ST § 22-9-209 The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.

**§ 22-9-210. Renovation of historic sites--Contract award**

(a) The highest quality of restoration commensurate with reasonable costs and obtainable within available funds is considered to serve the best interests of the state. Cost, proposed method, and experience in similar work shall be considered by the agency as interrelated and inseparable factors in the award of a contract. Therefore, the award may be made other than to the lowest bidder. To permit evaluation of bidder qualifications, bid proposal documents shall include the following:

- (1) The types of skills and numbers of persons of each skill needed to accomplish the work, together with the proposed rate of payment of each;
- (2) The anticipated quantity of materials estimated to be required, together with the unit price for each;
- (3) The proposed factor by which subdivisions (a)(1) and (2) of this section shall be multiplied to provide for overhead and profit;
- (4) The calculations contained in subdivisions (a)(1), (2), and (3) of this section shall be extended and totaled to produce an estimated total cost for the project. Bid forms prepared by the contracting agencies shall be provided for the purpose of setting forth the calculations;
- (5) A narrative statement of the methods and the techniques proposed for the restoration work;
- (6) A listing of previous comparable projects completed by the bidder, including location, cost, date completed, and owner's name and address; and
- (7) A resumé of the personal experience of the key supervisory personnel who will be directly involved in the execution of the project.

(b) No contract shall be awarded under the provisions of this section and §§ 22-9-208, 22-9-209, and 22-9-211 until the contracting agency has submitted copies of the invitation for bids, together with all proposals received and the agency's narrative statement of its evaluation and recommendations for approval, to the Chief Fiscal Officer of the State. **Credits** Acts of 1977, Act 869, § 3. Formerly A.S.A. 1947, § 14-654.2. A.C.A. § 22-9-210, AR ST § 22-9-210 The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.

**§ 22-9-211. Renovation of historic sites--Payment**

(a) The contracting agency shall establish, as part of the contract, a maximum compensation for the project.

(b) Payment shall be based on the work actually done and the materials actually used.

(c) The contractor shall submit periodic invoices for labor, materials, and overhead and profit in accordance with the rates established in the bid proposal. **Credits** Acts of 1977, Act 869, § 4. **Formerly** A.S.A. 1947, § 14-654.3. A.C.A. § 22-9-211, AR ST § 22-9-211 The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.

**§ 22-9-212. Trench or excavation safety systems--Inclusion in base bid**

(a) Whenever any agency of this state or of any county, municipality, or school district, or other local taxing unit or improvement district, enters into a contract covered by the provisions of §§ 22-9-202 -- 22-9-204 for the making of repairs or alterations or the erection of buildings or for the making of any other improvements, or for the construction or improvement of highways, roads, streets, sidewalks, curbs, gutters, drainage or sewer projects, or for any other construction project in which the public work or public improvement construction project involves any trench or excavation which equals or exceeds five feet (5') in depth, the agency, county, municipality, school district, local taxing unit, or improvement district shall require:

(1) That the current edition of the United States Occupational Safety and Health Administration Standard for Excavation and Trenches Safety System, 29 C.F.R. Part 1926, Subpart P, be specifically incorporated into the specifications for the project; and

(2) That the contract bid form include a separate pay item for trench or excavation safety systems to be included in the base bid.

(b) In the event a contractor fails to complete a separate pay item in accordance with the applicable provisions of subsection (a) of this section, the agency, county, municipality, school district, local taxing unit, or improvement district shall declare that the bid fails to comply fully with the provisions of the specifications and bid documents and will be considered invalid as a nonresponsive bid. The owners of the above-stated project shall notify the Safety Division of the Division of Labor of the award of a contract covered by this section. **Credits** Acts of 1993, Act 291, §§ 1, 2, eff. March 1, 1993; Acts of 2019, Act 910, § 5504, eff. July 1, 2019.

A.C.A. § 22-9-212, AR ST § 22-9-212 The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.

### § 22-9-213. Exemption of state projects from local regulation

Public works construction projects conducted by the Building Authority Division or other state agencies are exempt from permit fees or inspection requirements of county or municipal ordinances.

**Credits** Acts of 1995, Act 1229, § 1, eff. April 12, 1995; Acts of 2015 (1st Ex. Sess.), Act 7, § 57, eff. July 1, 2015; Acts of 2015 (1st Ex. Sess.), Act 8, § 57, eff. July 1, 2015; Acts of 2019, Act 910, § 6242, eff. July 1, 2019.

### § 22-9-214. Unenforceable provisions in public construction agreements and public construction contracts--Definitions

(a) As used in this section:

(1) "Construction" means any of the following services, functions, or combination of the following services or functions to construct a building, building site, or structure, or to construct a permanent improvement to a building, building site, or structure, including site work:

- (A) Alteration;
- (B) Design;
- (C) Erection;
- (D) Reconditioning;
- (E) Renovation;
- (F) Repair; or
- (G) Replacement;

(2)(A) "Public construction agreement" means an agreement in which one (1) party is a public entity and the agreement is the bargain of the parties in fact as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in § 4-1-303.

