A Guidebook to Local Government Construction Projects

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ACCG

2nd Edition - 2008

Association County Commissioners of Georgia
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Introduction

The Georgia Local Government Public Works Construction Law, O.C.G.A. § 36-91-1 et. seq. enacted in 2000 was the result of two years of work by the Public Construction Law Task Force made up of members of the Association County Commissioners of Georgia, the Georgia Municipal Association, the Associated General Contractors and the Georgia Utility Contractors Association. It substantially updated how counties contract for construction projects, and extended the law to cities, school boards and local government authorities. It establishes the basic requirements that local governments must follow when hiring private contractors to do construction projects (other than road construction) over $100,000. It ensures that public works contracts are awarded in a fair and competitive manner. Prior to the Local Government Public Works Construction Law, county governments were subject to several antiquated laws and were unable to use some of the more modern construction delivery methods, such as design-build. Cities and school boards were subject only to portions of these laws. The lack of uniformity made it difficult for contractors to know the requirements when bidding on public works projects, depending upon the type of local government. This 2008 edition incorporates legislation enacted by the Georgia General Assembly during the 2005 legislative session regarding who is responsible for payment of sales taxes when the local government provides materials for the project. The new addition also incorporates the 2007 amendments to both the Local Government Public Works Construction Law and legislation applicable to road construction projects.

This guidebook is divided into six parts. Part I contains definitions of words frequently used in this guide. Part II deals with the legal requirements that local governments must observe when undertaking a construction project other than road projects. The legal requirements that local governments must observe when contracting for road projects is explained in Part III. In Part IV, legal requirements that apply to both public works and road construction projects are addressed. Part V contains sample forms that local governments may use on construction projects. The final part of this guide contains excerpts from relevant portions of the Official Code of Georgia Annotated.

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Executive Director
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of Georgia
November 2008

DISCLAIMER: This publication contains general information for the members of ACCG and the public. This information is not and should not be considered legal advice. Readers should consult with legal counsel before taking action based on the information contained in this book.

Acknowledgements

The First Edition of this guidebook was authored in 2002 by Kelly Pridgen, then Assistant General Counsel to ACCG. The Second Edition was updated by Trent Myers, ACCG's legal intern for the summer of 2007. This edition was further edited under the direction of James F. Grubiak, ACCG General Counsel, and Michele NeSmith, ACCG Research and Policy Development Director.

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Part I.
Useful Terms

Useful Terms

Addendum is a written amendment to an invitation to bid or request for proposal that changes the project specifications.

Alternate bid is the amount stated in the bid or proposal to be added to or deducted from the amount of the base bid or base proposal if the corresponding change in project scope or alternate materials or methods of construction is accepted.

Base bid or **base proposal** is the amount of money stated in the bid or proposal as the sum for which the bidder or proposer offers to perform the work.

Bidder is a person, firm or entity that submits a bid under the bid method.

Bid bond provides reimbursement to a local government if the bidder or offeror selected to perform the construction project does not enter into a contract with the local government.

Bridge is a structure, including the approaches thereto, providing vehicular passage over rivers, streams, ponds, lakes, bays, ravines, gullies, railroads, public roads and canals.

Change order means an alteration, addition or deduction from the original scope of work as defined by the contract documents to address changes or unforeseen conditions necessary for project completion.

Competitive Process is the process by which a local government solicits a public works construction contract through either the bid method or the proposal method.

Bid Method or **Competitive sealed bidding** is a method of soliciting public works construction contracts whereby the contract is awarded based upon the lowest responsive, responsible bid.

Construction Delivery Method is a method of building a project.

Construction Manager Agency serves as an advisor and agent of the local government, as well as coordinates the design and construction teams on project.

Construction Management At Risk is a construction delivery method in which the local government hires a construction manager at risk.

Construction Manager At Risk serves as an advisor and agent of the local government, coordinates the design and construction team, as well as is responsible for the construction of a project.

Design Bid Build is a construction delivery method where a project is totally designed before the construction is begun.

Design Build is a construction delivery method where construction on a project begins before the design is complete.

Emergency means any situation resulting in imminent danger to the public health or safety or the loss of an essential governmental service.

Fast Track is a construction delivery method where construction of a project begins as soon as the first phase of design documents is complete.

Governing Authority is the official or group of officials responsible for governance of a governmental entity.

Governmental Entity is a county, municipal corporation, consolidated government, authority, board of education, or other public board, body, or commission exclusive of any authority, board, department, or commission of the state, or a public transportation agency as defined by Chapter 9 of Title 32.

Offeror is a person, firm or entity that submits a proposal under the proposal method.

Payment bond protects a local government from liability by reimbursing the suppliers and subcontractors providing labor, materials, machinery, and equipment if the contractor fails to pay.

Performance bond reimburses the local government if a contractor fails to complete the construction project within the time stated in the contract.

Prequalification Process means a requirement that any prospective bidder or offeror meet certain minimum qualifications related to the project or the quality of work before being eligible to submit a bid or proposal.

Professional Service generally means those services provided by attorneys, accountants, architects and engineers. In the context of the Local Government Public Works Construction Law, it means those services where the other party is not responsible for construction.

Program Manager or **Project Manager** is a person, firm or local government employee that oversees or manages a construction project.

Proposal Guaranty is a certified check or other security payable to the local government to ensure that the successful bidder will execute the contract on which he bid similar to a bid bond.

Proposal Method or **Competitive sealed proposals** means a method of soliciting public works contracts whereby the contract is awarded based upon criteria identified in a request for proposals – not necessarily based upon the lowest price.

Public works construction means the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property other than road construction or the routine operation, repair, or maintenance of existing structures, buildings or real property.

Qualification Based Selection means a way of selecting professional services or offerors under the proposal method in which the professional or offeror is selected prior to consideration of price.

Responsible Bidder or **Responsible Offeror** means a person or entity that has the capability in all respects to perform requirements of the construction contract.

Responsive Bidder or **Responsive Offeror** means a person or entity that has submitted a bid or proposal that meets all of the requirements established in the invitation for bids or request for proposals.

Retainage is the portion of the total contract amount that a local government retains from the contractor until the project is totally complete.

Road includes highways, roads, streets, avenues, toll roads, detours, structures, sidewalks, facilities, shoulders, bridges, causeways, viaducts, ferries, overpasses, underpasses, railroad grade crossings, tunnels, signs, signals, markings, wayside parks, parking facilities, drainage ditches, canals, culverts, rest areas, truck weighing stations and scenic easements.

Road Construction is the planning, location, surveying, designing, supervising, inspecting, building, paving, striping, and re-striping, modifying, grading, widening, relocating, rebuilding or other major improvement of a substantial portion to an existing road.

Scope of Project is the work required by the original contract documents and any subsequent change orders required or appropriate to accomplish the intent of the project as described in the bid documents.

Scope of Work is the work that is required by the contract documents.

Sole source means those procurements made pursuant to a written determination by a governing authority that there is only one source for the required supply, service or construction item.

Part II.
Public Works
Construction Projects

PROCURING PUBLIC WORKS CONSTRUCTION CONTRACTS

The Local Government Public Works Construction Law establishes minimum requirements for counties, cities, school boards, authorities and other local agencies to advertise covered public works contracts, to solicit and evaluate bids or proposals, to select a contractor and to obtain certain bonds. If a local government requires potential bidders or offerors to be pre-qualified or if a local government issues an addendum to a request for proposal or invitation to bid, there are certain minimum procedures that must be followed. To properly contract for a public works project, a county or other local government should follow the steps outlined below.

DECIDE WHETHER THE PROJECT IS SUBJECT TO THE REQUIREMENTS OF LOCAL GOVERNMENT PUBLIC WORKS CONSTRUCTION

Contracts That Are Subject to State Law Requirements

Except as provided below, all contracts entered into by local governments for "construction," are subject to the requirements of O.C.G.A. § 36-91-1 *et seq*. "Construction" includes building, repairing, renovating or demolishing buildings and structures for local governments. *See* O.C.G.A. § 36-91-2(12). The Local Government Public Works Construction Law allows local governments to use any construction delivery method, but if the other party is at risk for construction and provides labor and building materials then the contract must be awarded by either competitive sealed bid or competitive sealed proposal under the requirements of the Local Government Public Works Construction Law. *See* O.C.G.A. § 36-91-20(c).

Projects and Contracts That Are Not Subject to State Law Requirements

Certain contracts, like contracts for professional services, for projects in response to an emergency, and other specified below, are not subject to the Local Government Public Works Construction Law.

Contracts for Professional Services. Contracts where the other party is not responsible for construction such as those that are strictly for design (i.e., architectural, engineering) or management/coordination (i.e., program management or construction management agency) are not subject to the requirements of the Local Government Public Works Construction Law. See O.C.G.A. §§ 36-91-2(12) and 36-91-20(c). However, contracts may be subject to the Local Government Public Works Construction Law, regardless of what they are called, if they contain the responsibility for construction. For instance, sometimes construction managers are responsible for hiring the trade contractors on a project and are at risk for construction (e.g., "construction manager at risk"). In such a case, the contract would be subject to the Local Government Public Works Construction Law.

However, there are other times when a construction manager serves in an advisory capacity and is not responsible for construction (e.g., "construction manager agency"). In such a case, the contract would not be subject to the Local Government Public Works Construction Law.

Construction Contracts Less Than $100,000. Construction contracts costing less than $100,000 are not subject to the requirements of the Local Government Public Works Construction Law. However, because the requirements of the Local Government Public Works Construction Law encourage and foster open competition on projects and hopefully reduce the costs of projects, local governments may use the same or similar procedures on smaller contracts. However, local governments are specifically prohibited from intentionally subdividing a contract over $100,000 in order to avoid the requirements of the Local Government Public Works Construction Law. O.C.G.A. § 36-91-22(a).

Road Construction. Contracts to a local government contracts to construct, reconstruct or maintain a public road with a private contractor, an adjacent county, city, the state or federal government are not subject to the Local Government Public Works Construction Law, except where specified. Road construction contracts are subject to the requirements of O.C.G.A. § 32-4-1 *et seq*. O.C.G.A. § 36-91-2(12).

Construction As A Result of Emergencies and Natural Disasters. Contracts necessitated by emergencies are not subject to all of the advertising and other requirements of the Local Government Public Works Construction Law. However, in the case of a county, the board of commissioners must ratify a contract executed in an emergency as soon as practicable. As with the old law, the meeting minutes must describe the nature of the emergency. In the case of a city, the nature of the emergency must be described in the minutes. O.C.G.A. § 36-91-22(e).

This exemption was carried forward into the new law to protect the public from an interruption of services during those true emergencies that cannot wait four weeks to be advertised. A contract may only be entered into pursuant to this exemption if the local government cannot comply with the requirements of the Local Government Public Works Construction Law because there is imminent danger to the public health or safety or because there is an imminent threat of the loss of an essential governmental service. O.C.G.A. § 36-91-2(7).

Construction Provided by County Employees. Prior to 2000, counties could only perform construction in-house on projects under the $20,000 threshold or using inmate labor. Under the Local Government Public Works Construction Law, both counties and cities are specifically authorized to perform construction in-house on any project. If the local government, contracts with a private firm to perform a portion of the project and the contract is estimated to cost more than $100,000, then the local government must comply with the requirements of the Local Government Public Works Construction Law in awarding that contract.

Any supplies, equipment or materials purchased by a local government to perform the project are subject to the local government's purchasing requirements that may be contained in local legislation, city charter, ordinance or policy.

Construction Provided By Inmate Labor. Construction projects using inmate labor from a correctional institution ("CI") or county work camp are not subject to the requirements of the Local Government Public Works Construction Law.

