

**REPORT
OF THE
SUBCOMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE
REVIEW (PEER)
OF THE ARKANSAS LEGISLATIVE COUNCIL**

September 16, 2011

Co-Chairs:

Your Subcommittee on Performance Evaluation and Expenditure Review (PEER) met on September 1, 2011 and after having reviewed the following items, reports that the Committee's review and/or approval is complete with the exception of those noted by an asterisk (*):

A. Cash Fund Appropriation Increase Requests – FY12

1. Department of Career Education - \$61,000
2. Secretary of State - \$73,390
3. Department of Arkansas Heritage – Delta Cultural Center - \$10,000

B. Items Approved

1. Appropriation and/or Fund Transfer Request – FY12
 - a. Arkansas State Police - \$95,000 Fund Transfer from the Court Awards Fund to the State Police Fund and \$95,000 Appropriation Transfer from the Confiscated Funds Transfer Appropriation to the State Police Operations for roof repairs for Troop H Fort Smith and Troop C Jonesboro. ***The remaining \$1,595,000 for Troop L land acquisition held for October 6th PEER meeting.**
 - b. Arkansas State Police - \$61,612.30 Fund Transfer from the Court Awards Fund to the State Police Fund and \$61,612.30 Appropriation Transfer from the Confiscated Funds Transfer Appropriation to the State Police Operations Appropriation Capital Outlay line item to pay sales tax on vehicles.

C. Budget Classification Transfer Requests – FY12

1. Department of Parks and Tourism – Cultural Resources Studies for Prairie Grove Battlefield - \$81,000 from Operating Expenses to Professional Fees
2. Department of Education – State Library – Federal Operations - \$20,000 from Operating Expenses to Professional Fees

D. Miscellaneous Federal Grant Appropriation Requests – FY12

1. Department of Labor – OSHA (Occupational Safety & Health Administration) - \$26,640
2. Department of Human Services – Division of Services for the Blind – Independent Living – Older Blind ARRA - \$16,057
3. Arkansas Agriculture Department – Forestry Commission – Recovery Act Domestic Grant - \$18,686

E. Contracts Between State Agencies

1. Department of Human Services – Division of Behavioral Health and UAMS Partners for Inclusive Communities - \$91,531

F. Emergency Transfer Requests - FY12

1. Miscellaneous Federal Grant Appropriation Request
 - a. Department of Higher Education - \$15,332,229
2. Cash Fund Appropriation Increase Request
 - a. Natural Resources Commission - \$1,150,000

G. FY12 - Transfer to 88th Session Projects Account – Executive Division from Educational Facilities Partnership Fund

The Subcommittee reviewed a Transfer to 88th Session Projects Account – Executive Division from Educational Facilities Partnership Fund – FY12 in the amount of \$2,000,000 upon recommendation of the House and Senate Education Committees. **The Subcommittee adopted a motion to request Legislative Council to request the Governor seek alternative funding for ADTEC before the \$2 million is transferred from Educational Facilities Partnership Fund and that the Department of Finance and Administration report back to the PEER Subcommittee at its October meeting on the status of this item.**

The Subcommittee also requests Legislative Council to direct Bureau Legal Staff to provide an official document on the issue of “review” and “approval”; to put together something that outlines: What we did before, what got us in trouble, the result of a lawsuit and the process since then. How is review and approval defined now and what power the Subcommittee has and if we are or not exercising that power properly. This analysis is to apply to all the Council subcommittees.

The Subcommittee requests legal staff to report to Legislative Council when state universities are required to bid contracts, and if it is appropriate that those contracts come with offers of gifts as a condition of the contract.

Respectfully submitted,

Senator Johnny Key, Co-Chair

Rep. James McLean, Co-Chair



State of Arkansas
Bureau of
Legislative Research

David Ferguson, Director
Kim Arnall, Assistant Director
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MEMORANDUM

TO: Senator Sue Madison

FROM: Joi Leonard, Legislative Attorney, Legal Research and Drafting

DATE: September 13, 2011

SUBJECT: Requirements for Procurement Contracts for State Universities; Disclosure of Gifts

QUESTIONS PRESENTED

What are the requirements for state universities with respect to bidding out purchasing contracts?

What are the requirements regarding the receipt and disclosure of gifts or donations received by a state university?

