

1 HB382  
2 121927-4  
3 By Representative Williams (J)  
4 RFD: County and Municipal Government  
5 First Read: 21-JAN-10

1  
2 ENROLLED, An Act,

3           Relating to competitive bidding for public works  
4 projects under Title 39 and public contracts under Title 41 of  
5 the Code of Alabama 1975; to amend Sections 39-2-1, 39-2-6,  
6 41-16-51, as amended by Act No. 2009-760, 2009 Regular  
7 Session, (Acts 2009, p. 2249), and 41-16-57, as amended by Act  
8 2009-653 of the 2009 Regular Session (Acts 2009, p. 2009),  
9 Code of Alabama 1975, to define the term "life cycle costs"  
10 and to clarify the definition of a "public works project"; to  
11 allow local governments to purchase goods and services through  
12 vendors with a current and valid contract with the Government  
13 Services Administration without further competitive bidding;  
14 to provide that life cycle costs may be considered by the  
15 awarding authority in determining the lowest responsible and  
16 responsive bidder; and to clarify that the definition of  
17 personal property includes goods that are, or are to become,  
18 fixtures.

19 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

20           Section 1. Sections 39-2-1, 39-2-6, 41-16-51, as  
21 amended by Act No. 2009-760, 2009 Regular Session, (Acts 2009,  
22 p. 2249), and 41-16-57, as amended by Act 2009-653 of the 2009  
23 Regular Session (Acts 2009, p. 2009), Code of Alabama 1975,  
24 are amended to read as follows:

25           "§39-2-1.

1           "As used in this title, the following words shall  
2 have the meanings ascribed to them as follows:

3           "(1) AWARDING AUTHORITY. Any governmental board,  
4 commission, agency, body, authority, instrumentality,  
5 department, or subdivision of the state, its counties and  
6 municipalities. This term includes, but shall not be limited  
7 to, the Department of Transportation, the State Building  
8 Commission, the State Board of Education, and any other entity  
9 contracting for public works. This term shall exclude the  
10 State Docks Department and any entity exempted from the  
11 competitive bid laws of the state by statute.

12           "(2) FORCE ACCOUNT WORK. Work paid for by  
13 reimbursing for the actual costs for labor, materials, and  
14 equipment usage incurred in the performance of the work, as  
15 directed, including a percentage for overhead and profit,  
16 where appropriate.

17           "(3) LIFE CYCLE COSTS. The total costs of ownership  
18 over the expected life of a water or sewer public works  
19 project, taking into consideration the costs of construction,  
20 operation, and maintenance, less any value obtained from  
21 salvage and quantifiable environmental benefits.

22           "~~(3)~~(4) PERSON. Natural persons, partnerships,  
23 limited liability companies, corporations, and other legal  
24 entities.

1           "~~(4)~~(5) PUBLIC PROPERTY. Real property which the  
2 state, county, municipality, or awarding authority thereof  
3 owns or has a contractual right to own or purchase, including  
4 easements, rights-of-way, or otherwise.

5           "~~(5)~~(6) PUBLIC WORKS. The construction,  
6 installation, repair, renovation, or maintenance of public  
7 buildings, structures, sewers, waterworks, roads, curbs,  
8 gutters, side walls, bridges, docks, underpasses, and viaducts  
9 as well as any other improvement to be constructed, installed,  
10 repaired, renovated, or maintained on public property and to  
11 be paid, in whole or in part, with public funds or with  
12 financing to be retired with public funds in the form of lease  
13 payments or otherwise.

14           "§39-2-6.