Additionally, other local governments are authorized to contract with those counties with CIs for use of inmate labor for construction projects without advertising or taking bids or proposals. O.C.G.A. § 36-91-22(b).

Construction Using Federal or State Labor. Construction projects using state or federal labor furnished to the local government without charge are not subject to the Local Government Public Works Construction Law. O.C.G.A. § 36-91-22(c).

Construction Pursuant to Federal Grants. Federal grants used on public works construction contracts may have additional requirements with which a local government must comply. Because the funding is tied to these requirements, local governments must comply with the federal requirements. To the extent that the requirements of the Local Government Public Works Construction Law can mutually exist with the federal requirements, local governments must comply with the Local Government Public Works Construction Law. Oftentimes, the federal requirements may require special notices or additional certifications from bidders or offerors. Any the Local Government Public Works Construction Law requirements that conflict with those federal requirements are waived. O.C.G.A. § 36-91-22(d) However, if there is no conflict, the local government must comply with both the Local Government Public Works Construction Law and the federal requirements.

When the local government advertises a project subject to additional federal procurement requirements, it must include a statement that federal procedures exist for the award of the contract. O.C.G.A. §§ 36-91-21(b) and 36-91-22(d). Additionally, the local government must inform any person requesting such information of the availability and location of the federal requirements. O.C.G.A. § 36-91-21(d).

Routine Maintenance. Contracts for the routine operation, repair or maintenance of existing structures, buildings or property do not have to be advertised and awarded in accordance with the Local Government Public Works Construction Law. O.C.G.A. § 36-91-2(12).

Sole Source. If there is legitimately only one source for a required supply, service or construction item, then the contract is not required to be advertised and competitively procured. However, the board of commissioners or city council must make a written determination that there is only one source. O.C.G.A. §§ 36-91-2(17) and 36-91-22(h). Local government officials should carefully investigate any claims by a vendor that a product or service is only available through one source. For example, the local government should contact the manufacturer to obtain their patent number and/or a written determination from them that they are the only manufacturer of the product. Other vendors or firms should be contacted to confirm that they cannot provide the product or the service. Additionally, the Internet can be an invaluable research tool to find other firms that provide the same product or are authorized to install particular products.

CHOOSE A CONSTRUCTION DELIVERY METHOD

Before a local government can advertise a project or decide which competitive process (i.e., the bid method or the proposal method) to use, it should first consider which construction delivery method is best suited for the project. There are several construction delivery methods available under the Local Government Public Works Construction Law.

Which method should be used depends very much on each individual project, including the complexity of the project, how quickly the project must be completed, the amount of available funds and the in-house resources.

Although the basic methods are outlined below, too much emphasis should not be placed on what the method is called because the methods of construction delivery are ever evolving. Whether the requirements of the Local Government Public Works Construction Law apply depends upon whether the other party to the contract is responsible for construction regardless of what the other party is called.

Traditional Design-Bid-Build

This is the method typically used by counties. First, the design professionals (i.e., architects and engineers) are hired to design the project. Once the designs are completed, the local government bids out the construction to a general contractor. This method may take a little longer because the construction phase does not begin until the design for the entire project is complete. However, because the contractor is bidding on completed design documents, the price should be more accurate than on projects using other methods where there is still uncertainty on the design of the project. Additionally, the fact that the design professional and the contractor have separate contracts with the local government provides a sort of check and balance to the process. Both can serve as watchdogs for the local government. The construction contracts under this method are subject to the requirements of the Local Government Public Works Construction Law – most likely using the bid method.

Design-Build

Under this method, a local government contracts with one firm to both design and construct the project. Projects may be completed quicker than with the traditional method because construction begins while the project is being designed. Because the builder has input in the design stage, it may result in a more efficient project. However, the check and balance provided by design-bid-build may be lost because the design team and construction team are employed by the same firm. Such a contract is subject to the requirements of the Local Government Public Works Construction Law – most likely using the proposal method.

A variation to design-build is "design-build-operate." According to O.C.G.A. § 36-60-15.1, local governments may contract with a private firm to design, construct and operate for 20 years wastewater treatment systems, storm water systems, water systems and sewer systems. However, the construction portion of such a contract must be procured by the proposal method in accordance with the provisions of the Local Government Public Works Construction Law.

Fast Track

Under this method, construction begins as soon as the plans and specifications for the first phase are final. As the name implies, projects are completed quickly. However, a great deal of coordination is

required to ensure that nothing slips through the cracks, particularly with the contract documents. The construction contracts are subject to the Local Government Public Works Construction Law. However, if a program manager or a construction manager agency is hired to assist with coordination, then the program manager or construction manager agency contract is not likely to be subject to the Local Government Public Works Construction Law.

Construction Management

There are different variations on the construction management method.

Construction Manager Agency Under the construction manager agency method, the construction manager is hired by the local government to serve as an advisor and coordinator. The construction manager supervises the design professional and the construction team. The local government may hire a general contractor to handle the construction or the local government may hire all of the trade contractors. In such a case, the requirements of the Local Government Public Works Construction Law would not apply to the contract with the construction manager, but they would apply to the contracts with the contractor or trade contractors, if the cost is more than $100,000.

Construction Manager At Risk Under the construction manager at risk method, the construction manager is responsible for the construction of the project, as well as to serve as an advisor and coordinator. If the construction management at risk variation is used, the construction management contract would be subject to the requirements of the Local Government Public Works Construction Law since the construction manager is responsible for construction.

Program Management/Project Management

For those local governments without in-house expertise in managing construction projects, the program/project manager is hired as the local government's representative. Similar to the construction manager agency, the program manager works with local government employees, the design team and the construction team to coordinate the project through completion. So long as the program manager is not responsible for the actual construction of the project, the program manager contract would not be subject to the requirements of the Local Government Public Works Construction Law.

Choosing a Construction Delivery System

There is not one "best" construction delivery system. One method may be better suited to a particular project. It is very important to understand the various methods, as well as their strengths and weaknesses before selecting a construction delivery system.

There are a few basic questions that the local government should consider when selecting a construction delivery method. First, does the local government have an established idea of what the project will look like or do they want a firm to provide some ideas on what should be included in the project? Design-bid-build works very well when the scope of the project is fairly well established. Second, are there circumstances requiring the project to be completed faster than on an average construction schedule? Fast track and design-build work well when the project must be completed rapidly. Third, does the local government have personnel who can supervise and coordinate the project, as well as prepare the contract documents? Program/project manager and construction management agency work well when the local government does not have the in-house resources to manage the project. Finally, what level of control does the local government want to have over the

project? The local government has a greater level of control in the design-bid-build method than in some variations of design-build and construction management.

SELECT A COMPETITIVE PROCESS

Depending upon the project needs and the method of construction delivery, the local government must choose a competitive process to solicit a public works construction contract under the Local Government Public Works Construction Law. There are two competitive processes for public works construction: the bid method and the proposal method.

Bid Method

Under the bid method, the local government issues an "invitation to bid" establishing the requirements necessary to be awarded the contract. Bidders submit bids to perform the project for a specified price. The final award must be made to the responsible bidder with the lowest price who meets all of the requirements set forth in the invitation to bid. Under the bid method, price is the bottom line in choosing a contractor once it has been determined which bidder are "responsive" and "responsible" – the board of commissioners and city council do not have the discretion to select any other bidder than the lowest responsive, responsible bidder. Using the bid method works well where the design of the project is well established, as with design-bid-build.

Proposal Method

Under the proposal method, the local government issues a "request for proposal" (RFP) describing the project and establishing the factors, as well as their relative importance, that will be used to evaluate offerors. Offerors submit proposals to perform the project. Depending upon the RFP, the proposals may or may not include a final price or fee for the project. While price may be a factor in the local government's decision, it is not the bottom line, as with the bid method. The local government may decide to place more importance on qualifications. In many instances, local governments do not have the exact and final specifications for the project.

It is more likely that they have a general idea of what they need and they are soliciting a firm to help craft a solution that will require creativity, expertise and experience. The proposals are evaluated using the criteria established in the RFP. The board of commissioners does not have the discretion to award the contract to an offeror that on criteria other than those established in the request for proposal. Using the proposal method works well for projects using a construction delivery method other than traditional design-bid-build.

Qualification Based Selection. A form of the proposal method is called qualification based selection (QBS). Local governments may use QBS on contracts not subject to the Local Government Public Works Construction Law such as contracts for engineering or architectural services. Although not specifically addressed in the Local Government Public Works Construction Law, QBS may also be used on any contract involving construction so long as the minimum requirements of the Local Government Public Works Construction Law are met. Typically, QBS would be used in a two-part or bifurcated proposal process.

Traditional Qualification Based Selection. Under traditional QBS, which may be used on contracts not subject to the Local Government Public Works Construction Law, such as contracts with architects and engineers, a local government submits a request for statements of qualification to potential firms or contractors. The request should include the general scope of work, the type of qualification information that the local government will use to evaluate the submittals and a submission deadline. The request may be advertised in the newspaper, trade magazines, Internet and/or may be sent directly to known firms. After interested firms submit a statement of qualification, the local government evaluates the submittals. Evaluation criteria typically include relevant experience, references, staff qualifications, availability of key personnel, current and projected workload and financial ability to complete the project. Oftentimes, a committee is appointed to perform the evaluation. After evaluating the submittals, the local government eliminates all but the highest ranked firms according to the evaluation criteria to a manageable number of firms – generally, three to five firms. The local government then submits a request for technical proposals to each of the short listed firms. The local government may also interview the short listed firms. This generally consists of allowing the firms to make a presentation with time for questions and answers. Based upon the technical proposals and interviews, the local government ranks the firms and begins scope of work and price negotiations with the top ranked firm. If agreement is not reached with the top ranked firm, then the local government begins negotiations with the next highest ranked firm.

Qualification Based Selection on Public Works Construction Contracts. For projects subject to the Local Government Public Works Construction Law, the local government may use a bifurcated proposal process that consists of two phases: the statement of qualification phase and the technical proposal phase. The request for proposal should clearly establish both parts of this process, particularly the evaluation factors that will be used to rank firms in the statement of qualifications phase, the evaluation factors that will be used to rank firms in the technical proposal phase and how the negotiation of scope of work and fees will be conducted.

Requesting statements of qualification is different than the prequalification process discussed later in this guide. The statement of qualification provides more in-depth information than what would typically be provided through a prequalification process. So long as the local government does not use the Local Government Public Works Construction Law prequalification process, the local government may narrow the number of short listed firms to a manageable number, regardless of the number of firms that meet the minimum requirements. However, under a prequalification process, the local government must consider all firms that meet the minimum qualifications – not just the top three to five firms, as with qualification based selection.

MATCH THE COMPETITIVE AWARD PROCESS TO THE CONSTRUCTION DELIVERY METHOD

The bid method of competitive award works very well with the traditional design-bid-build method. Because the project design is complete when the time comes to select a builder, once the bidders not deemed "responsible" and "responsive" are eliminated, the only remaining factor in the decision is price. The proposal method of competitive award works well with the design-build method and the fast track method because price is not required to be a factor. Because design and construction of the project are integrated in this method, the local government needs some flexibility in selecting a firm. Innovativeness of proposal, timeliness of completion and quality of past projects and key personnel designated for the project become more important factors in the decision. Also, until there is a final

design, it is difficult to have an accurate total price for the project. Similarly, the proposal method works well for construction management agency and construction management at risk. Because one of the major benefits of using construction management is the coordination and supervision of the project of the project, the quality of the firm is generally a more important factor in the decision to hire a construction manager than price.