(B) "Public construction agreement" does not include an insurance contract, a construction bond, or a contract to defend a party against liability; and

(3)(A) "Public construction contract" means a contract in which one (1) party is a public entity and the contract is the total legal obligation that results from the parties' agreement under this section and as supplemented by any other applicable law.

(B) "Public construction contract" does not include an insurance contract, a construction bond, or a contract to defend a party against liability.

(b) A provision in a public construction agreement or public construction contract is void and unenforceable as against public policy if it requires an entity or that entity's insurer to indemnify, insure, defend, or hold harmless another entity against liability for damage arising out of the death of or bodily injury to a person or persons or damage to property, which arises out of negligence or fault of the indemnitee, its agents, representatives, subcontractors, or suppliers.

(c) A provision, covenant, clause, or understanding in a public construction agreement or public construction contract that conflicts with the provisions and intent of this section or attempts to circumvent this section by making the public construction agreement or public construction contract subject to the laws of another state, or that requires any litigation, arbitration, or other

dispute resolution proceeding arising from the construction agreement or construction contract to be conducted in another state, is void and unenforceable as against public policy.

(d) A clause described under subsections (b) and (c) of this section is severable from the public construction agreement or public construction contract and shall not cause the entire public construction agreement or public construction contract to become unenforceable.

(e) The provisions of this section do not affect any provision in a public construction contract or public construction agreement that requires an entity or that entity's insurer to indemnify another entity against liability for damage arising out of the death of or bodily injury to persons or damage to property, but such indemnification shall not exceed any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitors, its agents, representatives, subcontractors, or suppliers. **Credits**

Acts of 2007, Act 874, § 1, eff. July 31, 2007; Acts of 2009, Act 540, § 1, eff. July 31, 2009; Acts of 2011, Act 1123, § 1, eff. July 27, 2011; Acts of 2015, Act 1110, § 5, 6, eff. July 22, 2015; Acts of 2015, Act 1120, §§ 5, 6, eff. July 22, 2015.A.C.A. § 22-9-214, AR ST § 22-9-214 The constitution and statutes are current through the 2022 Third Extraordinary Session of the 93rd Arkansas General Assembly. Some statute sections may be more current; see credits for details. Also included are changes made by the Arkansas Code Revision Commission received through October 25, 2022.

2019 Arkansas Laws Act 1075 (S.B. 409)  
ARKANSAS 2019 SESSION LAWS  
92nd GENERAL ASSEMBLY, REGULAR SESSION, 2019

Additions are indicated by [Text](#); deletions by

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ACT 1075

S.B. 409

FAIR NOTICE AND EFFICIENCY IN PUBLIC WORKS ACT

AN ACT TO AMEND THE PURCHASING REQUIREMENTS AND PROCEDURES FOR CERTAIN ENTITIES; TO ALLOW FOR THE ELECTRONIC NOTIFICATION OF AN INVITATION FOR BIDS AND ~~THE ELECTRONIC SUBMISSION OF BIDS~~; TO CREATE THE FAIR NOTICE AND EFFICIENCY IN PUBLIC WORKS ACT; AND FOR OTHER PURPOSES.

**Subtitle**

*TO ALLOW FOR THE ELECTRONIC NOTIFICATION OF AN INVITATION FOR BIDS AND ELECTRONIC SUBMISSION OF BIDS; AND TO CREATE THE FAIR NOTICE AND EFFICIENCY IN PUBLIC WORKS ACT.*

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. DO NOT CODIFY. [Legislative findings.](#)

*The General Assembly finds that:*

- (1) [There is a need for a statewide system for the online advertisement of notices of an intention to receive bids by local governmental units;](#)*
- (2) [Legislation is necessary to provide for the efficient procurement of services to provide for the online advertisement of notices of an intention to receive bids by local governmental units;](#)*
- (3) [There is a need for an impartial selection process in selecting statewide vendors to administer online advertisements of notices of an intention to receive bids by local governmental units; and](#)*
- (4) [The Office of State Procurement has the authority and infrastructure to issue requests for qualifications to effectuate this act.](#)*

SECTION 2. Arkansas Code Title 22, Chapter 9, is amended to add an additional subchapter to read as follows:

[Subchapter 9 — Fair Notice and Efficiency in Public Works Act](#)

<< AR ST § 22–9–901 >>

[22–9–901. Title.](#)

*[This subchapter shall be known and may be cited as the “Fair Notice and Efficiency in Public Works Act”.](#)*

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<< AR ST § 22-9-902 >>

22-9-902. Legislative intent.

The General Assembly intends for this subchapter to:

- (1) Provide for the efficient procurement of services to provide for the online advertisement of notices of an intention to receive bids by local governmental units;
- (2) Promote the economical and efficient administration and completion of public works construction projects;
- (3) Provide for an impartial selection process in selecting statewide vendors to administer online advertisements of notices of an intention to receive bids by local governmental units;
- (4) Provide for fair and open competition in selecting vendors to accomplish the goals of this subchapter;
- (5) Prohibit anticompetitive conduct in vendors, including without limitation a vendor's having a direct interest in one (1) or more of the other vendors awarded a contract under this subchapter; and
- (6) Provide significant penalties for an individual or entity that violates this subchapter.