DISCUSSION

I. Requirements for State Universities Regarding Purchasing Contracts

A. *Arkansas Procurement Law*

State universities are authorized to employ a procurement official to handle “commodities, technical and general services, and professional and consultant services, which are not within the exclusive jurisdiction of the State Procurement Director and which are not under state contract.” Ark. Code Ann. § 19-11-220(a). The State Procurement Director has exclusive jurisdiction over the procurement of a variety of commodities and services, including without limitation passenger vehicles, paper products, and wholesale gasoline, oil, and related products. *Id.* § 19-11-222.

Contracts that exceed an estimated purchase price of twenty-five thousand dollars (\$25,000) are required to be awarded by competitive sealed bidding unless the university procurement official makes a determination in writing that competitive sealed bidding is “not practicable and advantageous.” *Id.* § 19-11-229(b)(1). In making this determination, the university procurement official must consider the following: (1) whether the “[p]urchase descriptions are suitable for award on the basis of the lowest evaluated bid price” and (2) whether “[t]he available sources, the time and place of performance, and other relevant circumstances are appropriate for the use of competitive sealed bidding.” *Id.* § 19-11-229(b)(3).

Although purchasing contracts are generally awarded by competitive sealed bidding, there are several exceptions under Arkansas Code § 19-11-228:

- Competitive sealed proposals: If the use of competitive sealed bidding is not practicable and advantageous, then the contract may be awarded by competitive sealed proposals. *Id.* § 19-11-230(b);
- Small procurements: Procurements not exceeding five thousand dollars (\$5,000) may be made according to the requirements promulgated by the director regarding small procurements. *Id.* § 19-11-231;
- Competitive bidding: Purchasing contracts between five thousand dollars (\$5,000) and twenty-five thousand dollars (\$25,000) may be awarded by competitive bidding. *Id.* § 19-11-234;
- Proprietary or sole source procurements: A contract for a required or designated commodity or service may be awarded to a sole or mandatory supplier if the director, the head of the university, or a designee of either officer above the level of the university procurement official “determines in writing that it is not practicable to use other than the required or designated commodity or service.” *Id.* § 19-11-232(a);
- Emergency procurements: The director, the head of the university, or a designee of either officer may authorize the procurement of commodities or services that are immediately necessary to preserve human life or health, state property, or the functional capability of a state agency in accordance with the regulations promulgated by the director regarding emergency procurements. *Id.* § 19-11-233;
- Multiple award contracts: If a university procurement official determines in writing that a single award is not advantageous, then multiple award contracts may be made. *Id.* § 19-11-262; and
- Special procurements: The director or the head of the state university “may initiate a procurement above the competitive bid amount specified in § 19-11-234, when the officer determines that an unusual or unique situation exists that makes the application of all requirements of competitive bidding, competitive sealed bidding, or competitive sealed proposals contrary to the public interest.” *Id.* § 19-11-263.

However, the Arkansas Procurement Law, Arkansas Code § 19-11-201 *et seq.*, applies only to expenditures of public funds by a state agency, including state universities, under any contract. *Id.* § 19-11-207(a). The definition of “public funds” under the Arkansas Procurement Law does not include donations or “revenues derived from self-supporting enterprises which are not operated as a primary function of the agency, no part of which funds are deposited into the State Treasury.” *Id.* § 19-11-203(23)(B). Accordingly, the procurement laws do not require that a revenue-generating contract—such as a contract between a university and a bookstore or a university and a food service company—be awarded by bid.

In addition to complying with the procurement laws, state universities must also comply with laws regarding the procedure for contracting for the design and construction of buildings and facilities. Under Arkansas Code §§ 19-4-1401—19-4-1416, state agencies are required to follow certain notice

and bidding procedures for construction projects. However, if more than five million dollars (\$5,000,000) in funding is provided to a state university for the construction project, excluding the cost of the land, then the provisions in Arkansas Code §§ 19-4-1401—19-4-1416 and the other provisions governing construction of public buildings, including without limitation Arkansas Code §§22-9-201—22-9-214, do not apply if the state university follows the selection and contracting process outlined in Arkansas Code § 19-4-1415. Ark. Code Ann. § 19-4-1415(a). That selection and contracting process includes the following: approval by the Arkansas Building Authority and review by the Legislative Council (unless the state university is exempt¹), separate contracts for construction and design, involvement by the authority in the selection and contract process, and the formation of a preselection committee and final selection committee to review proposals and recommend professionals to be awarded contracts. *Id.* § 19-4-1415.

