

19-11-247. Remedies for unlawful solicitation or award.

(a) The provisions of this section apply where it is determined upon any review provided by law that a solicitation or award of a contract is in violation of law.

(b) If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

(1) Cancelled; or

(2) Revised to comply with the law.

(c) If after an award it is determined that a solicitation or award of a contract is in violation of law, then in addition to or in lieu of other remedies provided by law:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(A) The contract may be ratified and affirmed if it is determined that doing so is in the best interests of the state; or

(B) The contract may be terminated;

(2) If the person awarded the contract has acted fraudulently or in bad faith:

(A) The contract may be declared null and void; or

(B) The person awarded the contract may be directed to proceed with performance of the contract and pay such damages, if any, as may be appropriate if such action shall be in the best interests of the state.

(d) Before a contract is ratified and affirmed under subdivision (c)(1)(A) of this section, a contract shall be presented to the Legislative Council or, if the General Assembly is in session, to the Joint Budget Committee, for review if the contract is required to be submitted for review under § 19-11-1006.

History. Acts 1979, No. 482, §§ 60-62; A.S.A. 1947, §§ 14-279 — 14-279.2; Acts 2017, No. 696, § 4.

Amendments. The 2017 amendment added (d).

Case Notes

Improper Remedy.

Improper Remedy.

In their action under the Arkansas Purchasing Law, plaintiffs sought the wrong remedy as the Purchasing Law provides for termination of the contract or "other remedies provided by law," such as an injunction or mandamus, if an award is in violation of the law; plaintiffs sought compensatory and punitive damages, but failed to seek injunctive relief or mandamus. *Milligan v. Burrow*, 52 Ark. App. 20, 914 S.W.2d 763 (1996).

1 State of Arkansas As Engrossed: S3/13/17 H3/17/17

2 91st General Assembly

A Bill

3 Regular Session, 2017

SENATE BILL 448

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5 By: Senator Hester

6 By: Representative Wardlaw

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For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW; TO
10 PROMOTE EFFICIENCY IN STATE PROCUREMENT BY EXPANDING
11 THE ABILITY OF THE STATE TO NEGOTIATE CONTRACTS; TO
12 DEFINE "COLLUSION" UNDER ARKANSAS PROCUREMENT LAW; TO
13 REQUIRE REVIEW OF A CONTRACT BEFORE IT IS RATIFIED OR
14 AFFIRMED; AND FOR OTHER PURPOSES.

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Subtitle

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

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SECTION 1. Arkansas Code § 19-11-229(h)(2), concerning competitive
28 sealed bidding, is amended to read as follows:

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(2)(A) ~~In the event all bids exceed available funds as certified
by the appropriate fiscal officer in situations in which time or economic
considerations preclude resolicitation of work of a reduced scope, the Except
with respect to a contract being procured for a construction project, the
director or the head of a procurement agency may negotiate an adjustment of
the a lower bid price, including changes in the bid requirements, with the
lowest responsive and responsible bidder, in order to bring the bid within
the amount of available funds if:~~



1 (i) All bids received from responsive and
2 responsible bidders exceed available funding as certified by the appropriate
3 fiscal officer of the procurement agency; or

4 (ii) It appears that additional savings to the state
5 may result from negotiation.

6 (B)(i)(a) If negotiations with the lowest responsive and
7 responsible bidder conducted under subdivision (h)(2)(A) of this section fail
8 to result in a lower bid price, the state may negotiate for a lower bid price
9 with the next lowest responsive and responsible bidder.

10 (b) If negotiations with the next lowest
11 responsive and responsible bidder under subdivision (h)(2)(B)(i)(a) of this
12 section fail to result in a lower bid price, the state may negotiate for a
13 lower bid price with the next lowest responsive and responsible bidder until
14 an acceptable lower bid price is negotiated or the state determines that
15 negotiations are no longer in the best interest of the state.

16 (ii) A bid price resulting from negotiations
17 conducted under this section shall not be higher than:

18 (a) The bid price originally submitted by the
19 lowest responsive and responsible bidder; or

20 (b) A price previously offered in negotiations
21 by a responsive and responsible bidder.

22 (iii) Negotiations conducted under this section do
23 not preclude the use of other methods of source selection or procurement
24 authority provided under this subchapter.

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26 SECTION 2. Arkansas Code § 19-11-230(e), concerning competitive sealed
27 proposals, is amended to read as follows:

28 (e)(1) As provided in the request for proposals and under ~~regulations~~
29 rule, discussions may be conducted with responsible offerors who submit
30 proposals determined to be reasonably susceptible of being selected for award
31 for the purpose of clarification;

32 (A) Clarifying solicitation requirements to assure full
33 understanding of, and responsiveness to, the solicitation requirements; or

34 (B) Negotiating a contract that is more advantageous to
35 the state.

36 (2)(A) ~~Offerors~~ If discussions conducted after the deadline for

1 the receipt of proposals necessitate material revisions of proposals, each
2 offeror determined to be responsible and reasonably susceptible of being
3 awarded a contract shall be accorded fair and equal treatment with respect to
4 any provided an opportunity for discussion and revision of proposals, and
5 such revisions may be permitted after submissions and prior to award to
6 revise its proposal for the purpose of obtaining submitting a best and final
7 offers offer.

8 (B) An offeror may be permitted to revise its original
9 proposal as a result of discussions only after the original submission
10 deadline and before award for the purpose of providing a best and final
11 offer.

12 (3) In conducting discussions, there shall be no disclosure of
13 any information derived from proposals a proposal submitted by a competing
14 offerers offeror shall not be disclosed until after a notice of anticipation
15 to award is announced.

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17 SECTION 3. Arkansas Code § 19-11-240 is amended to read as follows:

18 19-11-240. Reporting of suspected collusion – Definition.

19 (a) As used in this section, "collusion" means cooperation in the
20 restraint of free and open competition in a public procurement, including
21 without limitation:

22 (1) Price fixing;

23 (2) Bid rigging;

24 (3) Customer or market allocation;

25 (4) Misrepresenting the independence of the relationship between
26 colluding parties; and

27 (5) Exerting improper influence on public officials to obtain
28 advantage in a public procurement, including without limitation:

29 (A) Offering bribes or kickbacks;

30 (B) Extortion; and

31 (C) Fraudulent misrepresentation.

32 (b) Notification to the Attorney General. When for any reason
33 collusion is suspected among any bidders or offerors, a written notice of the
34 relevant facts shall be transmitted to the Attorney General.

35 (b) (c)(1) Retention of All Documents. All documents involved in any
36 a procurement in which collusion is suspected shall be retained until the

1 Attorney General gives notice that they may be destroyed.

2 (2) All retained documents shall be made available to the
3 Attorney General or a designee upon request and proper receipt therefor of
4 the request.

5 (d) Collusion is cause for:

6 (1) Debarment from consideration for award of a contract under §
7 19-11-245; and

8 (2) Suspension from consideration for award of a contract if
9 there is probable cause for suspecting collusion as determined by the
10 Attorney General or the State Procurement Director.

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12 SECTION 4. Arkansas Code § 19-11-247, concerning remedies for unlawful
13 solicitation or award, is amended to add an additional subsection to read as
14 follows:

15 (d) Before a contract is ratified and affirmed under subdivision
16 (c)(1)(A) of this section, a contract shall be presented to the Legislative
17 Council or, if the General Assembly is in session, to the Joint Budget
18 Committee, for review if the contract is required to be submitted for review
19 under § 19-11-1006.

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21 */s/Hester*

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24 *APPROVED: 03/27/2017*

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