ADVERTISE THE PROJECT

The advertising requirements in the Local Government Public Works Construction Law provide local governments flexibility and the opportunity to use the Internet to advertise projects. Under the Local Government Public Works Construction Law, public works contract opportunities must be posted in a conspicuous location in the local government's offices, O.C.G.A. § 36-91-20(b)(1), and in one of the following locations: (1) the legal organ; (2) the local government Internet website; or (3) another website identified by the local government. O.C.G.A. § 36-91-20(b)(1). Local governments that have not yet developed a website may designate another website to post their public works contract opportunities. If another website is used, the local government should make sure that the location of this website is well known to ensure more competition. ACCG and GMA have developed a Georgia Local Government Access website that contains classified advertisements located at www.glga.org. There is no charge to local governments to advertise on this website and there is no charge to contractors to access it. Another possible advertisement location is the Georgia Procurement Registry that is maintained by the Georgia Department of Administrative Services (www.procurement.state.ga.us). O.C.G.A. § 36-91-20(b)(1).

In addition to being a potential place to advertise projects, the Georgia Procurement Registry is an excellent place to learn what the state and other local governments in Georgia are paying for their construction projects and other procurements.

- ✓ An advertisement in the legal organ must run at least two times during the four weeks prior to the bid or proposal opening. The first advertisement must be at least four weeks before the bid or proposal opening. The second advertisement must be at least two weeks after the first advertisement. O.C.G.A. § 36-91-20(b)(2). If the local government solely uses the Internet to advertise, the advertisement must be posted during the entire four weeks prior to the bid or proposal opening. O.C.G.A. § 36-91-20(b)(3).[1] Since there is no charge for this service, cost in continuously advertising during the four week period would not be a concern.

- ✓ Any advertisement must include enough details and specifications that will inform the public of the extent and character of the project. O.C.G.A. § 36-91-20(b)(6).

- ✓ If the local government requires potential bidders or offerors to meet certain pre-qualification requirements or to attend mandatory pre-bid conferences in order to be eligible to bid on a project, then the advertisement must include reasonable advance notice of these requirements. O.C.G.A. § 36-91-20(b)(7).

[1] An inadvertent or unintentional loss of internet service will not delay the contract award or bid opening. O.C.G.A. § 36-91-20(b)(3).

- ✓ If the project is funded by a federal grant that has special requirements, then the advertisement must include reasonable advance notice that federal procedures exist for the award of the contract. O.C.G.A. §§ 36-91-20(b)(7) and 36-91-22(d).

- ✓ In addition, if the contract is to be awarded by competitive sealed bid, then these opportunities must make available plans and specifications on the first day of the advertisement. O.C.G.A. § 36-91-20(b)(4).

- ✓ These plans and specifications must be available to the public for inspection and must also indicate whether the project will be awarded by base bid or by base bid plus selected alternatives. O.C.G.A. 36-91-20(b)(4). A base bid represents the amount of money for which the bidder or proposer offers to perform the work. O.C.G.A. § 36-91-2(2). An alternative bid represents the amount of money to be added or deducted from the base bid if there are certain changes in the project scope or certain alternative methods and materials of construction are accepted. O.C.G.A. § 36-91-2(1).

- ✓ Moreover, , plans and specifications for contracts to be awarded by competitive sealed bid must include a statement listing whether all anticipated federal, state and local permits have been obtained or a statement indicating the status of such permits, including the time each permit is expected to be obtained. O.C.G.A. § 36-91-20(b)(4)(A).

- ✓ Similarly, a statement must be included which specifies whether all anticipated rights-of-way or easements have been obtained or an indication of the status of such acquisitions. O.C.G.A § 36-91-20(b)(4)(B).

- ✓ Contracts to be awarded by competitive sealed proposals must be publicly advertised with an RFP that includes "conceptual program information" describing the requested services in a level of detail appropriate to the project delivery method. O.C.G.A. § 36-91-20(b)(5).

- ✓ Local governments are certainly permitted to advertise more frequently or in additional places, so long as these minimum requirements are met. In fact, the more that a project is advertised, the more likely that the local government will encourage more competitive bids, resulting in better prices.

MAKE PROJECT DOCUMENTS AVAILABLE

Project plans and specifications must be available to potential bidders/offers and the public on the first day of advertisement. O.C.G.A. § 36-91-20(b)(4). How detailed the documents have to be depends upon the type of competitive process used and the method of construction delivery.

SOLICIT BIDS PROPOSALS

Bid Method

If the bid method is used, the local government issues an invitation to bid that includes the criteria upon which the bidder will be judged. Because the contract, if awarded, must be to the lowest responsive, responsible bidder, care should be taken in developing the criteria to ensure that it meets all of the local government's needs for the project.

Proposal Method

If the proposal method is used, the local government issues an RFP that includes the following:

- ✓ "Conceptual program information" describing the requested services in a level of detail appropriate to the project delivery method. O.C.G.A. §§ 36-91-20(b)(5) and 36-91-21(c)(1). Depending upon the method of construction delivery selected, "conceptual program information" may be completed design documents (e.g., if design-bid-build is used), schematic drawings (e.g., if a method other than design-bid-build is used) or a written description of the basic project.
- ✓ The length of time that an offeror must honor his or her proposal. O.C.G.A. § 36-91-50(c).
- ✓ All of the evaluation factors upon which the offeror will be judged, as well as their relative weight/importance. This is one of the most important aspects of this process.
- ✓ The contract, if awarded, must be to the offeror with the best score on these evaluation factors. The contract file must include the relative scores of each offeror.
- ✓ If the local government wants the ability to negotiate the contract or to allow for revision of proposals, it must establish this procedure in the RFP. O.C.G.A. § 36-91-21(c)(2).

Bid and Proposal Method

The following must be included in both an invitation to bid and an RFP:

- ✓ The criteria for any mandatory pre-qualification as well as the procedure for a disqualified bidder to respond to his or her disqualification. O.C.G.A. § 36-91-20(b)(7) and O.C.G.A. § 36-91-22(d).
- ✓ Any special federal procurement requirements, if the project receives federal funding or assistance. O.C.G.A. §§ 36-91-20(b)(7) and 36-91-22(d).

All Bids and Proposals

Although not required, the following statements should be included in all invitations to bid and RFPs:

- ✓ The local government has the authority to waive any technicalities or informalities. O.C.G.A. § 36-91-20(c)(2).
- ✓ The local government has the right to reject all bids or proposals or any bid or proposal that is non-responsive or not responsible. O.C.G.A. § 36-91-20(c)(2).
- ✓ The local government may issue change orders altering the original scope of work to address changes or unforeseen conditions necessary for the project completion.
- ✓ Since local governments are required to approve the form of bid bonds, performance bonds and payment bonds, a standard form acceptable to the local government should be included in the RFP with a statement that all bidders or offerors, by submitting a bid or proposal, agree to use the standard form. This saves the local government's finance officer or manager from having to evaluate and approve several bonds with varying language. Sample bonds are included in this guidebook. Similarly, if the county or city attorney has a standard construction agreement that is used or standard terms that are required, then these should be included in the RFP with a statement

that all bidders or offerors, by submitting a bid or proposal, agree to use the standard contract or standard terms and conditions. This saves time after the award of the bid negotiating legal technicalities in a contract.

✓ State law requires local governments to ensure that bidders and offerors are aware of their responsibilities to pay sales and use taxes on construction materials that are furnished to them by the local government. An invitation should include advance written notice of this tax liability. For further discussion, see **Sales Tax: Who Pays?** (on page 42).

PRE-QUALIFY BIDDERS OR OFFERORS

Although not required, some local governments require potential bidders or offerors to meet certain minimum requirements before they are even eligible to submit a bid or proposal on a project. A reasonable pre-qualification process should facilitate the evaluation and award process by "weeding out" those bidders or offerors that are not qualified candidates for the contract. While local governments are not required to have a pre-qualification process, if they have one it must meet certain minimum requirements intended to ensure that the process is fair and open:

✓ Any minimum criteria that a potential bidder or offeror must meet in order to be eligible to bid on a project must be reasonably related to the project or the quality of work. O.C.G.A. § 36-91-20(f)(1).

✓ For example, it is reasonable to require that potential bidders or offerors have all required licenses, a certain amount of experience on similar projects, the ability to obtain any necessary permits, etc. However, political party affiliation would not be an appropriate pre-qualification requirement. This requirement is intended to prevent a local government from creating a pre-qualification process designed to ensure that a favored bidder or offeror will be the only one eligible to submit a bid or proposal.

✓ The minimum criteria to be pre-qualified must be available to any prospective bidder or offeror that requests the information for each project that requires prequalification. O.C.G.A. § 36-91-20(f)(2).

✓ The procedure must include a process for notifying prospective bidders or offerors of the minimum criteria for, or limitations to, prequalification. O.C.G.A. § 36-91-20(f)(3). The local government is required to place potential bidders or offerors on notice that the criterion exists in the advertisements for the contract opportunity according to O.C.G.A. § 36-91-20(b)(7). Local governments should also include the criteria in the invitation to bid or request for proposal, as well as have them available in the office of the purchasing agent.

✓ The procedure must include a process for disqualified bidders or offerors to respond to their disqualification to a local government representative. O.C.G.A. §36-91-20(f)(4). This does not mean that the disqualified bidder gets to "appeal" his or her disqualification. It is just an opportunity for the disqualified bidder to clear his or her name. The procedure may be as simple as allowing a disqualified bidder to submit a letter responding to the disqualification within a specified number of days to a designated official (i.e., the chairman, mayor, manager, clerk or purchasing agent) or it may be more formalized by providing the opportunity for a hearing before the board, council, manager, clerk or purchasing agent. Although it is not required by the Local Government

Public Works Construction Law, a local government may provide a disqualified bidder or offeror with the opportunity to be reinstated as a qualified through a formal appeal before an official or board.

✓ Any pre-qualified bidder or offeror can not be later disqualified without cause. O.C.G.A. § 36-91-20(f)(4).

Prequalification is different from qualification based selection discussed earlier. First, prequalification may be used under either the bid method or the proposal method. Qualification based selection may only be used under the proposal method. It may not be used under the bid method. Second, using a pre-qualification process, a local government must consider bids or proposals from as many bidders or offerors that meet the minimum criteria established. No bidder or offeror may be excluded from submitting a bid or proposal so long as they meet the prequalification criteria. However, using qualification based selection, the local government need only consider a few of the most qualified offerors, regardless of how many offerors meet the minimum criteria.

HOLD A PRE-BID CONFERENCE

Pre-bid conferences, which are optional, are used by local governments to answer technical questions that potential bidders or offerors may have about the invitation to bid or request for proposal. Sometimes, problems are discovered in the documents at this stage and the local government can prepare a written addendum to the project specifications. The local government must state in the advertisement if attendance at the pre-bid conference is mandatory in order to be eligible to submit a bid or proposal. O.C.G.A. § 36-91-20(b)(7).

ISSUE ANY NECESSARY ADDENDUM

Sometimes technical questions about the bid documents arise. In order that all bidders or offerors have access to the same information, such questions should be answered in writing in the form of an addendum to the invitation to bid/RFP. Also, sometimes it becomes necessary for the local government to make changes to the project specifications after the invitation to bid/request for proposal is advertised and available. However, if the local government issues an addendum modifying plans or specifications within 72 hours (excluding weekends and legal holidays) of the advertised bid or proposal opening, then the bid or proposal opening must be extended at least 72 hours (excluding weekends and legal holidays) from the original bid or proposal opening date. O.C.G.A. § 36-91-20(d). This may be done without the need to re-advertise the project. O.C.G.A. § 36-91-20(d). Local governments are encouraged to take reasonable steps to inform all potential bidders or offerors of the changes to the project, as well as to the bid or proposal opening date.

This may include calling or faxing known bidders or offerors, placing a notice in the office of the purchasing agent and/or board of commissioners/city council, placing an advertisement in the legal organ or placing a notice on the local government's Internet website. In addition to fostering competition, this ensures fairness to all potential bidders or offerors.