<< AR ST § 22-9-903 >>

22-9-903. Definitions.

As used in this subchapter:

- (1) "Public agency" means:
  - (A) A county, city, town, and school district in this state; and
  - (B) A department, agency, board, bureau, commission, committee, or authority of a county, city, town, or school district; and
- (2) "Vendor" means an individual, association, corporation, company, firm, organization, partnership, governmental entity, or any other entity that can provide an online system for the online advertisement of notice of an intention to receive bids under §§ 22-9-203 and 22-9-209.

<< AR ST § 22-9-904 >>

22-9-904. Public Works Committee — Creation — Duties — Immunity.

- (a)(1) The Public Works Committee is created and, except as provided in subdivision (a)(2) of this section, shall have the following members:
  - (A) The State Procurement Director or his or her designee;
  - (B) The Executive Director of the Arkansas Press Association, Inc. or his or her designee;
  - (C) The Executive Director of the Association of Arkansas Counties or his or her designee;
  - (D) The President of the Arkansas Municipal League or his or her designee; and
  - (E) The Executive Director of the Arkansas Association of Educational Administrators or his or her designee.
- (2) If a member of the committee elects not to participate:



- (A) The Governor shall appoint a replacement; and
- (B) The member who elects not to participate is not part of the committee.
- (b) The committee shall meet as needed but at least one (1) time each year.
- (c) The committee shall:
- (1) Administer this subchapter;
  - (2) Prepare an annual report on the performance of the vendors selected under this subchapter and submit the report to the Office of State Procurement;
  - (3) Hear any complaints from interested individuals or entities relating to vendors selected under this subchapter;
  - (4) Prepare an annual report concerning the success of this subchapter and submit the report to the Office of State Procurement; and
  - (5) Perform an annual review and remove any noncompliant vendors under § 22-9-907.
- (d) A majority vote of the members of the committee is required for the committee to take action.
- (e)(1) The committee has the same immunity granted to state agencies under the Arkansas Constitution.

(2) The individual members of the committee are immune to the same extent as state employees under § 19-10-305.

<< AR ST § 22-9-905 >>

22-9-905. Online notice for bids.

A public agency may contract with a vendor selected under this subchapter to provide online advertisements of notices of an intention to receive bids under §§ 22-9-203 and 22-9-209.

<< AR ST § 22-9-906 >>

22-9-906. Selection of vendors.

- (a)(1) The Office of State Procurement shall select three (3) vendors using the procedures for the procurement of professional services under § 19-11-801 et seq.
- (2) The office may use the responses from a previous request for qualifications under this subchapter for up to five (5) years to replace any vendors that are removed under this subchapter.
- (3) If fewer than three (3) vendors respond to the request for qualifications or if there are fewer than three (3) qualified vendors, the office shall select as many qualified vendors as possible.
- (b) The vendors selected under this subchapter shall be the only vendors with which a public agency may contract for the online advertisement of notices of an intention to receive bids under §§ 22-9-203 and 22-9-209.
- (c) A vendor selected under this subchapter shall:
- (1) Maintain on its website a clearly designated area for public notices that is accessible through a prominently displayed and clearly labeled link from the homepage of the website; and
  - (2) Primarily publish in the English language.

(d) A vendor selected under this subchapter shall not:

(1) Have a common owner, shareholder, member of a board of directors, employee, or any other similar interest with another vendor selected under this subchapter;

(2)(A) Require payment or a subscription to view an advertisement of a notice of an intention to receive bids or any other posting authorized in this section.

(B) A vendor may require payment or a subscription to view any other document; or

(3) Provide services under this subchapter for a public agency until the public agency has complied with subsections (e) and (f) of this section.

(e) Before using the online advertisement of notices of an intention to receive bids as a form of notification, a county, city, or town shall:

(1) Provide notice through publication in a newspaper concurrently with notification through an online advertisement of notice of an intention to receive bids under this subchapter for five (5) weeks;

(2) Adopt a resolution at the beginning of each calendar year that identifies each website designated by ordinance for the online posting of advertisements for notices of an intention to receive bids;

(3) Publish notice in a newspaper of general circulation within the county identifying each website designated for the online posting of advertisements for notices of an intention to receive bids; and

(4) Adopt an ordinance that identifies each website designated for the online posting of advertisements for notices of an intention to receive bids.

(f) Before using the online advertisement of bids as a form of notification, a school district shall:

(1) Provide notice through publication in a newspaper concurrently with notification through an online advertisement of notices of an intention to receive bids under this subchapter for five (5) weeks;

(2) Adopt a resolution at the beginning of each calendar year that identifies each website designated for the online posting of advertisements for notices of an intention to receive bids; and

(3) Publish notice in a newspaper of general circulation within the county in which the school district is located that identifies each website designated for the online posting of advertisements for notices of an intention to receive bids.

