

An Act

ENROLLED HOUSE
BILL NO. 2862

By: Wallace and Moore of the
House

and

Pemberton of the Senate

An Act relating to competitive bidding; amending 61 O.S. 2011, Sections 102, as last amended by Section 1, Chapter 186, O.S.L. 2013, 103, as last amended by Section 2, Chapter 405, O.S.L. 2019, 103.5, Section 1, Chapter 288, O.S.L. 2014, 104, as last amended by Section 1, Chapter 40, O.S.L. 2017, 107, as amended by Section 313, Chapter 304, O.S.L. 2012, 113, as last amended by Section 3, Chapter 299, O.S.L. 2019, 119.1 and 130, as last amended by Section 1, Chapter 293, O.S.L. 2016 (61 O.S. Supp. 2020, Sections 102, 103, 103.7, 104, 107, 113 and 130), which relate to the Public Competitive Bidding Act of 1974; defining term; modifying certain monetary limits for public construction contracts; establishing monetary limits for construction management trade contracts or subcontracts; and providing an effective date.

SUBJECT: Competitive bidding

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 61 O.S. 2011, Section 102, as last amended by Section 1, Chapter 186, O.S.L. 2013 (61 O.S. Supp. 2020, Section 102), is amended to read as follows:

Section 102. As used in the Public Competitive Bidding Act of 1974:

1. "Administrator" means the State Construction Administrator of the Construction and Properties Division of the Office of Management and Enterprise Services;

2. "Awarding public agency" means the public agency which solicits and receives sealed bids on a particular public construction contract;

3. "Bidding documents" means the bid notice, instruction to bidders, plans and specifications, bidding form, bidding instructions, general conditions, special conditions and all other written instruments prepared by or on behalf of an awarding public agency for use by prospective bidders on a public construction contract;

4. "Chief administrative officer" means an individual responsible for directing the administration of a public agency. The term does not mean one or all of the individuals that make policy for a public agency;

5. "Construction management trade contract or subcontract" means any public construction contract exceeding Fifty Thousand Dollars (\$50,000.00) in amount that is awarded as a trade contract in an agency construction management contract or awarded as a subcontract in an at-risk construction management contract;

6. "Public agency" means the State of Oklahoma, and any county, city, town, school district or other political subdivision of the state, any public trust, any public entity specifically created by the statutes of the State of Oklahoma or as a result of statutory authorization therefor, and any department, agency, board, bureau, commission, committee or authority of any of the foregoing public entities;

~~6.~~ 7. "Public construction contract" or "contract" means any contract, exceeding One Hundred Thousand Dollars (\$100,000.00) in amount, or any construction management trade contracts or subcontracts exceeding Fifty Thousand Dollars (\$50,000.00) in amount, awarded by any public agency for the purpose of making any public improvements or constructing any public building or making repairs to or performing maintenance on the same except where the improvements, construction of any building or repairs to the same are improvements or buildings leased to a person or other legal entity exclusively for private and not for public use and no public tax revenues shall be expended on or for the contract unless the public tax revenues used for the project are authorized by a majority of the voters of the applicable public agency voting at an election held for that purpose and the public tax revenues do not exceed twenty-five percent (25%) of the total project cost. The

amount of public tax dollars committed to the project will not exceed a fixed amount established by resolution of the governing body prior to or concurrent with approval of the project;

~~7.~~ 8. "Public improvement" means any beneficial or valuable change or addition, betterment, enhancement or amelioration of or upon any real property, or interest therein, belonging to a public agency, intended to enhance its value, beauty or utility or to adapt it to new or further purposes. The term does not include the direct purchase of materials, equipment or supplies by a public agency, or any personal property, including property as defined in paragraphs 1 and 4 of subsection B of Section 430.1 of Title 62 of the Oklahoma Statutes;

~~8.~~ 9. "Purchasing cooperative" means an association of public entities working together to provide leverage in achieving best value and/or the best terms in contracts awarded through a competitive bidding process; and

~~9.~~ 10. "Retainage" means the difference between the amount earned by the contractor on a public construction contract, with the work being accepted by the public agency, and the amount paid on said contract by the public agency.

SECTION 2. AMENDATORY 61 O.S. 2011, Section 103, as last amended by Section 2, Chapter 405, O.S.L. 2019 (61 O.S. Supp. 2020, Section 103), is amended to read as follows:

Section 103. A. Unless otherwise provided by law, all public construction contracts exceeding One Hundred Thousand Dollars (\$100,000.00) or construction management trade contracts or subcontracts exceeding Fifty Thousand Dollars (\$50,000.00) shall be let and awarded to the lowest responsible bidder, by open competitive bidding after solicitation for sealed bids, in accordance with the provisions of the Public Competitive Bidding Act of 1974. No work shall be commenced until a written contract is executed and all required bonds and insurance have been provided by the contractor to the awarding public agency.

