

Ala. Op. Atty. Gen. No. 2011-100, 2011 WL 4545846 (Ala.A.G.)

Office of the Attorney General

State of Alabama

Opinion No. 2011-100

*1 September 20, 2011

Public Works Law - Newspapers - Advertising - Competitive Bid Law - Contracts

A court may find that the City of Pelham substantially complied with the advertisement of bids for its backup water supply based upon the substantial number of bids received and the number of states involved in the bidding process.

Honorable Frank C. Ellis, Jr.

Attorney for Shelby County

Wallace, Ellis, Fowler & Head

Post Office Box 587

Columbiana, Alabama 35051

Dear Mr. Ellis:

This opinion of the Attorney General is issued in response to your request on behalf of the City of Pelham.

QUESTION

Did the advertisement of bids by the City of Pelham for a public works project substantially comply with section 39-2-2(a) of the Code of Alabama?

FACTS AND ANALYSIS

In your letter of request, you informed this Office that the City of Pelham had a public works project for phase one of a backup water supply. The City advertised for sealed bids with the Shelby County Reporter on June 22, 2011, and again on July 20, 2011. The Shelby County Reporter is a newspaper published in Shelby County, has broad, general circulation in Shelby County, publishes items of interest to the general public, and is available to any member of the public within the state. The print circulation of paid subscribers and paid circulation is approximately 33,000 per issue. All legal notices published in the Shelby County Reporter are posted on both the Shelby County Reporter Internet website, which has between 120,000 and 130,000 visitors per month, and alabamalegals.com, a cooperative initiative by all newspapers in

the state which publish legal notices to ensure that every legal advertisement published in every newspaper in the State of Alabama is available for statewide accessing and viewing by any computer user with Internet access. The notice was also advertised in the Dodge Trade Journal and Data Fax. Finally, the project was also timely advertised on the City's public bulletin boards.

As a result of the advertising, twenty-eight contractors solicited prequalification packages. The contractors were in various locations in Alabama, Florida, Georgia, Kentucky, Mississippi, and Tennessee. Twenty-four contractors submitted prequalification packages and nineteen contractors were prequalified by the City. All nineteen qualified contractors were notified again of the bid date and time in notification letters of acceptance of their qualification packages, which authorized them to submit sealed bids on the project. Ultimately, eleven of the nineteen prequalified contractors submitted sealed bids on the project. You further informed this Office that bids were received from contractors in Alabama, Tennessee, and Kentucky.

Section 39-2-2(a) of the Code of Alabama sets out the advertising requirements for the Public Works Law. This law provides, in pertinent part, as follows:

(a) Before entering into any contract for a public works involving an amount in excess of fifty thousand dollars (\$50,000), the awarding authority shall advertise for sealed bids.... If the awarding authority is a municipality, or an instrumentality thereof, it shall advertise for sealed bids at least once in a newspaper of general circulation published in the municipality where the awarding authority is located. If no newspaper is published in the municipality, the awarding authority shall advertise by posting notice thereof on a bulletin board maintained outside the purchasing office and in any other manner and for the length of time as may be determined. In addition to bulletin board notice, sealed bids shall also be solicited by sending notice by mail to all persons who have filed a request in writing with the official designated by the awarding authority that they be listed for solicitation on bids for the public works contracts indicated in the request. If any person whose name is listed fails to respond to any solicitation for bids after the receipt of three such solicitations, the listing may be canceled. With the exception of the Department of Transportation, for all public works contracts involving an estimated amount in excess of five hundred thousand dollars (\$500,000), awarding authorities shall also advertise for sealed bids at least once in three newspapers of general circulation throughout the state....

*2 ALA. CODE § 39-2-2(a) (emphasis added) (Supp. 2010).