<< AR ST § 22-9-907 >>

22-9-907. Annual review — Removal of vendor — Penalties.

(a) The Public Works Committee shall review the performance and compliance of vendors selected under this subchapter.

(b) After reasonable notice to the vendor and a reasonable opportunity for the vendor to have a hearing, the committee may remove a vendor's authority to perform the services provided for under this subchapter if the committee determines that the vendor's performance does not meet the goals of this subchapter.

(c)(1) A vendor who knowingly violates this subchapter:

- (A) Upon conviction is guilty of a Class B misdemeanor;
  - (B) Is prohibited from performing services under this subchapter or being selected as a vendor under this subchapter for five (5) years; and
  - (C) Shall pay damages to any public agency, person, or entity that is found to have ascertainable damages as a result of the vendor's violation of this subchapter.
- (2) The Office of State Procurement shall maintain a list of vendors that are prohibited from performing services.

<< AR ST § 22-9-908 >>

22-9-908. Replacement of vendor.

- (a) A vendor shall be replaced as soon as practicable using the procedure established under § 22-9-906 if the vendor:
  - (1) Is unable to perform the services required under this subchapter;
  - (2) Has its authority to perform the services provided for under this subchapter removed under § 22-9-907; or
  - (3) Is otherwise no longer performing the services required under this subchapter.
- (b) If only one (1) vendor remains as a selected vendor under this subchapter as the result of action taken under § 22-9-907, the Public Works Committee shall meet and select at least one (1) additional vendor within ninety (90) days.
- (c) An online posting to advertise the notice of an intention to receive bids by a public agency on a vendor's website at the time of a vendor's removal under § 22-9-907 shall be reposted on the website of another vendor selected under this subchapter under the same terms as the original online advertisement for notice of an intention to receive bids.

<< AR ST § 22-9-909 >>

22-9-909. Multiyear contracts.

A contract with a vendor under this subchapter is subject to the restrictions of § 19-11-238.

SECTION 3. Arkansas Code § 22-9-203(a)(2), concerning contracts for public improvements, is amended to read as follows:

<< AR ST § 22-9-203 >>

(2)(A) The county, municipality, school district, or other local taxing unit shall have first published notice of its intention to receive bids one (1) time each week for not less than two (2) consecutive weeks in a newspaper of general circulation published in the county in which the proposed improvements are to be made.

Deleted: Any

(B) In addition to the publication of notice required under subdivision (a)(2)(A) of this section, the county, municipality, school district, or other local taxing unit:

Deleted: or in a trade

(i) May also publish notice in a trade journal reaching the construction industry; and

(ii) If the county, municipality, school district, or other local taxing unit is accepting electronically submitted bids, shall also post notice on the website of a vendor selected under the Fair Notice and Efficiency in Public Works Act, § 22–9–901 et seq.

SECTION 4. Arkansas Code § 22–9–203(b)(2) and (3), concerning contracts for public improvements, are amended to read as follows:

<< AR ST § 22–9–203 >>

(2)(A) If there is not a newspaper regularly published in the county in which the proposed work is to be done, the notices may be published in any newspaper having a general circulation in the county.

Deleted: no

(B) In addition to the publication of notice required under subdivision (b)(2)(A) of this section, the county, municipality, school district, or other local taxing unit:

(i) May also publish notice in a trade journal reaching the construction industry; and

(ii) If the county, municipality, school district, or other local taxing unit is accepting electronically submitted bids, shall also post notice on the website of a vendor selected under the Fair Notice and Efficiency in Public Works Act, § 22–9–901 et seq.

(3) This section does not limit to two (2) the number of weeks the notices may be published for projects over fifty thousand dollars (\$50,000), limit to one (1) the number of weeks the notices may be published for projects more than the quote bid limit, as provided under subsection (a) of this section, and less than or equal to fifty thousand dollars (\$50,000), or limit to two (2) the number of weeks the notices may be published for all other projects.

Deleted: Nothing in this section shall be construed as limiting...

Deleted: the amount of

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SECTION 5. Arkansas Code § 22–9–203(c)(1), concerning contracts for public improvements, is amended to read as follows:

<< AR ST § 22–9–203 >>

(c)(1) All notices shall contain:

(A) A brief description of the kind or type of work contemplated;

(B) The approximate location of the work contemplated;

Deleted: thereof

(C) The place at which prospective bidders may obtain plans and specifications, including any websites on which a county, municipality, or school district is posting notice of its intention to receive bids under the Fair Notice and Efficiency in Public Works Act, § 22–9–901 et seq.;

(D) The date, time, and place at which sealed bids shall be received;

Deleted: will

(E) The amount, which may be stated in a percentage, of the bid bond required;

(F) A statement of the taxing unit's reservation of the right to reject any or all bids and to waive any formalities; and

(G) Such other pertinent facts or information which to it may appear necessary or desirable.