ACCEPTANCE OF BIDS OR PROPOSALS

If the bid method is used, bidders must submit sealed bids based upon the criteria set forth in the invitation to bid by the date established in the advertisements and the invitation to bid. O.C.G.A. § 36-91-21(b)(2). If the proposal method is used, offerors must submit proposals in conformance with the criteria in the RFP.

It is unlawful for any individual to try to prevent competition in the submission of bids or proposals. O.C.G.A. § 36-91-21(d).

REQUIRE BID BONDS

Requiring bidders to submit a bid bond protects the local government if the contract is awarded to the lowest responsive, responsible bidder, but that bidder refuses to enter into the contract for the bid amount. O.C.G.A. § 36-91-2(3).

- ✓ Except in the case of legitimate bid mistakes (see bid mistakes discussed later in this guide), the local government may go to the next lowest responsive, responsible bidder and can recover the difference in price from the low bidder's bond, so long as the action against the original low bidder is instituted within one year from the completion of the project. O.C.G.A. § 36-91-54.

- ✓ Bids or proposals on contracts over $100,000 must include a bid bond, cashier's check, certified check or cash deposit of at least 5% of the total contract price that ensures that the bidder will accept the contract if awarded by the local government. O.C.G.A. §§ 36-91-50(a), 36-91-50(d) and 36-91-51(a). If the contract is less than $750,000, the local government may accept an irrevocable letter of credit instead of a bid bond. O.C.G.A. § 36-91-51(b).

- ✓ It is in the discretion of the local government to require bid bonds on contracts of less than $100,000. O.C.G.A. § 36-91-50(a). If a contractor fails to provide a required bid bond, then the contract is invalid. O.C.G.A. § 36-91-21(g).

- ✓ The local government is required to approve the form and solvency of the surety prior to the acceptance of the bid or proposal. O.C.G.A. § 36-91-40(a)(2). The bond surety either must be authorized by the Insurance Commissioner to do business in Georgia or must be on the United States Department of Treasury's list of approved bond sureties. O.C.G.A. § 36-91-40(a)(1). Each July, the Financial Management Service of the Treasury Department prepares a list of approved sureties in Circular 570 in the Federal Register. The list may be accessed via the Internet at www.fms.treas.gov/c570 or by contacting the Surety Bond Branch Staff at 3700 East West Highway, Room 6A04, Hyattsville, MD 20782 or (202) 874-6850.

- ✓ If the local government believes that the surety has become insolvent, that the surety is no longer approved by the Insurance Commissioner to do business in Georgia or that there are no longer sufficient sureties on the bond, the local government may require the contractor to strengthen the bond or provide a new or additional bond within ten days. O.C.G.A. § 36-91-40(b).

✓ The local government may order all work on the contract to cease until the new or strengthened bonds are provided. If they are not provided, then the local government may terminate the contract.

OPEN THE BIDS OR PROPOSALS

Bid Method

The local government must open the bids in public on the bid opening date established in the invitation to bid and advertisements. O.C.G.A. § 36-91-21(b)(3). This means that members of the public, as well as bidders, may be present.

Proposal Method

The local government must open the proposals on the date specified in the advertisement and the RFP in a way that the contents of the proposals from being disclosed to competing offerors. O.C.G.A. § 36-91-21(c)(1)(B).

Utility Contractors

If 50% or more of the project is utility work, the bidder or offeror must have the utility contractor license number written on the face of the bid. O.C.G.A. § 43-14-8.2(h). It is unlawful for the local government to open or consider a bid or proposal for utility contracting unless the bidder/offer has obtained a utility license.

EVALUATE BIDS OR PROPOSALS

In evaluating bids or proposals, counties must consider only bidders or offerors. A "responsible" bidder or offeror is one that has the capability to fully and reliably perform the contract requirements. O.C.G.A. § 36-91-2(13). Examples of what may be considered by a local government may include:

✓ Quality of work on similar projects, particularly public works;

✓ Ability to perform the project within the time specified;

✓ General reputation in the community; or

✓ Financial responsibility.

A "responsive" bidder or offeror is one that has submitted a bid or proposal that conforms in all material respects to the requirements that the local government established in the invitation to bid/request for proposal. O.C.G.A. § 36-91-2(14).

A local government is specifically allowed to waive any technicalities or informalities in the bids or proposals and may reject all bids or proposals or any bid or proposal that is non-responsive or not responsible. O.C.G.A. § 36-91-20(c). For example, a local government may waive the requirement that

all bids contain a list of subcontractors if this requirement is immaterial to the evaluation of the bid or proposal.[2]

Bid Method

The local government is required to evaluate bids, without discussion with the bidders, O.C.G.A. § 36-91-21(b)(3), based upon the criteria established in the invitation to bid. Assuming that the bidders who are not responsive and not responsible are eliminated, the only remaining question is lowest price.

Proposal Method

The proposals must be evaluated by the factors identified in the RFP. The local government must determine, in writing, which proposal receives the best score according to the factors identified in the RFP. O.C.G.A. § 36-91-21(c)(1)(C). A copy of the determination must be placed in the contract file.

BE AWARE OF LENGTH OF TIME THAT BID OR PROPOSAL IS OPEN

The limit on the number of days that a bidder or offeror must honor their bid or proposal was included in the Local Government Public Works Construction Law to prevent local governments from indefinitely tying up a contractor's bonding capacity by unreasonably delaying the award of the contract. Particularly in the case of the smaller and medium sized firms, contractors may not be able to get bonds for other projects until they are either awarded the contract or rejected by the local government.

Bid Method

Bidders are only required to honor their bids for 60 days after the bid opening. O.C.G.A. § 36-91-50(b). If the local government has not awarded the contract, it may request that the bidder extend his or her bid for an additional period of time.

The bidder must provide written notice of its willingness to extend the bid before the expiration of 60 days. O.C.G.A. § 36-91-50(b).

Proposal Method

Local governments must specify in the RFP how long an offeror is required to honor their proposal. O.C.G.A. § 36-91-50(c). However, if the contract is not awarded within 60 days, the local government must release any offeror not likely to be selected (i.e., those offerors who are not on the "short list"). O.C.G.A. § 36-91-50(c).

[2] O.C.G.A. § 36-91-20(c) and other sections of the Local Government Public Works Construction Law have been interpreted by the Georgia Supreme Court in R. D. Brown Contractors, Inc. v. Bd. of Educ. of Columbia County, 280 Ga. 210, 626 S.E.2d 471 (Ga. 2006).

WHAT TO DO WHEN THERE IS A BID MISTAKE

In a very limited situation, a bidder or offeror may withdraw his or her bid without forfeiting the bid bond. A bid may not be withdrawn without penalty if it will place the local government in a worse position than if the bid had never been submitted (i.e., when the mistaken bid is the only one submitted). O.C.G.A. § 36-91-52(b)(5). In order to withdraw a bid or proposal without penalty, the following requirements must be met:

- ✓ The mistake must have be an error in calculation, a clerical error, a typographical error or an inadvertent omission. It may not be an error in judgment. O.C.G.A. § 36-91-52(b)(4).
- ✓ The mistake must be documented by clear and convincing written evidence, as well as be clearly shown by looking at the original work papers, documents or materials used to prepare the bid or proposal. O.C.G.A. § 36-91-52(b)(1) and (2).
- ✓ The bid must have been submitted in good faith. O.C.G.A. § 36-91-52(b)(4).
- ✓ The withdrawal cannot unduly prejudice the local government or other bidders by placing them in a materially worse position than if the bid had never been submitted. O.C.G.A. § 36-91-52(b)(5). For example, if the bidder who submitted the mistaken bid is also a subcontractor or part-owner of one of the other bidders on the project, withdrawing the bid may prejudice that other bidder because the mistaken bidder can no longer participate on the project, even as a subcontractor or part-owner. O.C.G.A. § 36-91-52(d).
- ✓ The bidder must notify the local government of the mistake within 48 hours (excluding weekends and legal holidays) of the bid or proposal opening, but before the award of the contract. O.C.G.A. § 36-91-52(b)(3).

If a bidder or offeror withdraws a bid or proposal without penalty because of a mistake, he or she may not later submit a bid or proposal for the work if the project is re-bid. O.C.G.A. § 36-91-52(c). Additionally, he or she may not subcontract with the contractor who is awarded the project or supply material or labor to the project or benefit, directly or indirectly, from the performance of the project. O.C.G.A. § 36-91-52(d).

NEGOTIATE

Bid Method

If the bid from the lowest responsive, responsible bidder is more than the project budget, the local government may negotiate with that bidder to obtain a price within budget. O.C.G.A. § 36-91-21(b)(4). The negotiations may include changes in the scope of work or in the bid requirements.

Proposal Method

As provided in the RFP, a local government may discuss or negotiate with those responsible offerors on the "short list" (i.e., those with proposals that are candidates for award of the contract in accordance with the factors identified in the RFP) for purposes of obtaining a best and final offer. All offerors on the short list must be given the same opportunity to participate in the discussion, negotiations and revisions. However, during this process, the local government may not disclose the contents of proposals to the competing offerors. O.C.G.A. § 36-91-21(c)(2).

Prior to the final award of a public works construction contract, certain records involved in the procurement of the contract are not subject to disclosure under Georgia's Open Records Law. Records that do not have to be released include the engineers' cost estimate either prepared or received by a local government for the project, as well as any rejected or deferred bid proposal. O.C.G.A. § 50-18-72(a)(6)(B). However, once the final award is made, these documents become open records and must be made available to any party requesting them.

AWARD THE CONTRACT

The local government may award the contract or reject all bids or proposals or any bid or proposal that is non-responsive or not responsible. O.C.G.A. § 36-91-20(c). All contracts must be in writing and available for public inspection. O.C.G.A. §§ 36-91-20(a) and 50-18-70 *et seq*. In the case of counties, all contracts must be in writing and approved by the board of commissioners. O.C.G.A. §§ 36-10-1 and 36-91-20(a). The contracts must either be entered on to the meeting minutes or incorporated by reference. O.C.G.A. § 36-1-25. In the case of cities and consolidated governments, the contract must be approved in accordance with the city charter or ordinance. O.C.G.A. § 36-91-20(a).[3]

Contracts that were entered into during an emergency as discussed earlier in this guide must be ratified by the board of commissioners. Both counties and cities must record the nature of the emergency in the minutes. O.C.G.A. § 36-91-22(e). If a local government official receives any pay or profit from a public works construction contract or agrees to receive any pay or profit from a public works construction contract, then he or she may be convicted of a misdemeanor. O.C.G.A. § 36-91-21(f).

Bid Method

If awarded, the contract must be awarded to the lowest responsible and responsive bidder that meets the requirements and criteria established in the invitation to bid. O.C.G.A. § 36-91-21(b)(4).

Proposal Method

The local government must make a written determination of which proposal is most advantageous to the local government based upon the evaluation factors contained in the RFP. O.C.G.A. § 36-91-22(c)(1)(C). The contract file must indicate the basis of the decision. O.C.G.A. § 36-91-21(c)(1)(C). This may be the individual scoring sheets or a tabulation of all of the offerors' scores.

REQUIRE A PERFORMANCE BOND

Performance bonds protect the local government when the contractor fails to complete the project within the time specified by the contract. O.C.G.A. § 36-91-2(11). The local government may recover damages from the surety that wrote the performance bond if the local government institutes an

[3] This section of the statute has been interpreted by the Georgia Supreme Court in Duty Free Air & Ship Supply Co. v. City of Atlanta, 282 Ga. 173, 646 S.E. 2d 48 (2007). In this opinion, the majority found that the statute's requirement that a contract be awarded to the most responsible offeror is subject to any requirements and procedures under local law. *Id*. The dissent disagreed, finding that § 36-91-20(a) related to formalities and not the substantive formation of the contract. *Id*.

action within one year of the completion of the project and acceptance of the work. O.C.G.A. § 36-91-72.

