Competitive Bid Law Exceptions

Obtaining a definitive statement of the requirements of the Alabama competitive bid law is a difficult task. There are several sets of statutes directed to different state entities. And interpretations of the statutes are made by several authorities, including the Alabama appellate courts, the Alabama Attorney General, and the Alabama Department of Examiners of Public Accounts. These different sources of authority are not always in complete harmony. Nevertheless, some general statements about this important law can be made.

Many University employees are aware of the general rule that University contracts for the purchase of goods or services worth $15,000 or more must generally be awarded to the lowest responsible bidder. *See* § 41-16-20, *Alabama Code* (1975). They may also be aware of several exemptions from the requirements of the Alabama competitive bid law. One exemption relates to a contract for the purchase of professional services or consulting agreements. The statutory language establishing this "professional services" exemption states as follows:

> Competitive bids shall not be required. . . and the competitive bidding requirements of this article shall not apply to: . . . contracts for the securing of services of attorneys, physicians, architects, teachers, artists, appraisers, engineers, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part . . ."

Section 41-16-21, *Alabama Code* (1975). According to the Examiners of Public Accounts (EPA), while contracts for the services of professionals are not required to be bid, they must be procured through the use of other competitive procedures. Notice of the need for these services must be widely distributed to the professional community, which is typically done by means of a solicitation sent to a broad group of potential suppliers inviting proposals to provide the desired professional services. *Resource Manual for Alabama Regulatory Boards and Commissions*, EPA, at 72, (10th ed., January 2012).

A second major exemption from the competitive bid requirement is for contracts awarded for "services and purchases of personal property, which by their very nature are impossible of award by competitive bidding,"generally referred to as "sole source" contracts. § 41-16-21, *Alabama Code* (1975). These two exemptions are sometimes confused. While they have some similarities, they are not identical.

The process for obtaining the services of a sole-source provider does not require a request for proposals, as only one vendor can provide these services. *Resource Manual*, at 72. The test for the kind of procurement that may be considered as falling within the "sole source" exception has been delineated by the Alabama Supreme Court. The City of Mobile (the "City") had awarded two contracts to Motorola Communications and Electronics, Inc. (Motorola) without utilizing any competitive bidding process. In the first contract, the City purchased from Motorola a fire alert system for $126,873. Operation of the system would cost the City an additional $50.00 per month. The second contract gave Motorola a one-year service contract, valued at $99,486.00, for the maintenance of all the City's Fire and Police Department radio-

communications equipment. A Motorola competitor, General Electric Company, sought to prevent the awarding of the two contracts by filing suit seeking an injunction. The trial court refused to grant this relief on the grounds that Motorola was the sole source for the two contracts. General Electric then appealed the case to the Alabama Supreme Court, which considered the two contracts separately. *General Electric Co. v. City of Mobile*, 585 So. 2d 1311 (Ala. 1991).

With regard to the fire alert contract, Motorola argued that it was the "sole source" for the contracted services based upon two separate technologies: its possession of a "trunking" tower and the ability of its system to "partition" radio and telephone calls. The Alabama Supreme Court held that the ability to "trunk" radio calls, that is, to provide a number of clients network access by the sharing of lines or frequencies (rather than the use of individual lines/frequencies), represented a true technological breakthrough in the field of radio communications. The Court also acknowledged that Motorola did, in fact, already have a tower constructed and in place that had the capability to "trunk" radio calls. However, the evidence also showed that General Electric had a subsidiary company in Mobile with an installed radio tower capable of housing the equipment necessary to "trunk" radio calls. Furthermore, General Electric was prepared to install this equipment on its own tower. The Alabama Supreme Court concluded that Motorola's "trunking" tower did not provide a sufficient basis for the City to award the first contract under the "sole source" exception.

The Alabama Supreme Court then focused on Motorola's unique ability to "partition" radio calls and telephone calls, a feature that facilitated the use of extra radio channels and allowed radio calls to interconnect with telephone calls. Motorola's equipment was the only equipment that could accomplish "partitioning." However, a "partitioning" capability was not included in the City's original contract specifications, and General Electric could perform the contract as originally specified by the City. In the face of these facts, the Alabama Supreme Court observed, as follows:

> We are thus presented with this question: At what point does an additional feature, such as "partitioning," that is not required in the specifications, make a good or service, such as Motorola's system, so unique that its producer can be considered the sole source of the good or service for the purpose of Alabama's competitive bidding laws? Most goods and services are to some extent "unique"; indeed, the evidence indicates that large portions of the system that General Electric proposed in the place of Motorola's system are patented and work in a "unique" fashion. Accordingly, we will not hold that a good or service's "uniqueness" alone can qualify the producer or supplier of the good or service as a "sole source" of a good or service under Alabama's competitive bidding laws. Instead, to so qualify . . . , [1] the good or service offered must be unique; and [2] that uniqueness must be substantially related to the intended purpose, use, and performance of the good or service sought; and [3] the entity seeking to be declared a "sole source" must show that other similar goods or services cannot perform the desired objectives of the entity seeking the goods or services.

Id. at 1315-16.

Applying this test, the Supreme Court concluded that Motorola met the first two requirements, but it did not meet the third requirement. It then held that the City did not properly consider other sources, namely, General Electric, which could have supplied the equipment described in the original specifications.

The Alabama Supreme Court then turned its attention to the second contract awarded without competitive bidding, the contract for the maintenance services. The evidence indicated that several companies could have provided these services. The Court therefore concluded that the requirements for the "sole source" exception to the obligation to bid the contract competitively were not met. The decision of the trial court was reversed, and the case was remanded so that the two contracts could be awarded in compliance with Alabama's competitive bid laws.

It is clear that these two exceptions to the competitive bid law must be carefully utilized. A contract for "professional services" must still use a competitive process that involves notifying all entities capable of performing the contract. And a "sole source" contract should not be awarded unless the requirements set forth by the Alabama Supreme Court in the *City of Mobile* case have been met.