SECTION 6. Arkansas Code § 22–9–203, concerning contracts for public improvements, is amended to add an additional subsection to read as follows:

<< AR ST § 22-9-203 >>

(1) A sealed bid under this section shall be submitted in one (1) of the following formats:

(1) Written; or

(2) Electronic media.

SECTION 7. Arkansas Code § 22-9-209(a), concerning the advertising of contracts for the renovation of historic sites, is amended to read as follows:

<< AR ST § 22-9-209 >>

(a)(1) A contract for the altering, repairing, or renovation of a recognized historic site or structure owned by the state or with title vested in the name of a state agency or of another taxing authority in which the estimated cost of the work equals or exceeds the sum of thirty-five thousand dollars (\$35,000) shall not be entered into between the state agency or taxing authority and any contractor unless the state agency or taxing authority has first published notice of intention to receive bids for improvements one (1) time each week for not less than two (2) consecutive weeks in a newspaper of general circulation published in the county in which the proposed improvements are to be made.

Deleted: or in a trade

(2) In addition to the publication of notice required under subdivision (a)(1) of this section, the state agency or taxing authority:

(A) May also publish notice in a trade journal reaching the construction industry; and

(B) If the state agency or taxing authority is accepting electronically submitted bids, shall also post notice on the website of a vendor selected under the Fair Notice and Efficiency in Public Works Act, § 22-9-901 et seq.

SECTION 8. Arkansas Code § 22-9-209(b)(2), concerning the advertising of contracts for the renovation of historic sites, is amended to read as follows:

<< AR ST § 22-9-209 >>

(2)(A) If there is ~~not a~~ newspaper regularly published in the county in which the proposed work is to be done, the notices may be published in any newspaper having a general circulation in the county.

Deleted: no

(B) In addition to the publication of notice required under subdivision (b)(2)(A) of this section, the state agency or taxing authority:

(i) May also publish notice in a trade journal reaching the construction industry; and

(ii) If the state agency or taxing authority is accepting electronically submitted bids, shall also post notice on the website of a vendor selected under the Fair Notice and Efficiency in Public Works Act, § 22-9-901 et seq.

SECTION 9. Arkansas Code § 22-9-209(c)(1), concerning the advertising of contracts for the renovation of historic sites, is amended to read as follows:

<< AR ST § 22-9-209 >>

(c)(1) All notices shall contain:

Deleted: a

(A) A brief description of the kind or type of work contemplated;

Deleted: , the

(B) The approximate location of the work contemplated:

Deleted: thereof, the

(C) The place at which prospective contractors may obtain plans and specifications, including any websites on which a state agency or taxing authority is posting notice of its intention to receive bids under the Fair Notice and Efficiency in Public Works Act, § 22-9-901 et seq.:

Deleted: the

(D) The date, time, and place at which sealed bids shall be received; and,

Deleted: will

(E) The amount, which may be stated in a percentage, of bond required.

Deleted: ,

SECTION 10. Arkansas Code § 22-9-209, concerning the advertising of contracts for the renovation of historic sites, is amended to add an additional subsection to read as follows:

Deleted: the

<< AR ST § 22-9-209 >>

(e) A sealed bid under this section shall be submitted in one (1) of the following formats:

(1) Written; or

(2) Electronic media.

/s/Flippo

APPROVED: 4/17/2019

ACT 1068

S.B. 601

PUBLIC IMPROVEMENTS AND PUBLIC WORKS—PREVAILING WAGE LAW—  
REPEAL

AN ACT TO REPEAL THE ARKANSAS PREVAILING WAGE LAW; TO PROVIDE FLEXIBILITY TO CITIES AND COUNTIES FOR CAPITAL CONSTRUCTION *PROJECTS*; *TO DECLARE AN EMERGENCY*; AND FOR OTHER PURPOSES.

**Subtitle**

TO REPEAL THE ARKANSAS PREVAILING WAGE LAW; AND TO PROVIDE FLEXIBILITY TO CITIES AND COUNTIES FOR CAPITAL CONSTRUCTION *PROJECTS*; *AND TO DECLARE AN EMERGENCY*.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

**SECTION 1. Arkansas Code §§ 22–9–301 — 22–9–315 are repealed.**

**22-9-401. Coverage.** (a) All surety bonds required by the State of Arkansas or any subdivisions thereof by any county, municipality, school district, or other local taxing unit, or by any agency of any of the foregoing for the repair, alteration, construction, or improvement of any public works, including, but not limited to, buildings, levees, sewers, drains, roads, streets, highways, and bridges shall be liable on all claims for labor and materials entering into the construction, or necessary or incident to or used in the course of construction, of the public improvements. (b) Claims for labor and materials shall include, but not be limited to, fuel oil, gasoline, camp equipment, food for workers, feed for animals, premiums for bonds and liability and workers' compensation insurance, rentals on machinery, equipment, and draft animals, and taxes or payments due the State of Arkansas or any political subdivision thereof which shall have arisen on account of, or in connection with, wages earned by workers on the project covered by the bond.