- ✓ Performance bonds in the amount of the contract are required on all contracts subject to the Local Government Public Works Construction Law that are over $100,000. O.C.G.A. § 36-91-70. If the contract is less than $750,000, the local government may accept an irrevocable letter of credit instead of a performance bond. O.C.G.A. § 36-91-71. It is in the discretion of the local government to require performance bonds on contracts of less than $100,000. O.C.G.A. § 36-91-70. If a contractor fails to provide a required performance bond, then the contract is invalid. O.C.G.A. § 36-91-21(g).

- ✓ The local government must receive a performance bond from the contractor awarded the contract, as well as approve the form and solvency of the surety before the contract is signed. O.C.G.A. § 36-91-40(a)(2).

- ✓ The bond surety either must be authorized by the Insurance Commissioner to do business in Georgia or must be on the United States Department of Treasury's list of approved bond sureties. O.C.G.A. § 36-91-40(a)(1). Each July, the Financial Management Service of the Treasury Department provides a list of approved sureties in Circular 570 in the Federal Register. The list may be accessed via the Internet at www.fms.treas.gov/c570 or by contacting the Surety Bond Branch Staff at 3700 East West Highway, Room 6A04, Hyattsville, MD 20782 or (202) 874-6850.

- ✓ If the government believes that the surety has become insolvent, that the surety is no longer approved by the Insurance Commissioner to do business in Georgia or that there are no longer sufficient sureties on the bond, the local government may require the contractor to strengthen the bond or provide a new or additional bond within ten days. O.C.G.A. § 36-91-40(b). The local government may order all work on the contract to cease until the new or strengthened bonds are provided. If they are not provided, then the local government may terminate the contract.

REQUIRE A PAYMENT BOND

Payment bonds protect all of the subcontractors who work for the local government's contractor by ensuring that all of the people who provide labor and supplies on the project are paid. O.C.G.A. § 36-91-2(10). If a local government fails to obtain a payment bond, it may be responsible to all subcontractors and other persons providing labor, equipment or materials if they are not paid by the contractor. O.C.G.A. § 36-91-91. However, if the local government obtains a payment bond, the subcontractors and suppliers cannot initiate an action against the local government for payment. O.C.G.A. § 36-91-93(c).

- ✓ Payment bonds, cashier's checks, certified checks or cash deposits in the amount of the contract are required on all contracts subject to the Local Government Public Works Construction Law that are over $100,000. O.C.G.A. § 36-91-90. It is in the discretion of the local government to require payment bonds for contracts less than $100,000. O.C.G.A. § 36-91-91. If a contractor fails to provide a required payment bond, then the contract is invalid. O.C.G.A. § 36-91-21(g).

- ✓ The local government is required to approve the form and solvency of the surety prior to the execution of the contract. O.C.G.A. § 36-91-40(a)(2). The surety in the bond either must be

authorized by the Insurance Commissioner to do business in Georgia or must be on the United States Department of Treasury's list of approved bond sureties. O.C.G.A. § 36-91-40(a)(1). Each July, the Financial Management Service of the Treasury Department provides a list of approved sureties in Circular 570 in the Federal Register. The list may be accessed via the Internet at www.fms.treas.gov/c570 or by contacting the Surety Bond Branch Staff at 3700 East West Highway, Room 6A04, Hyattsville, MD 20782 or (202) 874-6850.

- ✓ If the local government believes that the surety has become insolvent, that the surety is no longer approved by the Insurance Commissioner to do business in Georgia or that there are no longer sufficient sureties on the bond, the local government may require the contractor to strengthen the bond or provide a new or additional bond within ten days. O.C.G.A. § 36-91-40(b). The local government may order all work on the contract to cease until the new or strengthened bonds are provided. If they are not provided, then the local government may terminate the contract.

- ✓ The local government must provide a certified copy of the bond and a construction contract to any person who provided labor or materials on a project that has not been paid or who is being sued in conjunction with the payment bond. O.C.G.A. § 36-91-94. The person must submit an application with an affidavit stating that he or she supplied labor or materials for the work and that payment has not been made or that he or she is being sued on the payment bond. The local government may charge up to $2.40 for the first page and up to $.50 for all other pages. O.C.G.A. §§ 36-91-94 and 15-6-77(g)(4).

FILE CONTRACTOR'S OATH

Before beginning work on the project, a contractor must make an oath in writing stating that he or she has not directly or indirectly attempted to prevent competition in the procurement of the contract. O.C.G.A. § 36-91-21(e). The local government official responsible for making payments to the contractor must file the oath. If the oath is false, the contract is void and the local government is entitled to recover any moneys paid to the contractor.

PENALTIES FOR FAILURE TO COMPLY THE LOCAL GOVERNMENT PUBLIC WORKS CONSTRUCTION LAW

It is unlawful for a local government to enter into a public works contract subject to the Local Government Public Works Construction Law without properly using either competitive sealed bids or competitive sealed proposals. O.C.G.A. § 36-91-21(a). Any contract entered into without complying with the Local Government Public Works Construction Law is invalid. O.C.G.A. § 36-91-21(g).

If a county commissioner or a city council member receives or agrees to receive any pay or profit, directly or indirectly, from a public works contract, it is a misdemeanor. O.C.G.A. § 36-91-21(f). If the contractor knows that the local government failed to properly advertise the contract opportunity and/or use competitive sealed bids or proposals, then the contractor is not entitled to payment for any of the work performed under the contract. O.C.G.A. § 36-91-21(a).

Part III.
Road Construction Projects

ROAD CONSTRUCTION PROJECTS

The procurement of road construction contracts is subject to the requirements of Chapter 4 of Title 32. Although some of the requirements of the Local Government Public Works Construction Law are incorporated or cross-referenced, most of the requirements for road construction contracts are different than other public works construction contracts. In general, the requirements of Title 32 apply whenever a local government contracts to construct, reconstruct or maintain a public road or bridge with a private contractor, an adjacent county, city, the state or federal government. It includes the purchase of materials, labor, professional services or other things incident to the work. O.C.G.A. §§ 32-4-60, 32-4-62, 32-4-110 and 32-4-112.

AUTHORITY TO CONTRACT

In addition to contracting with private persons or companies, local governments may contract with other governmental entities for road construction. O.C.G.A. § 32-4-60.

County Contracts with Adjoining Counties

A county may contract with an adjoining county for joint work on a road constituting a part of the county road system of both of the counties. O.C.G.A. § 32-4-62(c).

County or City Contracts with the State

In the case of both cities and counties, the DOT may negotiate a contract at the average bid price for similar work advertised during the 60 days prior to the contract. O.C.G.A. §§ 32-2-61(d)(1)(A) and 32-4-112(a). The DOT may subcontract such a contract to any private person or political subdivision. O.C.G.A. § 32-2-61(d)(2). The DOT retains the right to provide planning, contract plans, specifications and engineering supervision. O.C.G.A. § 32-2-61(d)(2). In the case of counties, the Department of Transportation (DOT) may reserve the right to supervise the performance of any such contracts with a state agency. O.C.G.A. § 32-4-62(b).

Contracts between Counties and Cities Located Within County

Construction and maintenance of a public road within the limits of the city may be provided through contract, using either county or city funds. O.C.G.A. §§ 32-4-62(d) and 32-4-112(b). The work may be performed by the city, the county or a contractor hired by either the city or the county. O.C.G.A. § 32-4-112(b)(4).

DETERMINE WHETHER THE PROJECT IS EXEMPT FROM BIDDING REQUIREMENTS

Although road construction contracts typically must be let out to the lowest reliable bidder, some contracts may be negotiated and are exempt from the advertising, bidding and bonding requirements:

✓ Road construction contracts under $20,000

- ✓ Road construction contracts with the state, an adjoining county or a city
- ✓ Contracts to purchase materials, supplies and equipment necessary for the support and maintenance of the county's in-house road construction and maintenance
- ✓ Contracts with a railroad company or a utility for the relocation of lines or tracks that are not in the right of way
- ✓ Contracts for engineering or other professional/specialized services
- ✓ Contracts for emergency maintenance
- ✓ The contract is expressly authorized by law to be negotiated.

O.C.G.A. §§ 32-4-63 and 32-4-113.

USE THE BID METHOD

Except as to the foregoing exceptions, road construction contracts must be let by public, competitive sealed bid. O.C.G.A. §§ 32-4-64, 32-4-65(a), 32-4-114 and 32-4-115(a).

ADVERTISE THE PROJECT

Road construction contract opportunities must be advertised in the legal organ or in any other newspaper that will ensure adequate publicity. O.C.G.A. §§ 32-4-65(a) and 32-4-115(a). Unlike public works construction contracts, there is no provision for advertisement on the Internet. While an Internet website could be used as a supplemental method of advertising a road construction contract opportunity, a local government must still advertise in the legal organ or other newspaper.

The advertisement must run at least two times during the two weeks prior to the bid opening. The first advertisement must two weeks prior to the bid opening. The second advertisement must be one week after the first advertisement. O.C.G.A. §§ 32-4-65(a) and 32-4-115(a). The advertisement must include:

- ✓ A description of the project
- ✓ The time for performance
- ✓ The terms and time of payment
- ✓ The procedure for and costs of obtaining detailed plans and specifications
- ✓ The amount of the proposal guaranty, if required
- ✓ The time and place for the submission and opening of bids
- ✓ The right to reject any or all bids

- ✓ Any bonds required other than performance and payment bonds (e.g., public liability and property damage bonds

O.C.G.A. §§ 32-4-65(b), 32-4-69(3), 32-4-115(b) and 32-4-119(2).

CONSIDER RECOVERING COST OF BID

Bidders may be required to pay a reasonable amount to cover the cost of the bid proposal form, contract and specifications. O.C.G.A. §§ 32-4-66 and 32-4-116.

REQUIRE PROPOSAL GUARANTIES

Bidders, other than those that are submitting bids solely for engineering or kinds of professional services, must submit a proposal guaranty (i.e., certified check or other security) with their bid payable to the local government in the amount necessary to ensure that the successful bidder will execute the contract on which he bid. O.C.G.A. §§ 32-4-67(a) and 32-4-117(a). Similar to bid bonds for public works construction projects, proposal guaranties ensure that the successful bidder honors his or her bid. Failure to sign the contract or furnish the bonds by the successful bidder will result in the forfeit of the proposal guaranty. O.C.G.A. §§ 32-4-72 and 32-4-121.

Proposal guaranties must be returned to a bidder if a written withdrawal of his bid is received before the scheduled bid opening. O.C.G.A. §§ 32-4-67(b) and 32-4-117(b). Proposal guaranties will be returned to all bidders except the lowest reliable bidder. O.C.G.A. §§ 32-4-67(b) and 32-4-117(b).

BE AWARE OF LENGTH OF TIME THAT BID IS OPEN

If no contract is awarded within 30 days of the bid opening, then all bids must be rejected and all proposal guaranties must be returned unless otherwise agreed, in writing, by the lowest reliable bidder and the local government. O.C.G.A. §§ 32-4-67(b) and 32-4-117(b).

BE AWARE OF IMPACT OF OPEN RECORDS LAW

Prior to the final award of a road construction contract, certain records involved in the procurement of a road construction contract are not subject to disclosure under Georgia's Open Records Law. These records that do not have to be released include the engineers' cost estimate either prepared or received by a local government for the project, as well as any rejected or deferred bid proposal. O.C.G.A. § 50-18-72(a)(6)(B). However, once the final award is made, these documents become open records and must be made available to any party requesting them.

