

3-324 QUALIFICATIONS OF CONTRACTORS

(A) Pre-Bid: Pursuant to Ark. Code Ann. §22-9-105, contractors who have an existing contract shall not bid on additional state capital improvement contracts with state agencies if the state agency determines that the Contractor has one (1) or more material issues of an existing contract and has provided written notification of their determination to the Contractor. Material issues include, but are not limited to:

(1) Having one (1) or more projects in which:

(a) the commencement of the project is delayed thirty (30) or more calendar days beyond the agency's notice to proceed and the delay is due to the contractor's acts or omissions, or both;

(b) the completion of the project is delayed ten percent (10%) or sixty (60) calendar days beyond the completion date, whichever is less, and the delay is due to the contractor's acts or omissions, or both;

(c) the Contractor has falsified or destroyed documents relating to the contract including without limitation, falsification of invoices, making false representations to state agency officials or making false statements about any payment(s);

(d) the Contractor has failed to replace inferior or defective work or materials after notification by the state agency to which such services or materials has been provided or delivered;

(e) the Contractor has failed to make appropriate and timely payments to their subcontractor;

(f) the agency has provided formal notice to the Surety to take action on a project;

(g) the Contractor has failed to meet the completion date for the project which has caused material harm, whether financial or operational, to the agency when the delay is due to the Contractor's acts or omissions, or both;

(h) the Contractor fails to adequately complete the project punch list within one hundred and twenty (120) calendar days from substantial completion and the delay is due to the Contractor's acts or omissions, or both; or

(i) the Contractor fails to respond to warranty issues or latent defects within ten (10) calendar days after being notified by the agency in writing.

(2)

(a) Appeals of material issues determinations by state agencies shall be made to the Transformation and Shared Services Office of State Procurement (OSP) Director or his or her designee.

(i) Substantive Requirements. An appeal must set forth facts showing that the appellant is a firm that has an existing state contract with a state agency and the factual basis for appealing the material issues determination by the state agency.

(ii) Formal Requirements. An appeal must be submitted in writing to the OSP Director. To expedite handling of appeals, if delivered by mail, the envelope containing an appeal should be clearly labeled "Appeal of Material Issues Determination." Appeals delivered by email should be identified as an Appeal of Material Issues Determination in the subject line and marked as important. An appeal shall include as a minimum the following: (1) The name and address of the appellant (or the appellant's attorney); (2) appropriate identification of the contract by reference to its number, if a number has been assigned; and (3) unless good cause is shown for its absence, a copy of any documents or supporting evidence upon which the appeal is based, attached to or enclosed with the appeal as an exhibit. Where such documents or supporting evidence substantiating any

claims made in an appeal are believed or known to exist, but are not available with reasonable diligence to include as an exhibit within the time for submitting a protest, the anticipated documents must be described in the protest so as to explain how they are expected to support the appeal and when the appellant reasonably anticipates they will be available, if ever. Failure to provide such supporting exhibits without good cause or within a reasonable time may result in the appeal being denied.

(iii) Timeliness. To be timely, an appeal must be submitted in writing to the OSP Director within fourteen (14) calendar days after the written determination was delivered to the Contractor pursuant to Section 2(b).

(iv) Burden of Supporting an Appeal and Supplying Requested Information. A Contractor submitting an appeal has the burden of stating facts showing that the appellant has a factual basis for the appeal. In determining an appeal, the OSP Director may, but has no duty to, request an appellant or other interested party to submit documentation or information relevant to the appeal. Failure of any person to comply expeditiously with a request for documents or information by the OSP Director when determining an appeal may result in the appeal being determined without consideration of the requested information. Delivery of requested documents or information after three business days from the request is generally not considered expeditious, but the OSP Director may allow additional time for good cause.

(v) Claims of damages or questions of law. When an appeal claims damages or questions of law, the Contractor should submit a claim through the Arkansas Claims Commission. The Commission regulates the procedure by which such claims are submitted and determined.

(vi) Decisions. The decision of the OSP Director regarding an appeal under this rule is final and conclusive. Decisions shall be issued by the OSP Director in writing, state the reasons for the decision, and be mailed or otherwise furnished to the appellant and interested parties.

(b) The state agencies under the jurisdiction of the Division of Building Authority (DBA) shall promptly notify and provide their written determination to the Contractor and provide a written copy to the Section Administrator. State agencies shall provide written notification to DBA if an appeal in (2)(a) is not timely filed or if the appeal is overruled in favor of the Contractor. Upon receipt of this notification, the Section shall place the name of the prohibited bidder on the DBA Website. The prohibition shall not be for a period of more than three (3) years and shall remain effective until the state agency's written notification to DBA that the material issue(s) affecting the existing contract is no longer a concern for the state agency or the contract has been terminated or closed out, whichever is sooner.