B. Notwithstanding subsection A of this section, in awarding public construction contracts exceeding One Hundred Thousand Dollars (\$100,000.00) or construction management trade contracts or subcontracts exceeding Fifty Thousand Dollars (\$50,000.00), counties, cities, other local units of government and any public trust with a county or a municipality as its sole beneficiary may

provide for a local bid preference of not more than five percent (5%) of the bid price if the awarding public agency determines that there is an economic benefit to the local area or economy. Provided, however, the local bidder or contractor must agree to perform the contract for the same price and terms as the bid proposed by the nonlocal bidder or contractor. Any bid preference granted hereunder must be in accordance with an established policy adopted by the governing body of the awarding public agency to clearly demonstrate the economic benefit to the local area or economy. Provided, further, no local bid preference shall be granted unless the local bidding entity is the second lowest qualified bid on the contract. The bid specifications shall clearly state that the bid is subject to a local bidder preference law. For purposes of this section, "local bid" means the bidding person is authorized to transact business in this state and maintains a bona fide establishment for transacting such business within this state. This provision does not apply to any construction contract for which federal funds are available for expenditure when its provisions may be in conflict with federal law or regulation.

C. Except as provided in subsection E of this section, other construction contracts for the purpose of making any public improvements or constructing any public building or making repairs to the same for ~~Fifty Thousand Dollars (\$50,000.00)~~ One Hundred Thousand Dollars (\$100,000.00) or less shall be let and awarded to the lowest responsible bidder by receipt of written bids or awarded on the basis of competitive quotes to the lowest responsible qualified contractor. Work may be commenced in accordance with the purchasing policies of the public agency.

D. Except as provided in subsection E of this section, other construction contracts for less than ~~Five Thousand Dollars (\$5,000.00)~~ Ten Thousand Dollars (\$10,000.00) may be negotiated with a qualified contractor. Work may be commenced in accordance with the purchasing policies of the public agency.

E. The provisions of this subsection shall apply to public construction for minor maintenance or minor repair work to public school district property. Other construction contracts for less than Twenty-five Thousand Dollars (\$25,000.00) may be negotiated with a qualified contractor. Construction contracts equal to or greater than ~~Twenty-five Thousand Dollars (\$25,000.00)~~ Fifty Thousand Dollars (\$50,000.00) but less than ~~Fifty Thousand Dollars (\$50,000.00)~~ One Hundred Thousand Dollars (\$100,000.00) shall be let and awarded to the lowest responsible bidder by receipt of written

bids. No work shall be commenced on any construction contract until a written contract is executed and proof of insurance has been provided by the contractor to the awarding public agency.

F. The Construction and Properties Division of the Office of Management and Enterprise Services may award contracts using best value competitive proposals. As used in this subsection, "best value" means an optional contract award system which can evaluate and rank submitted competitive performance proposals to identify the proposal with the greatest value to the state. The Office of Management and Enterprise Services, pursuant to the Administrative Procedures Act, shall promulgate rules necessary to implement the provisions of this subsection.

G. 1. A public agency shall not let or award a public construction contract exceeding One Hundred Thousand Dollars (\$100,000.00) or a construction management trade contract or subcontract exceeding Fifty Thousand Dollars (\$50,000.00) to any contractor affiliated with a purchasing cooperative unless the purchasing cooperative and the contractor have complied with all of the provisions of the Public Competitive Bidding Act of 1974, including but not limited to open competitive bidding after solicitation for sealed bids. A public agency shall not let or award a public construction contract exceeding ~~Five Thousand Dollars (\$5,000.00)~~ Ten Thousand Dollars (\$10,000.00) up to ~~Fifty Thousand Dollars (\$50,000.00)~~ One Hundred Thousand Dollars (\$100,000.00) to any contractor affiliated with a purchasing cooperative unless the purchasing cooperative and the contractor have complied with all of the provisions of the Public Competitive Bidding Act of 1974, including submission of a written bid upon notice of competitive bidding.

2. A purchasing cooperative and its affiliated contractors shall not be allowed to bid on any public construction contract exceeding One Hundred Thousand Dollars (\$100,000.00) or any construction management trade contract or subcontract exceeding Fifty Thousand Dollars (\$50,000.00) unless the purchasing cooperative and its affiliated contractors have complied with all of the provisions of the Public Competitive Bidding Act of 1974, including but not limited to open competitive bidding after solicitation for sealed bids. A purchasing cooperative and its affiliated contractors shall not be allowed to bid on any public construction contract exceeding ~~Two Thousand Five Hundred Dollars (\$2,500.00)~~ Five Thousand Dollars (\$5,000.00) unless the purchasing cooperative and its affiliated contractors have complied with all of

the provisions of the Public Competitive Bidding Act of 1974, including submission of a written bid upon notice of open competitive bidding.