15           "(a) The contract shall be awarded to the lowest  
16 responsible and responsive bidder, unless the awarding  
17 authority finds that all the bids are unreasonable or that it  
18 is not to the interest of the awarding authority to accept any  
19 of the bids. A responsible bidder is one who, among other  
20 qualities determined necessary for performance, is competent,  
21 experienced, and financially able to perform the contract. A  
22 responsive bidder is one who submits a bid that complies with  
23 the terms and conditions of the invitation for bids. Minor  
24 irregularities in the bid shall not defeat responsiveness. The  
25 bidder to whom the award is made shall be notified by

1 telegram, confirmed facsimile, or letter at the earliest  
2 possible date. If the successful bidder fails or refuses to  
3 sign the contract, to make bond as provided in this chapter or  
4 to provide evidence of insurance as required by the bid  
5 documents, the awarding authority may award the contract to  
6 the second lowest responsible and responsive bidder. If the  
7 second lowest bidder fails or refuses to sign the contract,  
8 make bond as provided in this chapter or to provide evidence  
9 of insurance as required by the bid documents, the awarding  
10 authority may award the contract to the third lowest  
11 responsible and responsive bidder.

12 "(b) If no bids or only one bid is received at the  
13 time stated in the advertisement for bids, the awarding  
14 authority may advertise for and seek other competitive bids,  
15 or the awarding authority may direct that the work shall be  
16 done by force account under its direction and control or, with  
17 the exception of the Department of Transportation, the  
18 awarding authority may negotiate for the work through the  
19 receipt of informal bids not subject to the requirements of  
20 this section. Where only one responsible and responsive bid  
21 has been received, any negotiation for the work shall be for a  
22 price lower than that bid.

23 "(c) If the awarding authority finds that all bids  
24 received are unreasonable or that it is not to the interest of  
25 the awarding authority to accept any of the bids, the awarding

1 authority may direct that the work shall be done by force  
2 account under its direction and control.

3 "(d) On any construction project on which the  
4 awarding authority has prepared plans and specifications,  
5 received bids, and has determined to do by force account or by  
6 negotiation, the awarding authority shall make available the  
7 plans and specifications, an itemized estimate of cost and any  
8 informal bids for review by the Department of Examiners of  
9 Public Accounts and, upon completion of the project by an  
10 awarding authority, the final total costs together with an  
11 itemized list of cost of any and all changes made in the  
12 original plans and specifications shall also be made available  
13 for review by the Department of Examiners of Public Accounts.  
14 Furthermore, the above described information shall be made  
15 public by the awarding authority upon request. Upon the  
16 approval of the awarding authority, its duly authorized  
17 officer or officers may, when proceeding upon the basis of  
18 force account, let any subdivision or unit of work by contract  
19 on informal bids.

20 "(e) No provision of this section shall be  
21 interpreted as precluding the use of convict labor by the  
22 awarding authority. This section shall not apply to routine  
23 maintenance and repair jobs done by maintenance personnel who  
24 are regular employees of the awarding authority, nor shall it

1 apply to road or bridge construction work performed by an  
2 awarding authority's regular employees and own equipment.

3 "(f) No contract awarded to the lowest responsible  
4 and responsive bidder shall be assignable by the successful  
5 bidder without written consent of the awarding authority, and  
6 in no event shall a contract be assigned to an unsuccessful  
7 bidder whose bid was rejected because he or she was not a  
8 responsible or responsive bidder.

9 "(g) Any agreement or collusion among bidders or  
10 prospective bidders in restraint of freedom of competition to  
11 bid at a fixed price or to refrain from bidding or otherwise  
12 shall render the bids void and shall cause the bidders or  
13 prospective bidders to be disqualified from submitting further  
14 bids to the awarding authority on future lettings. Any bidder  
15 or prospective bidder who willfully participates in any  
16 agreement or collusion in restraint of freedom of competition  
17 shall be guilty of a felony and, on conviction thereof, shall  
18 be fined not less than five thousand dollars (\$5,000) nor more  
19 than fifty thousand dollars (\$50,000) or, at the discretion of  
20 the jury, shall be imprisoned in the penitentiary for not less  
21 than one nor more than three years.

22 "(h) Any disclosure in advance of the terms of a bid  
23 submitted in response to an advertisement for bids shall  
24 render the proceedings void and require advertisement and  
25 award anew.