B. Requirements for the Procurement of Particular Types of Commodities and Services

Arkansas purchasing laws also address a state university's procurement of particular types of commodities and services:

- Professional Services: State universities that are exempt from the review and approval of the Arkansas Building Authority are required to “follow procedures established by their governing boards for the procurement of architectural, engineering, land surveying, and construction management professional consultant services.” *Id.* § 19-11-801(a)(2).
- Professional Services and Consultant Services: Contracts for professional services or consultant services (except for those specifically exempt from review) that (1) require the services of an individual for regular full-time or part-time weekly work and (2) have a total contract amount that exceeds twenty-five thousand dollars (\$25,000) must be presented to the Legislative Council or to the Joint Budget Committee, if the General Assembly is in session, before the execution date of the contract. *Id.* §§ 19-11-1006(a)(1). However, this provision does not apply to state university contracts that are for services related to patents, copyrights, or trademarks. *Id.* § 19-11-1003(b).
- Disabled Work Center Products and Services: Commodities and services, including small purchases, procured in accordance with applicable state specifications by or for a state university must be purchased from nonprofit work centers for individuals with disabilities when the commodities are available within the period specified and at the fair market price for the commodities and services purchased. *Id.* § 19-11-901(a). These services are required to be procured by competitive sealed bidding, competitive sealed proposals, or competitive bidding, subject to Arkansas Code § 19-11-902 regarding the exceptional circumstances in which nonworkshop services and commodities may be purchased. *Id.* § 19-11-901(b).

II. Disclosure of Gifts and Donations to State Universities

¹ Arkansas Code § 19-4-1415(b)(5) states that the Board of Trustees of the University of Arkansas and the Board of Trustees of Arkansas State University are exempt from review and approval of the authority and the regulations promulgated by the authority if the universities adopt policies and procedures governing the awarding and oversight of contracts for design and construction services.

The Arkansas Procurement Law does not “preclude the acceptance of gifts and donations in the manner authorized by law.” Ark. Code Ann. § 19-11-207(b). The Arkansas Ethics Commission has the authority to promulgate rules regarding gifts to governmental entities, including state universities. The Arkansas Ethics Commission’s Rules on Gifts state that “[t]he Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Commissioner of State Lands, and Attorney General, in their official capacity, may accept gifts, grants, and donations of money or property on behalf of the state for any lawful public purpose.” Rules on Gifts, § 308; *see also* Ark. Code Ann. § 21-8-804. If a public official accepts a gift, grant, or donation on behalf of a governmental entity under § 308, then the public official is required to disclose, on a quarterly basis, the following: (1) the gift, grant, or donation received; (2) the person donating the gift, grant, or donation; and (3) the estimated value of the gift, grant, or donation. Rules on Gifts, § 309; *see also* Ark. Code Ann. § 21-8-804.

In a written advisory opinion, the Arkansas Ethics Commission applied the foregoing rules to the Arkansas Service Commission, a unit of the Division of Volunteerism in the Arkansas Department of Human Services, an agency within the executive branch of the Arkansas government. Ark. Ethics Comm’n Ad. Op. 2010-EC-004 (2010). The Arkansas Ethics Commission opined that the Governor would be authorized to accept a gift, grant, or donation on behalf of the Arkansas Service Commission if he properly disclosed the gift in accordance with § 309 of the Rules on Gifts. *Id.* In doing so, the Arkansas Ethics Commission explicitly noted that the Arkansas Service Commission was not authorized to accept funds from private entities. *Id.* Applying this advisory opinion to universities, it would seem that, absent specific statutory authority otherwise, the Governor, not the university itself, is authorized to accept a gift, grant, or donation if he properly discloses it. However, unlike with the Arkansas Service Commission, various statutes authorize the board of trustees of certain state universities to receive and hold gifts and donations. *See, e.g.,* Ark. Code Ann. §§ 6-66-102(d)(1)(E)² and 6-67-103(d)(1)(D).³ Accordingly, it is not clear what the requirements are for universities to receive and disclose gifts, grants, and donations under Arkansas law, but the Rules on Gifts and the Arkansas Ethics Commission’s interpretations of those rules should be considered, as well as the statutory law applicable to each particular state university.

² Henderson State University

³ University of Central Arkansas