AWARD THE CONTRACT

The local government may award the contract, reject any and all bids, re-advertise the project, perform the work in-house or abandon the project. O.C.G.A. §§ 32-4-68 and 32-4-118. If the contract is awarded, it must be to the lowest reliable bidder. O.C.G.A. §§ 32-4-68 and 32-4-118. Contracts must

be approved by resolution of the board of commissioners or the city council and the resolution entered on the minutes. O.C.G.A. §§ 32-4-61, 32-4-111 and 36-10-1. If the successful bidder fails to sign the contract or furnish the bonds, the contract may be re-advertised, performed in-house or abandoned. O.C.G.A. §§ 32-4-72 and 32-4-121.

REQUIRE A PERFORMANCE BOND

On road construction contracts over $5,000, the contractor must provide a performance bond in the amount of the bid for the faithful performance of the contract and to indemnify the local government for any damages should the contract fail to perform the contract on time. O.C.G.A. §§ 32-4-69(1) and 32-4-119(1). Contracts that are exclusively for engineering or other professional services are exempt from this requirement. O.C.G.A. § 32-4-69.

REQUIRE A PAYMENT BOND

On road construction contracts over $5,000, other than those solely for engineering or other professional services, the contractor must provide a payment bond as for public works construction contracts. O.C.G.A. §§ 32-4-69(2) and 32-4-119(1). If the local government fails to obtain a required payment bond, it may be liable to any unpaid subcontractors, laborers or materialmen. O.C.G.A. §§ 32-4-71(a) and 32-4-120.

REQUIRE A BRIDGE REPAIR BOND

In the case of construction or reconstruction to a bridge or the approach to a bridge, counties may require a contractor to provide a bond to keep the bridge in good condition for at least seven years. O.C.G.A. § 32-4-70. The county will be liable for all injuries caused by a defective bridge for seven years if it fails to obtain a bridge repair bond. O.C.G.A. § 32-4-71(b).

CONSIDER OTHER BONDS

Local governments may require additional bonds, such as public liability and property damage bonds, so long as the project advertisement provided notice of the required additional bonds. O.C.G.A. §§ 32-4-69(3) and 32-4-119(2).

FILE CONTRACTOR'S OATH

The successful bidder must execute a written oath stating that he or she has not violated O.C.G.A. § 36-91-21(e) regarding unlawful restriction of competitive bidding. O.C.G.A. §§ 32-4-73 and 32-4-122.

Part IV.
Provisions that Apply to Public Works Construction and Road Construction

PROGRESS PAYMENTS AND RETAINAGE

To ensure that a contract is satisfactorily performed, local governments may pay their contractors in installments as the work progresses. Typically, the contractor submits an itemized payment application showing the materials furnished and the work performed. Depending upon the construction delivery method used, the design professional reviews the application to certify the quality and quantity of the work performed before the local government makes the payment. A portion of the amount due is retained by the local government to help ensure that the project is completed. However, there are legal restrictions on how much may be retained by a local government and how frequently payments must be made.

PROGRESS PAYMENTS AND RETAINAGE FOR PUBLIC WORKS AND ROAD CONSTRUCTION CONTRACTS GENERALLY

The progress payment and retainage provisions for local governments apply to construction contracts, including road construction contracts (other than those let by the Department of Transportation) for less than $150,000.00 in cost or 45 days in duration. O.C.G.A. § 13-10-80(c)(2). Local governments are required to make progress payments at least monthly, based upon the value of work completed plus the value of materials and equipment stored, insured and protected at the construction site or off site, less retainage. O.C.G.A. § 13-10-80(b)(1). Until 50% of the value of the contract (including change orders and additions) is complete and the manner of completion and progress is acceptable to the architect, engineer or other local government representative, up to 10% of each progress payment may be retained by the local government. O.C.G.A. § 13-10-80(b)(2)(A). However, after the contract is 50% complete, local governments may not retain any portion of the progress payments. O.C.G.A. § 13-10-80(b)(2)(A). Retention may be recommenced if the local government's architect, engineer or other authorized contract representative determines that the work is unsatisfactory or behind schedule. O.C.G.A. § 13-10-80(b)(2)(B).

After reasonably satisfactory and substantial completion of the work, the local government must pay the retainage to the contractor within 30 days of invoice and other necessary documentation. O.C.G.A. § 13-10-80(b)(2)(C). However, the local government may withhold 200% of the value of any minor items not completed. O.C.G.A. § 13-10-80(b)(2)(C).

In the local government's discretion and with the contractor's approval, the retainage of each subcontractor may be released separately as the work is completed. O.C.G.A. § 13-10-80(b)(2)(A).

These are the minimum standards to protect contractors and subcontractors. Local governments may extend greater protection. O.C.G.A. § 13-10-80(d).

CONTRACTS FOR THE INSTALLATION, IMPROVEMENT, MAINTENANCE OR REPAIR OF WATER AND SEWER FACILITIES

Counties may either retain a portion of the progress payments or establish an escrow account for contracts to install, improve, maintain or repair water and sewer facilities. O.C.G.A. §§ 13-10-81 and 13-10-82(a).

Retainage

Up to 10% of the gross value of the completed work may be retained until 50% of the work is completed on schedule and to the satisfaction of the county. O.C.G.A. § 13-10-81(a). The county may recommence retainage if it determines that the work is unsatisfactory or behind schedule. O.C.G.A. §13-10-81(a).

The amount retained by the county must be invested at the current market rate and the earned interest submitted to the contractor after completion of the project. O.C.G.A. § 13-10-81(a). Once the project is 50% complete and the county has discontinued retaining a portion of the payments, the county may continue to hold the previously retained funds. O.C.G.A. § 13-10-81(a). However, after reasonably satisfactory substantial completion of the work, the county must pay the retainage within 30 days of receipt of invoice and other documentation. O.C.G.A. § 13-10-81(c). An amount equal to 200% of the value of any incomplete minor items may be held until such items are completed. O.C.G.A. § 13-10-81(c). The contractor may receive final payment of the retained funds and earned interest after the engineer in charge of the project provides certification of satisfactory completion of the contract, plans and specifications. O.C.G.A. § 13-10-81(b).

Escrow account

The contract may require an escrow account in the amount authorized by the contract to be retained. O.C.G.A. § 13-10-82(a). The escrow agent must be a state and national bank chartered in the State of Georgia and the funds may only be invested in negotiable certificates of deposit. O.C.G.A. §§ 13-10-82(b)(1) and 13-10-82(b)(2). The interest earned on the certificates of deposit must be paid to the contractor. O.C.G.A. § 13-10-82(b)(3). The fiscal officer of the county must approve any withdrawals from the escrow account and can demand payment of the balance of the escrow account if the contractor defaults on the contract or if there is overpayment of the contract. O.C.G.A. §§ 13-10-82(b)(4) and 13-10-82(b)(5). The escrow account must be terminated upon completion and acceptance of the contract. O.C.G.A. § 13-10-82(b)(6). The form of the escrow agreement must be approved by the county's fiscal officer. O.C.G.A. § 13-10-82(b)(8).

PROMPT PAYMENT

The Prompt Payment Act applies to counties with a population of 10,000 or more and cities with a population of 2,500 or more. O.C.G.A. § 13-11-2(4). It requires local governments to pay contractors within 15 days of receipt of any payment request based upon completed work or service. O.C.G.A. § 13-11-4(a). However, a local government may withhold payment because:

- ✓ Unsatisfactory job progress, O.C.G.A. § 13-11-5(a);
- ✓ Defective and unremedied construction, O.C.G.A. § 13-11-5(a);
- ✓ Disputed work, O.C.G.A. § 13-11-5(a);
- ✓ Third party claims, O.C.G.A. § 13-11-5(a);
- ✓ Failure of contractor/subcontractor to make timely payments for labor, equipment and materials, O.C.G.A. § 13-11-5(a);
- ✓ Damage caused by the contractor, O.C.G.A. § 13-11-5(a);
- ✓ Reasonable evidence that the contract cannot be completed for the unpaid balance of the contract sum, O.C.G.A. § 13-11-5(a);
- ✓ Retainage, O.C.G.A. § 13-11-5(a).

Failure to pay within 15 days will result in interest being due at the rate of 1% per month if the local government is notified of the provisions of this law at the time the request for payment is made. O.C.G.A. § 13-11-7. The contract may provide a different interest rate or payment period. O.C.G.A. § 13-11-7.

SALES TAX: WHO PAYS?

Although local governments are exempt from paying sales and use tax on the supplies that they purchase, contractors, in most cases, must pay sales and use tax on the equipment and supplies that they purchase for use on county projects. O.C.G.A. § 48-8-3(1). In some instances, contractors are exempt from the local option sales tax (LOST) and special purpose local option sales tax (SPLOST) portions of the sales and use tax for building and construction materials, supplies, fixtures and equipment. For example, if the construction contract was advertised for bid or proposal prior to the referendum to approve either the LOST or the SPLOST, the contractor may be exempt from the LOST or SPLOST portions of the sales taxes otherwise due. O.C.G.A. §§ 48-8-94 and 48-8-118. However, for this exception to apply, the contractor must have entered into a contract with the local government after submitting a bid or proposal in response to the advertisement but prior to the approval of the levy of the tax.

Except in the case of water, gas or sewage systems that serve the public, a contractor cannot avoid payment of the sales and use tax by having a local government purchase supplies for use by the contractor on a public works or road construction project. O.C.G.A. § 48-8-3(2).

While the local government may purchase the supplies tax-free, the contractor will legally be considered the "consumer" of the products and be required to pay the sales and use tax. O.C.G.A. § 48-8-63(c). State law enacted in 2005 requires local governments to make sure that bidders or offerors are aware of their responsibilities to pay sales and use tax. O.C.G.A. § 48-8-63(h)(1) provides that any county or other local government that furnishes materials to a contractor for use in construction, repair or renovation of a public works or road project must give advance notice, in writing, to the contractor as to the amount of sale tax that is owed on the materials provided by the local government to the

contractor. If a county, city or school board fails to give such notice to the contractor, then the local government becomes liable for any taxes owed.

In other words, if the contractor is not made aware of the tax obligation before a bid or proposal is submitted, then the contractor cannot be held accountable for payment of the sales tax due.

Part V.
Sample Forms

Bid or Proposal Newspaper Advertisement

INVITATION TO BID/REQUEST FOR PROPOSAL

Sealed bids/proposals will be received at the _____ County Purchasing Department, located at _____ until _____ a.m./p.m. on _____, 20___ for the following project: _____. *[Include enough details and specifications to inform the public of the extent and character of the project.]*

Bid/Proposal forms, plans and specifications are on file at _____ or may be obtained for a $_____ per set non-refundable fee at _____.

_____ County reserves the right to accept or reject all bids/proposals or any bid/proposal that is non-responsive or not responsible and to waive technicalities.

[If project is subject to additional federal requirements, include the following:]

The award of this project is subject to federal procedures, which may be obtained by contacting _____.

[If there is a prequalification process or mandatory pre-bid conference, include the following:]

All potential bidders/offerors must be pre-qualified. Please contact _____ for further information.

[And/or:]

A mandatory pre-bid conference is scheduled for _____ a.m./p.m. at _____ _____.

[If the contract opportunity will be awarded by competitive sealed proposal, include the following text and attach conceptual program information:]

Additional project specifications are available. Please see attached conceptual program information.