SECTION 3. AMENDATORY 61 O.S. 2011, Section 103.5, is amended to read as follows:

Section 103.5 For purposes of the provisions of the Public Competitive Bidding Act of 1974, contracts not exceeding ~~Fifty Thousand Dollars (\$50,000.00)~~ One Hundred Thousand Dollars (\$100,000.00) entered into solely for right-of-way clearance by the Transportation Commission and the Oklahoma Transportation Authority for the exclusive purpose of demolition and removal of buildings, foundations, slab floors, stem walls, steps, brush, shrubs, brickbats or stone and all rubbish, scrap iron, fencing, and debris, and the installation of new right-of-way fencing, shall not be considered to be public construction contracts and shall not be required to be open for competitive bidding.

SECTION 4. AMENDATORY Section 1, Chapter 288, O.S.L. 2014 (61 O.S. Supp. 2020, Section 103.7), is amended to read as follows:

Section 103.7 For purposes of the provisions of the Public Competitive Bidding Act of 1974, contracts entered into solely for projects and activities by the Oklahoma Department of Wildlife Conservation relating to fish and wildlife conservation shall be let and awarded using the competitive bidding process as set forth in the Public Competitive Bidding Act of 1974. However, for contracts of ~~Twenty-five Thousand Dollars (\$25,000.00)~~ Fifty Thousand Dollars (\$50,000.00) or less the Department may administer the competitive bidding process and let and award the contract itself rather than the Construction and Properties Division of the Office of Management and Enterprise Services.

SECTION 5. AMENDATORY 61 O.S. 2011, Section 104, as last amended by Section 1, Chapter 40, O.S.L. 2017 (61 O.S. Supp. 2020, Section 104), is amended to read as follows:

Section 104. All proposals to award public construction contracts shall be made equally and uniformly known by the awarding public agency to all prospective bidders and the public in the following manner:

1. Notice thereof shall be given by publication in a newspaper of general circulation and published in the county where the work, or the major part of it, is to be done, such notice by publication to be published in two consecutive weekly issues of the newspaper, with the first publication thereof to be at least twenty-one (21) days prior to the date set for opening bids; and

2. Notice thereof shall be sent to one in-state trade or construction publication for their use and information whenever the estimated cost of the public construction contract exceeds One Hundred Thousand Dollars (\$100,000.00) or the cost of the construction management trade contract or subcontract exceeds Fifty Thousand Dollars (\$50,000.00); provided, however, this section shall not be construed to require the publication of the notice in such trade or construction publication or the requirement to provide the notice to more than one in-state trade or construction publication or to any out-of-state trade or construction publications.

SECTION 6. AMENDATORY 61 O.S. 2011, Section 107, as amended by Section 313, Chapter 304, O.S.L. 2012 (61 O.S. Supp. 2020, Section 107), is amended to read as follows:

Section 107. A. A bidder on a public construction contract exceeding One Hundred Thousand Dollars (\$100,000.00) or a construction management trade contract or subcontract exceeding Fifty Thousand Dollars (\$50,000.00) shall accompany the bid with:

1. A certified check, cashier's check or bid bond equal to five percent (5%) of the bid, which shall be deposited with the awarding public agency as a guaranty; or

2. An irrevocable letter of credit containing terms the Construction and Properties Division of the Office of Management and Enterprise Services prescribes, issued by a financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation for the benefit of the state, on behalf of the awarding public agency, in an amount equal to five percent (5%) of the bid. The awarding public agency shall deposit the irrevocable letter of credit with the Division.

B. The cost of republication of the notice to bidders, actual expenses incurred by reason of the bidder's default and the difference between the low bid of the defaulting bidder and the amount of the bid of the bidder to whom the contract is subsequently awarded, but not to exceed the amount of the certified check,

cashier's check, bid bond or irrevocable letter of credit may, at the discretion of the awarding public agency, be forfeited to the awarding public agency in the event the apparently successful bidder fails to execute the contract or fails to provide the required bonds or irrevocable letters of credit and insurance to the awarding public agency.

C. The public agency shall, upon receipt of notice from the awarding public agency, return a certified or cashier's check, bid bond, or irrevocable letter of credit to the successful bidder on execution and delivery of the contract and required bonds or irrevocable letters of credit and insurance. Checks of unsuccessful bidders shall be returned to them in accordance with the terms of the bid solicitation.