**22-9-402. Authorized bonding companies — Agents.** (a) All bonds enumerated in [§ 22-9-401](#) and bid bonds enumerated in [§ 19-4-1405](#) shall be made by surety companies that have qualified and are authorized to do business in the State of Arkansas and are listed on the current United States Department of the Treasury's Listing of Approved Sureties.

(b)(1) The bonds shall be executed by a resident or nonresident agent.

(2) The resident or nonresident agent shall:

(A) Be licensed by the Insurance Commissioner to represent the surety company executing the bond; and (B) File with the bond the power of attorney of the agent to act on behalf of the bonding company. Acts of 1929, Act 368, § 2; Acts of 1935, Act 82, § 2; [Acts of 1991, Act 1086, § 1](#); [Acts of 2001, Act 980, § 1, eff. Sept. 1, 2001](#); [Acts of 2005, Act 236, § 1, eff. Aug. 12, 2005](#); [Acts of 2013, Act 1015, § 1, eff. Aug. 16, 2013](#).

**Effective: July 1, 2019**

A.C.A. § 22-9-403

**§ 22-9-403. Statutory liability--Limitation on action**

(a) The liability imposed by [§ 22-9-401](#) on any bond furnished by a public works contractor shall be deemed an integral part of the bond, whether or not the liability is explicitly set out or assumed therein.

(b)(1) No action shall be brought on a bond after one (1) year from the date final payment is made on the contract, nor shall an action be brought outside the State of Arkansas.

(2) However, with respect to public works contracts where final approval for payment is given by the Building Authority Division or by an institution of higher education exempt from construction review and approval by the division, all persons, firms, associations, and corporations having valid claims against the bond may bring an action on the bond against the corporate surety, provided that no action shall be brought on the bond after twelve (12) months from the date on which the division or



the public institution of higher education approves final payment on the state contract, nor shall any action be brought outside the State of Arkansas in accordance with [§ 18-44-503](#). **Credits:** Acts of 1929, Act 368, § 3; Acts of 1935, Act 82, § 3; Acts of 1957, Act 209, § 4; Acts of 1997, Act 293, § 1; Acts of 2001, Act 496, § 1, eff. Aug. 13, 2001; Acts of 2001, Act 961, § 12, eff. Aug. 13, 2001; Acts of 2019, Act 910, § 6243, eff. July 1, 2019.

**22-9-404. Subcontractor bonds.** (a)(1) If required by the general contractor, each subcontractor must provide the general contractor with a payment and performance bond made by a surety company qualified under [§ 22-9-401](#) et seq., or a cash bond in a sum equal to the full amount of the subcontractor's bid on a portion of a public works contract when: (A) The subcontractor is the low responsible bidder for that portion of the contract; (B) The state, pursuant to [§ 22-9-204](#), requires the general contractor to list the subcontractor in the general contractor's bid; and (C) The work value of the subcontractor's bid is in excess of fifty thousand dollars (\$50,000). (2) If the general contractor requires the subcontractor to provide a bond, the subcontractor shall provide the bond to the general contractor within five (5) days after the award of the contract by the general contractor to the subcontractor. (b) If the subcontractor fails to provide a payment and performance bond when required by the general contractor, the subcontractor shall lose the bid and shall pay to the general contractor a penalty equivalent to ten percent (10%) of the subcontractor's bid or the difference between the low bid and the next responsible bid and the next responsible low bid, whichever is less, plus cost of recovery of the penalty, including attorney's fees. The purpose of this section is to compensate the general contractor for the difference between the low bid and the next responsible low bid. (c) The general contractor may enforce this section by a civil action in circuit court. (d) The provisions of this section shall not apply to contracts awarded by the State Highway Commission for construction or maintenance of public highways, roads, or streets.

**22-9-604. retainage.** (a)(1)(A) In the case of a construction contract entered into between a public agency and a contractor who is required to furnish a performance and payment bond, the contractor shall be entitled to payment of ninety-five percent (95%) of the earned progress payments when due, with the public agency retaining five percent (5%) to assure faithful performance of the construction contract. (B)(i) A public agency may forego withholding retainage of the progress payments if: (a) The construction contract is fifty-percent (50%) complete; (b) The contractor has provided the work in a satisfactory manner; and (c) The design professional and public agency agree with and approve of subdivisions (a)(1)(B)(i)(a) and (b) of this section. (ii) This subdivision (a)(1)(B) does not prohibit a public agency from withholding retainage throughout the project. (2) If the construction contract allows for phased work in which completion may occur on a partial occupancy, any retention proceeds withheld and retained under this section shall be partially released within thirty (30) days under the same conditions under this section in direct proportion to the value of the part of the capital improvement completed. (b)(1) In the case of a construction subcontract entered into between