_____

Director of Purchasing

Bid or Proposal Advertisement for the Georgia Local Government Access Internet Webpage

Your Name: _____

Organization: _____ County Board of Commissioners

Type of Organization: _____ County Government

Your Email: _____Phone Number: _____

Info for Listing

Title: *[Insert Project Name]*

Type: *[Select "Request for Proposal" or "Item for Bid"]*

End Date: *[Select a date that is at least four weeks after the initial advertisement]*

Description: _____ County will be accepting sealed bids or proposals until _____ a.m./p.m. on _____, 20___ for the following project: _____ _____. *[Include enough details and specifications to inform the public of the extent and character of the project.]* Bid or Proposal forms, plans and specifications are on file at _____ or may be obtained for a preset non-refundable fee at _____. To receive a copy, please contact _____ at _____.

Each bid/proposal must be submitted in a sealed envelope addressed to _____ at ____ _____. Bids/Proposals received after this time will not be considered. Each sealed envelope containing a bid or proposal must be plainly marked on the outside as "Bid/Proposal for _____" *[insert name of project]* and should include the bidder/offeror's name, address and license number, if applicable. (All bids must be on the required bid form. All blank spaces for bid prices must be typewritten or be handwritten in ink when submitted.) *or* (All proposals must be typewritten or handwritten in ink and contain all of the requested information.) _____ County reserves the right to accept or reject all bids/proposals or any bid/proposal that is non-responsive or not responsible, to waive technicalities or informalities, and to issue change orders altering the original scope of work to address changes or unforeseen conditions necessary for the project completion.

[If project is subject to additional federal requirements, include the following:]

The award of this project is subject to federal procedures, which may be obtained by contacting _____.

[If there is a prequalification process or mandatory pre-bid conference, include the following:]

All potential bidders/offerors must be pre-qualified. Please contact _____ for further information.

[And/or:]

A mandatory pre-bid conference is scheduled for _____ a.m./p.m. at _____ _____.

Prequalification Policy

[Note: A prequalification process is optional. If the county utilizes a mandatory prequalification process, such process must comply with O.C.G.A. § 36-91-20(f).]

When determined to be in the best interest of _____ County by the purchasing agent, potential bidders or offerors on public works construction projects may be required to be meet certain minimum qualifications before being permitted to submit a bid or proposal on a project.

The purchasing agent shall establish minimum criteria that are reasonably related to the specific project or the quality of work of a potential bidder or offeror. Potential bidders and offerors may be required to:

1. Be properly licensed;
2. Have an appropriate amount of experience on similar projects;
3. Provide references on past projects;
4. Provide references to show a history of compliance with applicable laws, regulations and ordinances relating to performance of past projects;
5. Provide evidence that they have the ability to obtain any necessary permits;
6. Provide assurance that the firm has stable financial and human resources and capabilities to successfully perform the project within the time specified without delay or interference;
7. Show that the potential bidder or offeror has the necessary character, integrity, reputation and judgment;
8. Any other criteria that is reasonably related to the specific project or the quality of work of a potential bidder or offeror.

A statement that only pre-qualified bidders or offerors will be permitted to submit bids or proposals on a particular project shall be included in all advertisements for a project where prequalification is required. Similarly, a copy of this policy, the specific prequalification criteria for a particular project and the deadline for submission of the prequalification questionnaire shall be included in the all requests for proposals or invitations to bid and as posted on the _____ County Internet Website *[if the county has a website].* Copies shall also be in the purchasing director's office. This policy and any criteria specific to the project shall be made available to any prospective bidder or offeror or any other member of the public requesting such information.

A complete prequalification packet, which includes a completed prequalification questionnaire and any necessary attachments, must be provided to the purchasing agent prior to the established deadline. All prequalification questionnaires must be typewritten or handwritten in ink. The purchasing director shall evaluate prequalification packets timely submitted according to the criteria established.

[Choose one:]

[No appeal rights for disqualified potential bidder or offeror:]

Potential bidders or offerors submitting prequalification packets shall be notified whether they are pre-qualified or disqualified. The decision of the purchasing agent shall be final. Only pre-qualified bidders or offerors may submit bids or proposals. Disqualified bidders may respond to their disqualification by a letter to the purchasing agent within ten days of notice of disqualification. The opportunity for a disqualified to provide a letter is merely for name clearing purposes; it shall not be construed as a right to appeal, to be reinstated, to protest the process or to protest the award of the project. The purchasing agent shall include a copy of the letter in the contract file and provide copies to any party requesting such information.

[Appeal rights for disqualified potential bidder or offeror:]

Potential bidders or offerors submitting prequalification packets shall be notified whether they are pre-qualified or disqualified. Only pre-qualified bidders or offerors may submit bids or proposals. Disqualified bidders may request, in writing, a hearing before the purchasing agent to be reinstated as a qualified bidder or offeror within five days of the notice of disqualification. The county manager shall set a hearing date not more than seven days following the receipt of the hearing request and shall cause notice of the hearing to be sent to the purchasing agent and the disqualified bidder or offeror. The disqualified bidder or offeror shall be allowed the opportunity to provide information or evidence that he or she met the minimum prequalification criteria for the project. The purchasing agent may provide information or evidence that the disqualified bidder or offeror did not meet the minimum criteria for the project. The disqualified bidder or offeror forfeits the privilege of a hearing if he or she fails to attend the scheduled hearing. Within five days of the hearing, the county manager shall issue a decision, which shall be final. Nothing in the procedure shall give any disqualified bidder or offeror the right to protest the award of the project. Failure to file a request for a hearing within the prescribed time or failure to attend a hearing shall be deemed a material prejudice to the interests of _____ County and shall constitute an absolute waiver of any right to pursue an action, if any, for failure to be deemed qualified.

Prequalification/Qualification Questionnaire

[Note: This form may be adapted for use as either a prequalification questionnaire or a QBS request for statement of qualification. A prequalification process is optional. However, if the county utilizes a mandatory prequalification process, such process must comply with O.C.G.A. § 36-91-20(f). A sample policy for prequalification is included in this guidebook.]

NAME OF PROJECT:_____

PROJECT SCOPE: _____

_____

_____

NAME OF PROPOSED CONTRACTOR:_____

INSTRUCTIONS

All questions must be fully answered in ink. If additional space is needed, additional pages should be attached and clearly labeled. Copies of other documents that will answer a question may be attached if clearly labeled.

The county may contact each and every reference provided, as well as any entity referenced in response to any question. The contractor, by completing this questionnaire, expressly agrees that any information concerning the contractor in possession of other entities and references may be made available to the owner.

The contractor warrants that, to the best of its knowledge and belief, the responses contained herein are true, accurate and complete. The contractor also acknowledges that the county is relying on the truth and accuracy of the responses contained herein. If it is later discovered that any material information given in response to a question was provided by the contractor is false, it shall constitute grounds for immediate termination or rescission by the county of any subsequent agreement between the county and the contractor.

If there are any questions concerning the completion of this form, the contractor is encouraged to contact _____*[insert the county manager, administrator, purchasing agent or other official administering the procurement of public works contract].*

If the contractor is a corporation, this questionnaire must be signed by either the president of vice-president of the corporation and attested by either the secretary or assistant secretary. If the contractor is a partnership, then at least one of the partners must provide a notarized signature. If the contractor is an individual, then he or she must have his or her signature notarized.

The completed questionnaire with any relevant attachments must be completed and returned in a sealed envelope with project name, contractor name and "Qualification Packet" clearly labeled on the outside, no later than _____ to:_____
_____
_____

This form, its completion by the contractor and its use by the county shall not give rise to any liability on the part of the county to the contractor or any third party or person.

No guarantee is made or implied that the project will be constructed in whole or in part. The contractor accepts all risk and costs associated with the completion of the prequalification packet.

Any contractor disqualified by this process that wishes to address the disqualification may *[insert the process that the county has selected].*

GENERAL BACKGROUND

1. Current name and address of contractor:
_____
_____
_____
_____

2. If a joint venture, list all of the participants:
_____
_____
_____
_____

3. Previous name or address of contractor, in any:
_____
_____
_____
_____

4. (a) Current president or chief executive officer: _____
   (b) Years in that position: _____

5. Number of permanent employees: _____

6. Name and addresses of current affiliated companies (parent, subsidiary, divisions):
_____
_____
_____
_____

7. List all state licenses held by contractor:

_____
_____
_____
_____

FINANCIAL STATUS

1. Please attach financial statements for the past three years. If such statements are not available, please furnish the following information for the last three completed fiscal years:

LAST COMPLETE FISCAL YEAR

For Year Ending _____
Gross Revenues _____
Gross Expenditures _____
Gross Overhead and Administrative Cost _____
Gross Profit _____

YEAR PRIOR TO LAST COMPLETED FISCAL YEAR

For Year Ending _____
Gross Revenues _____
Gross Expenditures _____
Gross Overhead and Administrative Cost _____
Gross Profit _____

TWO YEARS PRIOR TO LAST COMPLETED FISCAL YEAR

For Year Ending _____
Gross Revenues _____
Gross Expenditures _____
Gross Overhead and Administrative Cost _____
Gross Profit _____

2. Contractor's Dunn and Bradstreet number: _____

3. Has the contractor, or any of its parents or subsidiaries, ever had a bankruptcy petition filed in its name, voluntarily or involuntarily? If so, please specify the date, circumstances and resolution.

_____
_____
_____
_____

4. Has any majority shareholder ever had a bankruptcy petition filed in his/her name voluntarily or involuntarily? If yes, please specify the date, circumstances and resolution.

_____
_____
_____
_____

5. Is contractor currently in default on any loan agreement or financing agreement with any bank, financial institution or other entity? If yes, please specify the details, circumstances and prospects for resolution.

_____
_____
_____
_____
_____

6. (a) What is contractor's current bonding capacity? _____
   (b) What is contractor's current unencumbered bonding capacity? _____

7. Please identify the contractor's surety company.

_____
_____

8. Please give the name, address and telephone number of the contractor's current surety agent or underwriting contact.

_____
_____
_____
_____

9. Have performance or payment bond claims ever been made to a surety for this contractor on any project, past or present? If so, please state the approximate date of each claim and identify whether the surety paid any.

_____
_____
_____
_____

10. In the past five years, has any surety company refused to bond the contractor on any project? If so, please specify the reasons given for that refusal and the name and address of the surety company.

_____
_____
_____
_____

11. In the past five years, has any surety company refused to bond the contractor's parent or subsidiaries on any project? If so, please specify the reasons given for that refusal and the name of the surety company.

_____
_____
_____
_____

REFERENCES

1. Please provide two bank references.

   Name: _____
   Address: _____
   City and State _____
   Contact: _____
   Phone: _____

   Name: _____
   Address: _____
   City and State _____
   Contact: _____
   Phone: _____

2. Please provide at least two major subcontractors as references.

   Name: _____
   Address: _____
   City and State: _____
   Contact: _____
   Phone: _____

   Name: _____
   Address: _____
   City and State: _____
   Contact: _____
   Phone: _____

3. Please provide at least two major suppliers as references.

   Name: _____
   Address: _____
   City and State: _____
   Contact: _____
   Phone: _____

Name: _____
Address: _____
City and State: _____
Contact: _____
Phone: _____

4. Please provide at least four owners as reference. Include at least two governmental owners.

Project Name: _____
Location: _____
Contract Price: _____
Owner: _____
Address: _____
City and State: _____
Contact: _____
Phone: _____
Architect or Engineer: _____
Contact: _____
Phone: _____

Project Name: _____
Location: _____
Contract Price: _____
Owner: _____
Address: _____
City and State: _____
Contact: _____
Phone: _____
Architect or Engineer: _____
Contact: _____
Phone: _____

Project Name: _____
Location: _____
Contract Price: _____
Owner: _____
Address: _____
City and State: _____
Contact: _____
Phone: _____
Architect or Engineer: _____
Contact: _____
Phone: _____

Project Name: _____
Location: _____
Contract Price: _____
Owner: _____
Address: _____
City and State: _____
Contact: _____
Phone: _____
Architect or Engineer: _____
Contact: _____
Phone: _____

SIMILAR PROJECT EXPERIENCE

1. Please list all projects of reasonably similar nature, scope and duration performed by contractor in the past seven years, specifying, where possible, the name and last known address of each owner of those projects. Identify any projects performed in Georgia, as well as any public works projects.