1           "(i) The lowest responsible and responsive bidder on  
2 a water or sewer public works project may be determined to be  
3 the bidder offering the lowest life cycle costs. The lowest  
4 responsible and responsive bidder shall otherwise meet all of  
5 the conditions and specifications contained in the invitation  
6 to bid, except that a bidder may still be considered  
7 responsive if he or she responds with a bid using different  
8 construction materials that those specified in the invitation  
9 to bid if the materials' use would result in lower lifecycle  
10 costs for the water or sewer public works project. To utilize  
11 this provision to determine the lowest responsible and  
12 responsive bidder, the awarding authority must include a  
13 notice in the invitation to bid that the lowest responsible  
14 and responsive bidder may be determined by using life cycle  
15 costs.

16           "§41-16-51.

17           "(a) Competitive bids shall not be required for  
18 utility services, the rates for which are fixed by law,  
19 regulation, or ordinance, and the competitive bidding  
20 requirements of this article shall not apply to:

21           "(1) The purchase of insurance.

22           "(2) The purchase of ballots and supplies for  
23 conducting any primary, general, special, or municipal  
24 election.



1           "(3) Contracts for securing services of attorneys,  
2 physicians, architects, teachers, superintendents of  
3 construction, artists, appraisers, engineers, consultants,  
4 certified public accountants, public accountants, or other  
5 individuals possessing a high degree of professional skill  
6 where the personality of the individual plays a decisive part.

7           "(4) Contracts of employment in the regular civil  
8 service.

9           "(5) Contracts for fiscal or financial advice or  
10 services.

11           "(6) Purchases of products made or manufactured by  
12 the blind or visually handicapped under the direction or  
13 supervision of the Alabama Institute for Deaf and Blind in  
14 accordance with Sections 21-2-1 to 21-2-4, inclusive.

15           "(7) Purchases of maps or photographs from any  
16 federal agency.

17           "(8) Purchases of manuscripts, books, maps,  
18 pamphlets, or periodicals.

19           "(9) The selection of paying agents and trustees for  
20 any security issued by a public body.

21           "(10) Existing contracts up for renewal for  
22 sanitation or solid waste collection, recycling, and disposal  
23 between municipalities or counties, or both, and those  
24 providing the service.

1           "(11) Purchases of computer and word processing  
2 hardware when the hardware is the only type that is compatible  
3 with hardware already owned by the entity taking bids and  
4 custom software.

5           "(12) Professional services contracts for  
6 codification and publication of the laws and ordinances of  
7 municipalities and counties.

8           "(13) Contractual services and purchases of  
9 commodities for which there is only one vendor or supplier and  
10 contractual services and purchases of personal property which  
11 by their very nature are impossible to award by competitive  
12 bidding.

13           "(14) Purchases of dirt, sand, or gravel by a county  
14 governing body from in-county property owners in order to  
15 supply a county road or bridge project in which the materials  
16 will be used. The material shall be delivered to the project  
17 site by county employees and equipment used only on projects  
18 conducted exclusively by county employees.

19           "(15) Contractual services and purchases of products  
20 related to, or having an impact upon, security plans,  
21 procedures, assessments, measures, or systems, or the security  
22 or safety of persons, structures, facilities, or  
23 infrastructures.

24           "(16) Subject to the limitations in this  
25 subdivision, purchases of goods made as a part of the

1 purchasing cooperative sponsored by the National Association  
2 of Counties, or its successor organization. This subdivision  
3 shall not apply to goods for which a service or service  
4 contract, whether subject to competitive bidding under this  
5 article or not, is necessary to utilize the goods. Such  
6 purchases may only be made if all of the following occur:

7 "a. The goods being purchased are available as a  
8 result of a competitive bid process approved by the Alabama  
9 Department of Examiners of Public Accounts for each bid.

10 "b. The goods are either not at the time available  
11 to counties on the state purchasing program or are available  
12 at a price equal to or less than that on the state purchasing  
13 program.

14 "c. The purchase is made through a participating  
15 Alabama vendor holding an Alabama business license if such a  
16 vendor exists.

17 "(17) Purchase of goods or services, other than  
18 wireless communication services, whether voice or data, from  
19 vendors that have been awarded a current and valid Government  
20 Services Administration contract. Any purchase made pursuant  
21 to this subdivision shall be under the same terms and  
22 conditions as provided in the Government Services  
23 Administration contract. Prices paid for such goods and  
24 services, other than wireless communication services, whether

1 voice or data, may not exceed the amount provided in the  
2 Government Services Administration contract.