(c) Institutions of higher education shall promptly notify and provide a written determination to the Contractor and copy the Department of Higher Education. Institutions of higher education shall provide written notification to the Department of Higher Education if an appeal in (2)(a) is not timely filed or if the appeal is overruled in favor of the Contractor. Upon receipt of this notification, the Department of Higher Education shall place the name of the prohibited bidder on the Department of Higher Education's Website. The prohibition shall not be for a period of more than three (3) years and shall remain effective until the institution of higher education's written notification to the Department of Higher Education that the material issue(s) affecting the existing contract is no longer a concern

for the institution of higher education or the contract has been terminated or closed out, whichever is sooner.

(B) Post-Bid: Contract awards should be made to the lowest responsible bidder. Breaches of responsibility may include ~~but not limited to~~ without limitation:

- (1) Conviction for of a criminal offense in connection with obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
- (2) Conviction under State or Federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity;
- (3) Conviction under State or Federal antitrust;
- (4) Violation of contract provisions, as set forth below:
 - (a) Failure to perform in accordance with the specifications or within the time limit provided in the state capital improvement contract; or
 - (b) Failure to perform or unsatisfactory performance in accordance with the terms of one or more contracts;
- (5) Failure to post bid or performance bonds as required by laws or rules;
- (6) Substitution of work or materials without the prior written approval of the Agency and the Design Professional; however, these approvals shall not in any manner diminish the Section's approval of change orders;
- (7) Failure to replace inferior or defective work or materials after notification by the Agency or the Section to which such services or materials has been provided or delivered;
- (8) Refusal to accept a contract awarded pursuant to the terms and conditions of the contractor's bid;
- (9) Falsifying invoices, or making false representations to any Agency or State official, or untrue statements about any payment under a contract or to procure award of a contract, or to induce a modification in the price or the terms of a contract to the contractor's advantage;
- (10) Collusion or collaboration with another contractor or contractors in the submission of a bid or bids that results in, or could result in lessening or reducing competition for a bid;
- (11) Falsifying information in the submission of any document in any process related to the capital improvement project.
- (12) Failure to make appropriate and timely payments to their subcontractors;
- (13) Any other act or omission the Agency determines to demonstrate that the Contractor cannot act in a responsible manner, including but is not limited to suspension or debarment by any other governmental entity for any cause, which may include but not limited to Contractors who are suspended or debarred by the State Department of Labor or deemed unqualified by the Contractor's Licensing Board.

1 State of Arkansas
2 92nd General Assembly
3 Regular Session, 2019
4

As Engrossed: S2/27/19

A Bill

HOUSE BILL 1181

5 By: Representative Wardlaw
6 By: Senator Flippo
7

For An Act To Be Entitled

9 AN ACT TO AMEND THE LAW CONCERNING THE PROCUREMENT OF
10 DESIGN SERVICES CONTRACTS; AND FOR OTHER PURPOSES.

Subtitle

14 TO AMEND THE LAW CONCERNING THE
15 PROCUREMENT OF DESIGN SERVICES CONTRACTS.
16
17

18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
19

20 SECTION 1. Arkansas Code § 22-2-108(7)(A), concerning the powers and
21 duties of the Building Authority Division of the Department of Finance and
22 Administration, is amended to read as follows:

23 (7)(A) To execute contracts necessary to accomplish the purposes
24 of this chapter, including without limitation a statewide contract for design
25 services to expedite the procurement of design services by a state agency in
26 an emergency.
27

28 SECTION 2. Arkansas Code Title 22, Chapter 9, Subchapter 1, is amended
29 to add an additional section to read as follows:

30 22-9-105. Poor contractual performance – Additional bids prohibited.

31 (a)(1) A firm that has an existing state contract with a state agency
32 shall not bid on any additional state contracts with a state agency if the
33 firm's existing state contract with a state agency has one (1) or more
34 material issues, including without limitation a material delay in the
35 commencement or completion of a project or a breach of contract.

36 (2)(A) If a state agency determines that an existing state



1 contract with a firm has one (1) or more material issues under this section,
2 the firm may appeal the state agency's determination to the State Procurement
3 Director.

4 (B) The decision of the State Procurement Director
5 regarding an appeal under this subsection is final and conclusive.

6 (C) The State Procurement Director shall adopt rules to
7 establish the process and procedure for appeals under this subsection.

8 (b) As used in this section, "state agency" means the same as defined
9 in § 22-2-102.

10 (c) The Director of the Department of Finance and Administration shall
11 adopt rules to provide guidance on what is considered to be a material issue
12 under subsection (a) of this section.

13
14 SECTION 3. Arkansas Code § 22-9-203, concerning the award of contracts
15 for public improvements, is amended to add an additional subdivision to read
16 as follows:

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

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22
23 /s/Wardlaw

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26 APPROVED: 3/11/19