D. Nothing contained herein shall be construed so as to prevent the awarding public agency or the courts from exonerating the bidder and other parties to the bid security document from liability upon a timely showing that the bidder committed what the courts have determined under the common law to be an excusable bidding error and for that reason it would not be equitable to enforce the bid security.

SECTION 7. AMENDATORY 61 O.S. 2011, Section 113, as last amended by Section 3, Chapter 299, O.S.L. 2019 (61 O.S. Supp. 2020, Section 113), is amended to read as follows:

Section 113. A. Except as otherwise provided by law, within the period of time, not to exceed sixty (60) days, specified in the bid notice by the awarding public agency, a contract embodying the terms set forth in the bidding documents shall be executed by the awarding public agency or, where construction management at-risk is the project delivery method, by the construction manager and the successful bidder. No bidder shall obtain any property right in a contract awarded under the provisions of the Public Competitive Bidding Act of 1974 until the contract has been fully executed by both the bidder and the awarding public agency.

B. Except as otherwise provided by law, within the period of time specified in subsection A of this section, the following shall be provided by the contractor to the awarding public agency for public construction contracts exceeding One Hundred Thousand Dollars (\$100,000.00) or construction management trade contracts or subcontracts exceeding Fifty Thousand Dollars (\$50,000.00):

1. A bond or irrevocable letter of credit complying with the provisions of Section 1 of this title;

2. A bond in a sum equal to the contract price, with adequate surety, or an irrevocable letter of credit containing terms prescribed by the Construction and Properties Division of the Office of Management and Enterprise Services issued by a financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation for the benefit of the state, on behalf of the awarding public agency, in a sum equal to the contract price, to ensure the proper and prompt completion of the work in accordance with the provisions of the contract and bidding documents;

3. A bond in a sum equal to the contract price or an irrevocable letter of credit containing terms as prescribed by the Division issued by a financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation for the benefit of the state, on behalf of the awarding public agency, in a sum equal to the contract price, to protect the awarding public agency against defective workmanship and materials for a period of one (1) year after acceptance of the project, except when the awarding public agency is the Department of Transportation or the Oklahoma Turnpike Authority, in such case the period shall be for one (1) year after project completion; and

4. Public liability and workers' compensation insurance during construction in reasonable amounts. A public agency may require the contractor to name the public agency and its architects or engineers, or both, as an additional assured under the public liability insurance, which requirement, if made, shall be specifically set forth in the bidding documents.

C. A single irrevocable letter of credit may be used to satisfy paragraphs 1, 2 and 3 of subsection B of this section, provided such single irrevocable letter of credit meets all applicable requirements of subsection B of this section.

If the contractor needs additional time in which to obtain the bond required pursuant to subsection B of this section, the contractor may request and the awarding agency may allow the contractor an additional sixty (60) days in which to obtain the bond.

D. 1. After the award of a contract, but prior to its execution, an awarding public agency, upon discovery of an administrative error in the award process that would void an otherwise valid award, may suspend the time of execution of the contract. The agency may rescind the award and readvertise for bids, or may direct correction of the error and award the contract to the lowest responsible bidder, whichever shall be in the best interests of the state.

2. If the awarding public agency has a governing body, the agency shall, at the next regularly scheduled public business meeting of the governing body of the agency, upon the record, present to the governing body that an error has been made in the award process and shall state the nature of the error. The governing body, upon presentation of the facts of the error, may rescind the award and readvertise for bids, or may direct correction of the error and award the contract to the lowest responsible bidder, whichever shall be in the best interests of the state.

E. No public agency shall require for any public construction project, nor shall any general contractor submit a project bid based on acquiring or participating in, any wrap-up, wrap-around, or controlled insurance program. For the purposes of this subsection, "wrap-up, wrap-around, or controlled insurance program" means any insurance program that has the effect of disabling or rendering inapplicable any workers' compensation, commercial general liability, builders' risk, completed operations, or excess liability insurance coverage carried by a subcontractor that is engaged or to be engaged on a public construction project unless this is a cost savings to the public or the need exists for a specialized or complex insurance program and shall not apply to contracts less than Seventy-five Million Dollars (\$75,000,000.00).

F. This act shall not apply to the public construction projects of constitutional agencies which had authorized a wrap-up, wrap-around, or controlled insurance program on or before April 11, 2000.