3 "(b) This article shall not apply to:

4 "(1) Any purchases of products where the price of  
5 the products is already regulated and established by state  
6 law.

7 "(2) Purchases made by individual schools of the  
8 county or municipal public school systems from moneys other  
9 than those raised by taxation or received through  
10 appropriations from state or county sources.

11 "(3) The purchase, lease, sale, construction,  
12 installation, acquisition, improvement, enlargement, or  
13 expansion of any building or structure or other facility  
14 designed or intended for lease or sale by a medical clinic  
15 board organized under Sections 11-58-1 to 11-58-14, inclusive.

16 "(4) The purchase, lease, or other acquisition of  
17 machinery, equipment, supplies, and other personal property or  
18 services by a medical clinic board organized under Sections  
19 11-58-1 to 11-58-14, inclusive.

20 "(5) Purchases for public hospitals and nursing  
21 homes operated by the governing boards of instrumentalities of  
22 the state, counties, and municipalities.

23 "(6) Contracts for the purchase, lease, sale,  
24 construction, installation, acquisition, improvement,  
25 enlargement, or extension of any plant, building, structure,

1 or other facility or any machinery, equipment, furniture, or  
2 furnishings therefor designed or intended for lease or sale  
3 for industrial development, other than public utilities, under  
4 Sections 11-54-80 to 11-54-99, inclusive, or Sections 11-54-20  
5 to 11-54-28, inclusive, or any other statute or amendment to  
6 the Constitution of Alabama authorizing the construction of  
7 plants or other facilities for industrial development or for  
8 the construction and equipment of buildings for public  
9 building authorities under Sections 11-56-1 to 11-56-22,  
10 inclusive.

11 "(7) The purchase of equipment, supplies, or  
12 materials needed, used, and consumed in the normal and routine  
13 operation of any waterworks system, sanitary sewer system, gas  
14 system, or electric system, or any two or more thereof, that  
15 are owned by municipalities, counties, or public corporations,  
16 boards, or authorities that are agencies, departments, or  
17 instrumentalities of municipalities or counties and no part of  
18 the operating expenses of which system or systems have, during  
19 the then current fiscal year, been paid from revenues derived  
20 from taxes or from appropriations of the state, a county, or a  
21 municipality.

22 "(8) Purchases made by local housing authorities,  
23 organized and existing under Chapter 1 of Title 24, from  
24 moneys other than those raised by state, county, or city

1       taxation or received through appropriations from state,  
2       county, or city sources.

3               "(c) The state trade schools, state junior colleges,  
4       state colleges, and universities under the supervision and  
5       control of the State Board of Education, the district boards  
6       of education of independent school districts, the county  
7       commissions, and the governing bodies of the municipalities of  
8       the state shall establish and maintain such purchasing  
9       facilities and procedures as may be necessary to carry out the  
10      intent and purpose of this article by complying with the  
11      requirements for competitive bidding in the operation and  
12      management of each state trade school, state junior college,  
13      state college, or university under the supervision and control  
14      of the State Board of Education, the district boards of  
15      education of independent school districts, the county  
16      commissions, and the governing bodies of the municipalities of  
17      the state and the governing boards of instrumentalities of  
18      counties and municipalities, including waterworks boards,  
19      sewer boards, gas boards, and other like utility boards and  
20      commissions.

21              "(d) Contracts entered into in violation of this  
22      article shall be void and anyone who violates the provisions  
23      of this article shall be guilty of a Class C felony.

24              "§41-16-57.

