

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas  
2 86th General Assembly  
3 Regular Session, 2007

# A Bill

HOUSE BILL 2450

4  
5 By: Representative Hyde  
6  
7

## For An Act To Be Entitled

8  
9 AN ACT TO PREQUALIFY BIDDERS FOR PUBLIC  
10 CONSTRUCTION CONTRACTS; TO ESTABLISH A FAIR  
11 PROCEDURE FOR AWARDING BIDS; AND FOR OTHER  
12 PURPOSES.  
13

## Subtitle

14  
15 TO PREQUALIFY BIDDERS FOR PUBLIC  
16 CONSTRUCTION CONTRACTS AND TO ESTABLISH  
17 A FAIR PROCEDURE FOR AWARDING BIDS.  
18  
19

20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
21

22 SECTION 1. Arkansas Code § 22-9-201 is amended to read as follows:

23 22-9-201. Applicability of §§ 22-9-202 - ~~22-9-204~~ 22-9-206.

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

28 (b) The provisions of §§ ~~22-9-204~~ and 22-9-206 shall not apply to  
29 projects designed to provide utility needs of the state or any agency  
30 thereof, a municipality, or a county. Those projects shall include, but shall  
31 not be limited to, pipeline installation, sanitary projects, light earth work  
32 and foundation work, local flood control, sanitary landfills, drainage  
33 projects, site clearing, water lines, streets, roads, alleys, sidewalks,  
34 water channelization, light construction sewage, water works, and  
35 improvements to street and highway construction.

36 (c)(1) The notice provisions of §§ 19-4-1401, 19-4-1405, ~~and~~ 22-9-203,



1 and 22-9-206 pertaining to the project amount and the time frames of the  
 2 advertisement shall not apply to contracts for the performance of any work or  
 3 the making of any capital improvements due to emergency contracting  
 4 procedures.

5 (2) The requirements of §§ 22-9-203(e) and 22-9-206 shall not  
 6 apply to contracts for the performance of any work or the making of any  
 7 capital improvements due to emergency contracting procedures.

8 (3)(A) As used in this subsection, "emergency contracting  
 9 procedures" means the acquisition of services and materials for capital  
 10 improvements which are in accordance with the Arkansas Building Authority  
 11 minimum standards and criteria.

12 ~~(4)(B)~~ "Emergency contracting procedures" may include sole  
 13 sourcing or competitive quote bids.

14 ~~(5)(4)~~ The Director of the Arkansas Building Authority or a  
 15 designee may make or authorize others to make emergency contracting  
 16 procedures as defined in subdivision (c)(3) of this section and in accordance  
 17 with the authority minimum standards and criteria.

18 (d) The provisions of § 22-9-203 do not apply to a public construction  
 19 contract covered under § 22-9-206.

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21 SECTION 2. Arkansas Code §22-9-202 is amended to read as follows:

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

23 Nothing in this section ~~and §§ 22-9-203 and 22-9-204~~ shall be construed  
 24 to prevent any taxing unit from performing any of the work or making any of  
 25 the improvements referred to in this section ~~and §§ 22-9-203 and 22-9-204~~ by  
 26 the use of its own employees, or to require that, as a condition precedent to  
 27 the right to use its own employees, bids must be received from contractors,  
 28 nor shall this section ~~and §§ 22-9-203 and 22-9-204~~ be construed to amend or  
 29 repeal any law which requires the publication of notice in those instances  
 30 where the estimated amount of the cost of the proposed improvements shall be  
 31 less than ten thousand dollars (\$10,000), since it is the intention of this  
 32 section ~~and §§ 22-9-203 and 22-9-204~~ to provide a uniform procedure to be  
 33 followed by all taxing units whenever work is to be done under formal  
 34 contract.

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36 SECTION 3. Arkansas Code § 22-9-203(a) is amended to read as follows:

1 (a) ~~No~~ Except for public construction contracts under § 22-9-206, no  
2 contract providing for the making of major repairs or alterations, for the  
3 erection of buildings or other structures, or for making other permanent  
4 improvements shall be entered into by the state or any agency thereof, any  
5 county, municipality, school district, or other local taxing unit with any  
6 contractor in instances where all estimated costs of the work shall exceed  
7 the sum of twenty thousand dollars (\$20,000) unless:

8  
9 SECTION 4. Arkansas Code § 22-9-205 is amended to read as follows:  
10 22-9-205. Public improvements generally - Interest on delinquent  
11 payments.

12 Whenever any agency of this state or of any county, municipality, or  
13 school district, or other local taxing unit or improvement district enters  
14 into a contract covered by the provisions of §§ 22-9-202 - ~~22-9-204~~ 22-9-206  
15 for the making of repairs or alterations or the erection of buildings or for  
16 the making of any other improvements, or for the construction or improvement  
17 of highways, roads, streets, sidewalks, curbs, gutters, drainage or sewer  
18 projects, or for any other construction project, and the contract provides  
19 that payment therefor shall be made upon completion and acceptance of the  
20 project, and the contractor, upon completion and approval of the project,  
21 presents a claim for payment of the amount due thereon in accordance with the  
22 terms of the contract, and the claim is not paid by the public authority  
23 within ninety (90) days from the date of presentation of the claim, then the  
24 public authority shall pay to the contractor interest at the rate of ten  
25 percent (10%) per annum on the unpaid amount due for all periods of time that  
26 the payment under the contract is not made subsequent to ninety (90) days  
27 after presentation of the claim.