SECTION 8. AMENDATORY 61 O.S. 2011, Section 119.1, is amended to read as follows:

Section 119.1 A. If no timely bid is received after bid notices have been published on any proposed public construction contract which does not exceed One Hundred Thousand Dollars (\$100,000.00) or on any proposed construction management trade

contract or subcontract which does not exceed Fifty Thousand Dollars (\$50,000.00):

1. The governing body of a county, city, town or school district may direct its employees or agents to negotiate the contract with a prospective contractor; or

2. The state agency, as defined in Section 202 of this title, shall request the State Construction Administrator of the Construction and Properties Division to negotiate a contract on its behalf.

B. The amount of a public construction contract which may be awarded by the governing body pursuant to this section shall not exceed One Hundred Thousand Dollars (\$100,000.00), nor shall the amount of a construction management trade contract or subcontract awarded by the governing body pursuant to this section exceed Fifty Thousand Dollars (\$50,000.00), and the work to be performed shall be as specified in the initial bidding documents. The contract shall be executed within six (6) months after the date initially set for opening of bids. The contract and contract procedure shall conform to all other applicable provisions of the Public Competitive Bidding Act of 1974.

SECTION 9. AMENDATORY 61 O.S. 2011, Section 130, as last amended by Section 1, Chapter 293, O.S.L. 2016 (61 O.S. Supp. 2020, Section 130), is amended to read as follows:

Section 130. A. The provisions of the Public Competitive Bidding Act of 1974 with reference to notice and bids shall not apply to an emergency if:

1. The governing body of a public agency declares by a two-thirds (2/3) majority vote of all of the members of the governing body that an emergency exists;

2. The Transportation Commission and the Oklahoma Tourism and Recreation Commission, by majority vote of all the members of each Commission, declare that an emergency exists; or

3. The chief administrative officer of a public agency without a governing body declares that an emergency exists.

B. The governing body of a public agency may, upon approval of two-thirds (2/3) majority of all of the members of the governing

body, delegate to the chief administrative officer of a public agency the authority to declare an emergency whereby the provisions of the Public Competitive Bidding Act of 1974 with reference to notice and bids shall not apply to contracts less than ~~Seventy-five Thousand Dollars (\$75,000.00)~~ One Hundred Fifty Thousand Dollars (\$150,000.00) in amount; provided, such authority of the Department of Transportation and the Oklahoma Turnpike Authority shall not extend to any contract exceeding Seven Hundred Fifty Thousand Dollars (\$750,000.00) in amount and such authority of the Department of Corrections shall not extend to any contract exceeding Two Hundred Fifty Thousand Dollars (\$250,000.00) in amount for situations in which the emergency impacts the conditions of confinement, health and safety of correctional officers and inmates in the custody of the Department of Corrections.

C. Upon approval of a two-thirds (2/3) majority vote, the Oklahoma Conservation Commission may delegate to the Executive Director the authority to declare an emergency and set a monetary limit for the declaration. The provisions of this subsection may only be used for the purpose of responding to an emergency involving the reclamation of abandoned coal mines or the repair of damaged upstream floodwater retarding structures.

D. An emergency declared by the Board of Corrections pursuant to subsection C of Section 65 of this title shall exempt the Department of Corrections from the limits which would otherwise be imposed pursuant to subsection B of this section for the contracting and construction of new or expanded correctional facilities.

E. The chief administrative officer of a public agency with a governing body shall notify the governing body within ten (10) days of the declaration of an emergency if the governing body did not approve the emergency. The notification shall contain a statement of the reasons for the action, and shall be recorded in the official minutes of the governing body.

F. Emergency as used in this section shall be limited to conditions resulting from a sudden unexpected happening or unforeseen occurrence or condition whereby the public health or safety is endangered.

G. The chief administrative officer of a public agency shall report an emergency within ten (10) days of the emergency declaration and include the official minutes of the governing body of the public agency, if applicable, to the State Construction

Administrator of the Construction and Properties Division of the Office of Management and Enterprise Services who shall compile an annual report detailing all emergencies declared pursuant to this section during the previous calendar year. The report shall be submitted to the Governor, the President Pro Tempore of the Senate, and the Speaker of the House of Representatives.

SECTION 10. This act shall become effective November 1, 2021.

Passed the House of Representatives the 2nd day of March, 2021.

Presiding Officer of the House
of Representatives

Passed the Senate the 21st day of April, 2021.

Presiding Officer of the Senate

OFFICE OF THE GOVERNOR

Received by the Office of the Governor this _____

day of _____, 20_____, at _____ o'clock _____ M.

By: _____

Approved by the Governor of the State of Oklahoma this _____

day of _____, 20_____, at _____ o'clock _____ M.

Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Office of the Secretary of State this _____

day of _____, 20_____, at _____ o'clock _____ M.

By: _____