a contractor for a public agency and a subcontractor who is required by the contractor to furnish a performance and payment bond, the subcontractor shall be entitled to payment of ninety-five percent (95%) of the earned progress payments when due, with the contractor retaining five percent (5%) to assure faithful performance of the construction subcontract. (2) Upon the approval of the contractor, if the subcontractor completes fifty percent (50%) of the construction subcontract the contractor shall not retain any further moneys.(c) All sums withheld by the public agency shall be paid to the contractor within thirty (30) days after the construction contract has been completed. (d) In the event the construction contract requires the contractor to purchase and furnish materials or equipment that will be stored on the job site or in a bonded warehouse by the contractor and used in the job as required by the construction contract, no retainage shall be withheld on that amount of the submitted progress payment pertaining to the cost of these stored materials or equipment. Acts of 1977, Act 235, §§ 2, 3; Acts of 2007, Act 471, § 3, eff. July 31, 2007; Acts of 2009, Act 193, § 10, eff. July 31, 2009; Acts of 2015, Act 866, § 1, eff. July 22, 2015.

#### **ATTORNEY GENERAL OPINIONS & CASES ON CONSTRUCTION LAW**

**Attorney General Opinion No. 2004-322:** Taxing units such as county library boards, administrative boards, and hospital boards, airport commissions, suburban improvement districts and improvement districts must comply with county public works bidding, advertising requirements and opening bids in public meeting. See also: AG Op Nos: 1992-101, 2007-262, 2002-063, 2005-2001. Also, the AG says a private corporation acting on behalf of a taxing unit may be held to comply with taxing unit public works bidding and advertising requirements. *Conway Corp. v. Construction Engineers, Inc.* 300 Ark. 225, 782 S.W. 2d 36 (1989). ACA 22-9-205 expressly references improvement districts.

**Attorney General Opinion Nos. 2000-255, 1998-111 and 1999-067:** The court has consistently interpreted the term "lowest responsible bidder," as used in statutory language, broadly enough to allow the deciding body to reject the lowest bidder (as well as other bidders) on the grounds of factors other than the amounts of the bids. Indeed, the court has made the general observation that "the phrase 'lowest responsible bidder' in a statute providing for competitive bids before awarding contracts for certain public improvements implies skill, judgment and integrity necessary to a faithful performance of the contract, as well as sufficient financial resources and ability." *Fletcher v. Cherry*, 207 Ark. 650, 651, 182 S.W.2d 211 (1944), quoting *Williams v. City of Topeka, et al.*, 85 Kas. 857, 118 P. 864, 38 L.R.A., N.S., 672. The Fletcher court also noted that "where a statute requires municipal contracts to be let to the 'lowest responsible bidder' the duty of the officer letting the contract is not merely ministerial, but partakes of a judicial character, requiring the exercise of discretion." *Fletcher, supra*, 207 Ark. at 651. The court most recently considered this issue in *Massongill v. County of Scott*, 329 Ark. 98, 947 S.W.2d 749 (1997). In that case, it was argued that a county had unlawfully rejected the lowest bid for solid waste disposal, in violation of A.C.A. § 14-22-111. That statute, like A.C.A. § 14-58-303 and A.C.A. § 22-9-203, required the county to award the contract to the "lowest responsible bidder," but

(also like A.C.A. § [14-58-303](#) and A.C.A. § [22-9-203](#)) allowed the county to reject all bids. The court held that this statutory language did not require the county to accept the lowest bid. Similarly, in *Conway Corp. v. Construction Eng'rs.*, [300 Ark. 225, 782 S.W.2d 36](#) (1989), the lowest bidder for a city construction contract sued the Conway Corporation, the non-profit organization that operated the City of Conway's utilities, for rejecting its low bid, and awarding the contract to a higher bidder. The court found that the case was governed by A.C.A. § [22-9-203](#) (quoted above), and that under that statute, the Conway Corporation "had the discretion to reject [the lowest bid] so long as the rejection was for good cause and in good faith." *Conway Corp.*, supra, [300 Ark. at 231](#), citing *Worth James Constr. Co. v. Jacksonville Water Comm'n*, [267 Ark. 214, 590 S.W.2d 256](#) (1979). The Conway Corporation had rejected the lowest bid after having received information indicating that the quality of that bidder's workmanship was undesirable. The court found that under A.C.A. § [22-9-203](#), the Conway Corporation "had the discretion to reject [the lowest bid] so long as the rejection was for good cause and in good faith." *Conway Corp.*, supra, [300 Ark. at 231](#), citing *Worth James Constr. Co. v. Jacksonville Water Comm'n*, [267 Ark. 214, 590 S.W.2d 256](#) (1979). The court specifically found that the Conway Corporation had acted in good faith in rejecting the bid. In reaching this conclusion, the court appears to have relied substantially on the fact that the Conway Corporation's concerns were based on substantiated allegations concerning the low bidder (thus indicating a lack of bad faith) and on the fact that the Conway Corporation took the extra step of instigating a post-bid investigation of the two highest bidders (thus furthering its lack of bad faith). The court indicated that a finding of bad faith would require a showing of "dishonest, malicious or oppressive conduct with a state of mind characterized by hatred, ill will or a spirit of revenge." *Id.* at 232, citing *Stevenson v. Union Standard Ins. Co.*, [294 Ark. 651, 746 S.W.2d 39](#) (1988). In this regard, the court noted that the Conway Corporation had received both negative and positive comments about the low bidder and had not reported them in a manner that obscured the truth. {See also: ACA 14-22-111 on commodities and AG OP No. 1994-025 which provides for rejection by county of lowest responsible bidder where county can file written statement for rejection with county clerk setting for basis for rejection, such as, quality, time of performance, probability of performance and location. }