28  
29 SECTION 5. Arkansas Code Title 22, Chapter 9 is amended to add the  
30 following section to read as follows:

31 22-9-206. Public construction contracts generally – Award procedure –  
32 Prequalifying bidders.

33 (a) As used in this section:

34 (1) "Amount appropriated" means funds currently available for a  
35 construction contract as determined by an authority before the opening of a  
36 bid;

1           (2) "Authority" means:

2                   (A) The state;

3                   (B) An agency of the state;

4                   (C) A county;

5                   (D) A municipality;

6                   (E) A school district; or

7                   (F) A local taxing unit that has the responsibility for a  
 8 public construction contract;

9           (3) "Bid" means the documentation supplied by a bidder to enter  
 10 into a public construction contract with an authority;

11           (4) "Bidder" means an entity that submits a bid for a public  
 12 construction contract;

13           (5) "Design professional" means a person or an entity selected  
 14 by an authority to prepare prequalification criteria for a bid for a public  
 15 construction contract;

16           (6) "Prequalification criteria" means the specific bid  
 17 information required by a design professional at the general direction of an  
 18 authority that a bidder must submit to be a prequalifying bidder;

19           (7) "Prequalifying bid" means a bid that has been prequalified  
 20 by the design professional;

21           (8) "Prequalifying bidder" means a bidder who:

22                   (A) Submits a bid;

23                   (B) Meets all of the prequalification criteria; and

24                   (C) Meets any criteria required by an authority pursuant  
 25 to subsection (d) of this section;

26           (9) "Prequalifying low bid" means the lowest bid amount from all  
 27 bidders that have met the prequalification criteria;

28           (10) "Prequalifying low bidder" means the bidder who:

29                   (i) Submits the lowest bid amount; and

30                   (ii) Meets all of the prequalification criteria; and

31           (11)(A) "Public construction contract" means an agreement, a  
 32 contract, or a subcontract to construct a building, a building site, or  
 33 structure, or permanent improvement to a building, building site, or  
 34 structure, including, without limitation any of the following services or  
 35 functions or combination of the following services or functions:

36                   (i) Alteration;

- 1                    (ii) Construction;
- 2                    (iii) Design;
- 3                    (iv) Erection;
- 4                    (v) Financing;
- 5                    (vi) Maintenance;
- 6                    (vii) Operation;
- 7                    (viii) Permanent improvement;
- 8                    (ix) Reconditioning;
- 9                    (x) Renovation;
- 10                   (xi) Repair; or
- 11                   (xii) Replacement.

12                    (B) "Public construction contract" does not include:

- 13                    (i) Highway construction or a highway construction
- 14 contract; or
- 15                    (ii) A water or sewer system constructed under § 22-
- 16 9-203;

17                    (b) A public construction contract in which the estimated cost of the  
18 public construction contract exceeds twenty thousand dollars (\$20,000) is  
19 subject to this section.

20                    (c)(1) Before publishing the notice required under this section, an  
21 authority shall select a design professional to establish prequalification  
22 criteria for the public construction contract consistent with subsections  
23 (d), (e), and (f) of this section to prequalify prospective bidders for the  
24 public construction contract and shall set the prequalification criteria for  
25 the public construction contract in writing.

26                    (2) An authority shall make all prequalification criteria for a  
27 public construction contract equally and uniformly known to all prospective  
28 bidders.

29                    (d) To be eligible to be a prequalifying bidder, the bidder shall  
30 demonstrate to the authority that the bidder has:

31                    (1) The qualifications, experience, and management personnel  
32 necessary to carry out the terms of the public construction contract;

33                    (2) The financial strength and ability to provide  
34 indemnification for liability arising from the public construction contracts;

35                    (3) Evidence of past performance of public construction  
36 contracts;

1           (4) The ability to comply with any applicable court orders;

2           (5) The ability to comply with an applicable certification or  
 3 standard from a professional or an industry association, a society, a trade  
 4 group, or a similar organization; and

5           (6) The ability to meet any other prequalification criteria made  
 6 equally and uniformly known to all prospective bidders by an authority.

7           (e) The prequalification criteria may include or reference standards  
 8 adopted by a professional or an industry association, a society, a trade  
 9 group, or a similar organization, but shall not require that the bidder be  
 10 endorsed by any professional or industry association, society, trade group,  
 11 or similar organization.

12           (f) No bid is eligible to be a prequalifying bid unless the bidder  
 13 provides an affidavit affirming:

14           (1) The name or names of other business entities under which  
 15 the bidder has conducted construction contracts or similar businesses;

16           (2) Whether the bidder or any officer or principal of the  
 17 bidder's organization has ever failed to complete any work awarded to it  
 18 under a construction contract;

19           (3) Whether there is a judgment, a claim, an arbitration  
 20 proceeding, or suit pending or outstanding against the bidder;

21           (4) Whether the bidder has filed a lawsuit or requested  
 22 arbitration with regard to a construction contract within the last five (5)  
 23 years; and

24           (5) The environmental compliance record of the bidder for the  
 25 five (5) years before submission of the bid.