The Supreme Court of Alabama has held that a public contract “must substantially comply with the requirements of the Competitive Bid Law.” *Beavers v. County of Walker*, 645 So. 2d 1365, 1373 (Ala. 1994); *Kennedy v. City of Prichard*, 484 So. 2d 432, 434 (Ala. 1986) (emphasis added). In *Owens v. Bentley*, 675 So. 2d 476 (Ala. Civ. App. 1996), the Alabama Court of Civil Appeals found substantial compliance, even though the awarding authority did not engage in any statutory advertising for the second request for bids, directing the second request at only the two

vendors that responded to the first request for bids. In *Owens*, the court, citing *Kennedy v. City of Prichard*, stated as follows:

It has been previously recognized by our supreme court that an entity can “substantially comply” with the competitive bid laws. After reviewing the record, we find that under the facts of the present case, as indicated above, the Commission and SWA substantially complied with the competitive bid laws.

Id. at 478.

This Office has concluded that there is substantial compliance in a number of public works matters, despite less than full advertising required for large contracts such as in this opinion. The following are examples of instances where this Office has determined that an agency has substantially complied with the advertising requirements of section 39-2-2(a) of the Code:

- In opinion to Honorable Todd J. Adams, Chairman, Coosa County Commission, dated May 6, 2011, A.G. No. 2011-058, this Office determined that the Coosa County Commission substantially complied with the advertising requirement that the ads for sealed bids appear in three newspapers of general circulation throughout the state even though the advertisement for sealed bids ran in only two newspapers of general circulation throughout the state and the bids were opened later than advertised. In this matter, three bids were received.
- In opinion to Hugh E. Holladay, Attorney, Town of Argo, dated July 10, 2008, A.G. No. 2008-106, this Office determined that the Town had substantially complied with the advertising requirement that ads appear at least once in three newspapers of general circulation throughout the state even though the Town placed the ad in only one newspaper with circulation throughout the state. This newspaper also published the ad online. In this matter, four bids were received.
- In opinion to Honorable Joe McInnes, Alabama Department of Transportation, dated May 19, 2005, A.G. No. 2005-136, this Office determined that DOT had substantially complied with the advertising requirement that bids are advertised once a week for three consecutive weeks in a newspaper of general circulation even though one newspaper misplaced the order and the matter was only advertised for two weeks. In this matter, this Office noted that there were sophisticated methods of notice to potential bidders (direct mailings, Internet postings, and Dodge Reports), and three bids were received.
- *3 • In opinion to Honorable Melba Patton, Mayor, Town of South Vinemont, dated October 31, 2003, A.G. No. 2004-018, this Office determined that the Town of Vinemont had substantially complied with the advertising requirement that bids are advertised at least once in three newspapers of general circulation throughout the state even though the town advertised only in two newspapers that would be considered newspapers of general circulation throughout the state. In this matter, the town received six bids.

In this matter, the City of Pelham advertised the project twice with the Shelby County Reporter, a newspaper of general circulation throughout the state. This notice was also posted on the Shelby County Reporter's website. The newspaper arranged for this notice to be posted on alabamalegals.com, which is an Internet site that posts all legal notices for newspapers throughout the state. In addition, the City posted the information on the bulletin boards within the municipality and posted the information on DataFax and Dodge Reports, publications known and routinely accessed by contractors. Except for the print advertisements and posts to various bulletin boards, information regarding this matter was thoroughly advertised online and accessible to anyone with Internet access.

The advertising requirement in section 39-2-2 of the Code is there to insure that sufficient notice is given to the public to enable a governmental entity to meaningfully advance the open and competitive bidding process. Based on the extensive advertising of this project, the City of Pelham received several requests for prequalification packets from contractors who were located in six different states. Ultimately, eleven contractors submitted bids for this project. The company that is considered the low bidder in this matter under bid the project by more than \$100,000 and is located in Kentucky. Based upon the foregoing, it is the opinion of this Office that a court of competent jurisdiction may find that the City of Pelham substantially complied with the advertising requirements of section 39-2-2(a) of the Code of Alabama.

CONCLUSION

A court may find that the City of Pelham substantially complied with the advertisement of bids for its backup water supply based upon the substantial number of bids received and the number of states involved in the bidding process.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

Luther Strange

Attorney General

By: Brenda F. Smith Chief

Opinions Division

Ala. Op. Atty. Gen. No. 2011-100, 2011 WL 4545846 (Ala.A.G.)