**Attorney General Opinion No. 1993-445:** The AG opined that ACA 22-9-203 appears to require the county have the money appropriate prior to solicitation of bids for the project. And where all bids submitted exceeded the amount appropriated for the project, deductive alternatives should be subtracted from bids first to ascertain which contractor is the apparent lowest responsible bidder.

**Attorney General Opinion No. 2009-033; AG Opinion 2009-038 {Clarified by AG Opinion 2012-005}:** Counties are generally prohibited from contracting for the construction or renovation of county public buildings for value of a construction contract in excess of \$20,000 without using competitive bidding (awarding the construction contract to the lowest responsible bidder). Pursuant to ACA 22-9-201 et seq. counties, cities, schools and taxing units are mandated to award of construction contracts to the lowest responsible bidder as "competitive bidding". Meanwhile, pursuant to ACA 19-11-801 et seq counties and political subdivisions are prohibited by public policy in law from awarding professional services on the basis of competitive or low bid. Rather, professional services such as engineering, architect, legal, financial advisory,

and construction management are explicitly required to follow the process of “comparative bidding”.

In building the Garland County Jail, an attorney general opinion was sought that which used a defined project delivery method based upon an agreement in which the government acquires from a construction entity services include, but not limited to, design review, scheduling, costs control, value engineering, constructability evaluation, preparation and coordination of bid packages, and construction administration; and that acquisition by law is as a professional service under “comparative bidding, 19-11-804, 805. Counties are by law required to low bid the construction work on public works projects, the actual work performed and under the contractor for the bid bond and performance bond by competitive bidding. The Arkansas Constitution, Article 19, Section 16, provides: *“All contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor...shall be given to the lowest responsible bidder under such regulations as may be provided by law”*. Pursuant to ACA 22-9-201 et seq. counties, cities, schools and taxing units are mandated to award of construction contracts to the lowest responsible bidder as “competitive bidding”.

Other sections of ACA 19-8-801(d) affirmatively allow public schools (Only) to award “agency Construction Management” and “at-risk Construction Management” by use of comparative bidding. Public Schools are allowed by this law to avoid low bid of construction work. A political subdivision is prohibited from awarding by competitive bid professional services such as: legal, financial advisory, architectural, engineer, construction management, and land surveying professional services, such services are awarded by comparative bidding.

A governing body of a political subdivision may elect to award other professional services on the basis of “comparative bidding” process upon 2/3 vote. {Further Ag Opinions may be rendered explaining that: an owner-county may award contracts to a construction project to various contractors, rather than to one general contractor. Also, an owner-county may engage a construction manager based upon comparative bidding, however, the work identified as actual construction work must be awarded to the lowest responsible bidder}.

**Attorney General Opinion No. 2012-005:** Counties are by law required to low bid the construction work on public works projects. Arkansas Constitution, Article 19, Section 16, provides: *“All contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor...shall be given to the lowest responsible bidder”* under such regulations as may be provided by law. Pursuant to ACA 22-9-201 et seq. counties, cities, schools and taxing units are mandated to award of construction contracts to the lowest responsible bidder as “competitive bidding”. Meanwhile, pursuant to ACA 19-11-801 et seq counties and political subdivisions are prohibited by public policy in law from awarding professional services on the basis of competitive or low bid. Rather, professional services such as engineering, architect, legal, financial advisory, and construction management are explicitly required to follow the process of “comparative bidding”. This opinion makes clear that a county may procure by “comparative bidding” an “agency” construction manager to perform a professional consultant on professional services. The “agency” construction manager may be procured to provide consulting services,

not to perform the actual construction work, but to: “design review, scheduling, costs control, value engineering, constructability evaluation, preparation and coordination of bid packages, and construction administration”. In essence, the county may let the various construction contracts to construction contractors in phases as per lowest responsible bid. However, the construction contracts entered on the project may not be between construction manager and the contractors, but between the county and the contractors. Also, the process known as design-build is prohibited by the Constitution by counties since counties must award contracts for construction work to the lowest responsible bidder. This opinion can be read along with former opinions AG Opinion Nos. 2009-033 and 2009-038 which previously made clear that counties are required by Arkansas Constitution and law to award the actual construction work on public works projects to the lowest responsible bidder. **Attorney General Opinion No. 2013-051**: The AG reiterated the opinions rendered in AG OP 2012-05 and 2009-003}.

### III. Appendix

#### Construction Law/Contracting