26           (g) To promote transparency and fairness in the bid process, an  
 27 authority may require a bidder that has conducted similar business under a  
 28 different name or names than the bid name for the construction contract to  
 29 submit the information required in subsection (f) of this section on behalf  
 30 of the other business name or names.

31           (h) An authority shall publish in a newspaper of general circulation  
 32 in the county in which the public construction contract occurs, or publish in  
 33 a construction industry trade journal of general circulation, notice of its  
 34 intention to receive bids for a public construction contract. At a minimum,  
 35 the notice of intention to receive bids shall be published:

36           (1) One (1) time each week for not less than two (2) consecutive

1 weeks for a public construction contract totaling fifty thousand dollars  
2 (\$50,000) or more; or

3 (2) One (1) time each week for not less than one week for a  
4 public construction contract totaling less than fifty thousand dollars  
5 (\$50,000).

6 (i) The publication date of the last notice published in accordance  
7 with subsections (h) and (j) of this section shall not be less than one (1)  
8 week before the date for the authority to open bids set out in the notice.

9 (j) The notice of intention to receive bids shall contain:

10 (1) A brief description of the public construction contract;

11 (2) The kind or type of work contemplated;

12 (3) The approximate location of the public construction  
13 contract;

14 (4) The place at which a prospective bidder may obtain plans,  
15 specifications, and prequalification criteria;

16 (5) The date, time, and place at which sealed bids will be  
17 received;

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

20 (7) A statement of the authority's reservation of the right to  
21 reject or abandon all bids;

22 (8) A statement that only prequalified bidders are eligible for  
23 an offer of a public construction contract;

24 (9) The date, time, and place at which sealed bids will be  
25 opened; and,

26 (10) Other facts or information the authority deems reasonable  
27 and necessary to obtain a desirable bid.

28 (k)(1) As security for the bid, every bid submitted under this section  
29 shall be accompanied by a bond consistent with § 19-8-203 in the form of a  
30 cashier's check drawn upon a bank or trust company doing business in this  
31 state or by a corporate bid bond.

32 (2) No bond shall be required for a public construction contract  
33 totaling twenty thousand dollars (\$20,000) or less.

34 (3) The bond shall indemnify the authority against the failure  
35 of the bidder to execute and deliver the public construction contract and to  
36 ensure faithful performance of the public construction contract.

1           (4) The bond shall provide that the bidder or surety shall pay  
 2 the damage, loss, cost, and expense subject to the amount of the bond  
 3 directly arising out of the bidder's default in failing to execute and  
 4 deliver the public construction contract and bond.

5           (5) Liability under the bond is limited to five percent (5%) of  
 6 the amount of the bid.

7           (1)(1) In addition to the bond provided in subdivision (k)(1) of this  
 8 section, the prequalifying low bidder shall provide a one-hundred-percent  
 9 payment and a one-hundred-percent performance bond consistent with this  
 10 section and § 19-8-203 that is adequate to protect the authority from any  
 11 claim or loss incurred as a result of the public construction contract.

12           (2) Nothing in this subsection is intended to deprive a  
 13 successful bidder, the state, or a political subdivision of the benefits of  
 14 any law limiting exposure to liability or setting a limit on damages.

15           (m)(1) The authority shall open the prequalified bids on the date and  
 16 time fixed in the notice of intention to receive bids, and award the bid to  
 17 the lowest prequalifyng bidder.

18           (2) The authority shall return a bid unopened as non-responsive  
 19 to a bidder that does not prequalify.

20           (n) If all prequalifying bids submitted exceed the appropriated amount  
 21 of the public construction contract as specified in the notice of intention  
 22 to receive bids, the authority may negotiate an award with the prequalifying  
 23 low bidder but only if the prequalifying low bid is within twenty-five  
 24 percent (25%) of the appropriated amount.

25           (o)(1) If the plans and specifications for the public construction  
 26 contract require a bid on alternates in addition to a base bid, there shall  
 27 be no more than three (3) alternates, and the alternates shall be:

28                   (A) Deductive; and

29                   (B) Set forth in the plans and specifications in numerical  
 30 order.

31           (2) If all bids on alternates submitted exceed the amount  
 32 appropriated for the award of the public construction contract, then an  
 33 authority may determine the prequalifying low bidder by deducting the  
 34 alternates in numerical order.

35           (3) If the cost of the public construction contract is less than  
 36 twenty-five percent (25%) above the amount appropriated after making the

1 deduction for alternates, the authority may negotiate an award with the  
2 prequalifying low bidder.

3 (p) If it is obvious from examination of a bid that because of  
4 typographical error, such as the transposition of figures, the prequalifying  
5 low bid if accepted would create a serious financial loss to the  
6 prequalifying low bidder, the authority may relieve the prequalifying low  
7 bidder from responsibility under the bond and may reject the bid.

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