1           "(a) When purchases are required to be made through  
2 competitive bidding, awards shall be made to the lowest  
3 responsible bidder taking into consideration the qualities of  
4 the commodities proposed to be supplied, their conformity with  
5 specifications, the purposes for which required, the terms of  
6 delivery, transportation charges, and the dates of delivery.  
7 If at any time after the award has been made the lowest  
8 responsible bidder notifies the awarding authority in writing  
9 that the bidder will no longer comply with the terms of the  
10 award to provide the goods or services to the awarding  
11 authority under the terms and conditions of the original  
12 award, or the awarding authority documents that the lowest  
13 responsible bidder defaults under the terms of the original  
14 award, the awarding authority may terminate the award to the  
15 defaulting bidder and make an award to the second lowest  
16 responsible bidder for the remainder of the award period  
17 without rebidding, provided the award to the second lowest  
18 responsible bidder is in all respects made under the terms and  
19 conditions contained in the original bid specifications and is  
20 for the same or a lower price than the bid originally  
21 submitted to the awarding authority by the second lowest  
22 responsible bidder.

23           "(b) The awarding authority in the purchase of or  
24 contract for personal property or contractual services shall  
25 give preference, provided there is no sacrifice or loss in

1 price or quality, to commodities produced in Alabama or sold  
2 by Alabama persons, firms, or corporations. Notwithstanding  
3 the foregoing, no county official, county commission, school  
4 board, city council or city councilmen, or other public  
5 official, state board, or state agency charged with the  
6 letting of contracts or purchase of materials for the  
7 construction, modification, alteration, or repair of any  
8 publicly owned facility may specify the use of materials or  
9 systems by a sole source, unless:

10           "(1) The governmental body can document to the  
11 satisfaction of the State of Alabama Building Commission that  
12 the sole source product or service is of an indispensable  
13 nature, all other viable alternatives have been explored, and  
14 it has been determined that only this product or service will  
15 fulfill the function for which the product is needed.  
16 Frivolous features will not be considered.

17           "(2) The sole source specification has been  
18 recommended by the architect or engineer of record and who  
19 also documents that there is no other product available and  
20 that the use of the requirement is of an indispensable nature  
21 and why.

22           "(3) All information substantiating the use of a  
23 sole source specification is documented in writing and is  
24 filed into the project file.



1           "(c) (1) Beginning January 1, 2009, for purchases of  
2           personal property, including goods which are, or are to  
3           become, fixtures, in instances where the awarding authority  
4           determines that the total cost of ownership over the expected  
5           life of the item or items, including acquisition costs plus  
6           sustaining costs or life cycle costs, can be reasonably  
7           ascertained from industry recognized and accepted sources, the  
8           lowest responsible bid may be determined to be the bid  
9           offering the lowest life cycle costs and otherwise meeting all  
10          of the conditions and specifications contained in the  
11          invitation to bid. To utilize this subdivision to determine  
12          the lowest responsible bidder, the awarding authority shall  
13          include a notice in the invitation to bid that the lowest  
14          responsible bid may be determined by using life cycle costs  
15          and identify the industry recognized and accepted sources that  
16          will be applicable to such an evaluation.

17                 "(2) No later than November 30, 2008, the Department  
18                 of Examiners of Public Accounts shall establish procedures for  
19                 the use of life cycle costs, which shall be distributed to all  
20                 contracting agencies and shall be used in conducting any  
21                 audits of the purchasing agency.

22                 "(d) The awarding authority or requisitioning agency  
23                 may reject any bid if the price is deemed excessive or quality  
24                 of product inferior.

1           "(e) Each record, with the successful bid indicated  
2 thereon, and with the reasons for the award if not awarded to  
3 the lowest bidder, shall, after award of the order or  
4 contract, be open to public inspection.

5           "(f) Contracts for the purchase of personal property  
6 or contractual services shall be let for periods not greater  
7 than three years. Contracts for the leasing of motor vehicles  
8 by local governing bodies shall be let for periods not greater  
9 than five years. Lease-purchase contracts for capital  
10 improvements and repairs to real property shall be let for  
11 periods not greater than 10 years and all other lease-purchase  
12 contracts shall be let for periods not greater than 10 years."

13           Section 2. This act shall become effective  
14 immediately following its passage and approval by the  
15 Governor, or its otherwise becoming law.

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Speaker of the House of Representatives

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President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in  
and was passed by the House 13-APR-10.

Greg Pappas  
Clerk

Senate	<hr/>	22-APR-10	Amended and Passed
House	<hr/>	22-APR-10	Concurred in Senate Amendment