_____
_____
_____
_____
_____
_____
_____

2. Of the projects listed in response to question 1 above, identify any that were the subject of a substantial claim or lawsuit by or against the contractor. Please identify in your response the nature of such claim or lawsuit, the court in which the case was filed and the details of its resolution.

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

3. Has contractor ever failed to complete a project? If so, please provide explanation.

MANAGEMENT PRACTICES

1. Please identify any lawsuits, administrative proceedings or hearings initiated by the National Labor Relations Board or similar state agency in the past seven years concerning any labor practices of the contractor. Identify the nature of any proceeding and its ultimate resolution.

2. Please identify any lawsuits, administrative proceedings, hearings or fines initiated by the Occupational Safety and Health Administration (OSHA) concerning the project safety practices of the contractor in the past seven years. Identify the nature of any proceeding and its ultimate resolution.

3. List contractor's OSHA incident rates for the last three years. OSHA Form No. 200. ((Total incidents x 200,000 hours) divided by (number of hours worked) = incidence rate.). Specify the rates for: (a) fatalities; (b) injuries and illnesses with lost work days; and (c) injuries and illnesses with restricted work days.

4. List contractor's workers' compensation experience modification rates (EMR) for the last three years.

_____
_____
_____
_____
_____
_____

5. (a) Does contractor have a written safety program? If so, attach outline of program.

_____

(b) Does the plan require health and safety training of subcontractors? ___
(c) Is documentation of health and safety training required? _____
(d) Does contractor have a Hazard Communication Program (29 CFR 1910.1200, CCR Title 8 Section 5194)?_____
(e) Does contractor have a Confined Space Entry and Rescue Program (29 CFR 1910.146, CCR Title 8 Section 5156-5159)? _____
(d) Does contractor have a "Hot Work" permit program (29 CFR 1910.146, CCR Title 8 Section 5156-5159)? _____
(e) Does contractor have a "Lock-Out/Tag-Out" program (29 CFR 1910.417)? _____
_____

6. Does contractor have an equipment maintenance program for:
(a) Ladders? _____
(b) Scaffolds? _____
(c) Heavy Equipment? _____
(d) Vehicles? _____
(e) Miscellaneous construction tools and equipment? _____

7. If contractor has a new employee safety orientation program, does it include instruction on:

(a) Contractor's safety policy? _____
(b) Contractor's safety rules? _____
(c) Safety meeting attendance? _____
(d) Contractor safety record? _____
(e) Hazard recognition? _____
(f) Hazard reporting? _____
(g) Injury reporting? _____
(h) Non-injury accident reporting? _____
(i) Personal protective equipment? _____
(j) Respiratory protection? _____
(k) Fire protection? _____
(l) Housekeeping? _____
(m) Toxic substance? _____
(n) Electrical safety? _____

(o) Fall protection? _____
(p) Driving safety? _____
(q) First-aid/CPR? _____
(r) Hearing conservation _____
(s) Lock-out/tag-out? _____
(t) Blood borne pathogens? _____
(u) Asbestos? _____
(v) Confined spaces? _____
(w) Hazard communication? _____

8. Does contractor conduct safety meetings for employees? How often?

_____
_____
_____

9. Does contractor conduct health and safety audits of works in progress? If so, how often are the audits conducted? Who conducts the audits?

_____
_____
_____

10. Is safety a criterion in evaluating the performance of employees? Supervisors? Management?

_____
_____
_____

11. Does contractor have a drug and alcohol testing policy?

_____
_____
_____

12. Please identify any lawsuits, administrative proceedings or hearings initiated by the Internal Revenue Service or any state revenue department concerning the tax liability of the contractor (other than audits) in the past seven years. Identify the nature of any proceeding and its ultimate resolution.

_____
_____
_____
_____
_____
_____
_____
_____

13. Have any criminal proceedings or investigations been brought against the Contractor in the past ten years? If the answer is yes, please attach a complete and detailed report with your responses to this Questionnaire.

PROPOSED PROJECT PERSONNEL

1. Please list the name, qualifications and background of the contractor's proposed project manger for this project. Include the names and addresses of companies with which he/she has been affiliated in the past five years. Indicate whether the contractor commits to making the proposed project manager available for the duration of the project.

2. Please list at least three projects, by size, type and duration that the proposed project manager has managed in the past five years for the contractor or for any other company.

3. Please list the qualifications and background of contractor's proposed job superintendent (if different than the project manager). Include the names and addresses of any companies with which he/she has been affiliated in the past five years. Indicate whether the proposed job superintended will be made available for the duration of the project.

4. Please list at least three projects, by size, type and duration that the proposed job superintendent has supervised in the past five years, for the contractor or for any other company.

COMMENTS

Please list any additional information that you believe would assist the County in evaluating the possibility of using the contractor on this project.

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

I certify to the _____ County and to any construction or permanent lender of the project that the information and responses provided on this questionnaire are true, accurate and complete. _____ County or any construction or permanent lender of the project may contact any entity or reference listed in this questionnaire. Each entity or reference may make any information concerning the contractor available to _____ County or to any lender of __ _____ County.

Dated _____, 20___.

CONTRACTOR:

_____
_____

By: _____
Title: _____

Sworn to and subscribed before
me this _____ day of _____,
20_____.

_____
Notary Public

My Commission Expires:

_____

Bid Bond

KNOW ALL MEN BY THESE PRESENTS THAT WE _____ *[Insert contractor's name]*, as Principal, hereinafter called the Principal, and (Surety) _____ _____a corporation duly organized under the laws of the State of _____ as Surety, hereinafter called the Surety, and held and firmly bound unto

_____County
_____ *[Insert address]*
_____

as Obligee, hereinafter called Obligee, in the sum of _____ Dollars (_____), or __ _____(_____%) percent of the amount bid, whichever is less, for the payment of which sum well and truly to be made, the said Principal and the said Surety, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has submitted a bid for:

[Insert name, address and description of project.]

NOW, THEREFORE, if the Obligee shall accept the bid of the Principal and the Principal shall enter into a Contract with the Obligee in accordance with the terms of such bid and give such bonds or bond as may be specified in the bidding or Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the Principal to enter such Contract and give such bond or bonds, if the Principal shall pay to the Obligee the difference not to exceed the penalty hereof between the amount specified in said bid and such larger amount for which the Obligee may in good faith contract with another party to perform the Work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect.

Signed and Sealed this _____ day of _____, 2____.

_____
(Principal)

_____ By: _____
(Witness) (Title)

(Source: Robert L. Crewdson, Alston & Bird LLP, Atlanta, Georgia (404) 881-7291)

Proposal Method Interview Rating Form

Project _____ Date _____

Name of Firm, Joint Venture or Contractor _____

Lead Presenter _____ Years in Business _____

Is Lead Presenter the Proposed Project Manager? _____

Evaluation Factors		Score
General Professional Experience		
Total for General Professional Experience *(Maximum possible score for General Professional Experience is _____)*		_____
Specific Professional Experience for This Type of Work		
Environmental aspects	_____	
Technical aspects	_____	
Operational aspects	_____	
Maintenance aspects	_____	
Public and community aspects	_____	
Track record on performance time	_____	
Track record on cost and control	_____	
Total for Professional Experience *(Maximum possible score for Specific Professional Experience is _____)*		_____
Proposed Consultants or Subcontractors		
Satisfaction with the extent of participation of consultants/subcontractors	_____	
Appropriateness of responsibility level for consultants/subcontractors	_____	
Satisfaction with the extent of participation of consultants/subcontractors	_____	
Total for Proposed Consultants and Subcontractors *(Maximum possible score for Proposed Use of Consultants/Subcontractors is _____)*		_____
Project Approach		
Logical sequence and organization	_____	
Innovative methods or concepts	_____	
Total for Project Approach *(Maximum possible score for Project Approach is _____)*		_____

Qualifications of Proposed Project Manager

Relevant personal professional experience _____
Ability to express ideas _____
Ability to manage the working team _____
Commitment to remain available for duration of project _____
Ability to work with county _____

Total for Qualifications of Proposed Project Manager _____
(Maximum possible score for Qualifications of Proposed Project Manger is _____)

Adequacy of Proposed Staff Resources

Adequate number of proposed staff _____
Adequate type and quality of proposed staff _____
Adequacy of commitment to designate staff for project duration _____

Total for Adequacy of Proposed Staff Resources _____
(Maximum possible score for Adequacy of Proposed Staff Resources is _____)

Quality of Presentation

Clarity of presentation _____
Completeness of presentation _____
Quality of audio-visuals (if used) _____
Response to questions _____

Total for Quality of Presentation _____
(Maximum possible score for Quality of Presentation is _____)

Contractor's Total Score _____

Comments

_____

_____

[Note: The score assigned to particular firm on any one evaluation factor may not exceed the established maximum possible score designated for that factor. The evaluation factors, and their relative rate, must have been included in the request for proposal. The total scores may be entered into the Compilation of Interview Rating Form. Either or both of these forms may be used to comply with the requirement of O.C.G.A. § 36-91-21(c)(1)(C) that the contract file contain written documentation of the basis of the decision.]

Sample Compilation of Interview Rating Form

[The scores given by each individual preparing an Interview Rating Form should be tabulated and entered onto this form. This form may be used to comply with the requirement of O.C.G.A. § 36-91-21(c)(1)C) that the contract file contain written documentation of the basis of the decision.]

Project _____ Date _____

	Total for Contractor #1	Total for Contractor #2	Total for Contractor #3
General Professional Experience			
Specific Professional Experience			
Proposed Consultants and Subcontractors			
Project Approach			
Qualifications of Manager			
Adequacy of Staff Resources			
Quality of Presentation			
Total			

Apparent Best Offer: _____

[Note: The firm/contractor with the best score is the apparent best offer].

Performance Bond

KNOW ALL MEN BY THESE PRESENTS _____*[Insert name of contractor]* (hereinafter called the "Principal") and _____*[Insert name of surety]* (hereinafter called the "Surety"), are held and firmly bound unto _____ County (hereinafter called the "Owner") and their successors and assigns, in the penal sum of ___ _____Dollars ($_____), lawful money of the United States of America, for the payment of which the Principal and the Surety bind themselves, their administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered, or is about to enter, into a certain written contract with the Owner, dated _____ which is incorporated herein by reference in its entirety (hereinafter called the "Construction Contract"), for the _____ *[description of the project]*, more particularly described in the Construction Contract (hereinafter called the "Project"); and

NOW, THEREFORE, the conditions of this obligation are as follows, that if the Principal shall fully and completely perform all the undertakings, covenants, terms, conditions, warranties, and guarantees contained in the Construction Contract, including all modifications, amendments, changes, deletions, additions, and alterations thereto that may hereafter be made, then this obligation shall be void; otherwise, it shall remain in full force and effect.

Whenever the Principal shall be, and declared by the Owner to be, in default under the Construction Contract, the Surety shall promptly remedy the default as follows:

1) Complete the Construction Contract in accordance with the terms and conditions; or

2) Obtain a bid or bids for completing the Construction Contract in accordance with its terms and conditions, and upon determination by the Surety and the Owner of the lowest responsible bidder, arrange for a contract between such bidder and Owner and make available as the work progresses (even though there should be a default or succession of defaults under the Construction Contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the Surety maybe liable hereunder, the penal sum set forth in the first paragraph hereof, as may be adjusted, and the Surety shall make available and pay to the Owner the funds required by this Paragraph prior to the payment of the Owner of the balance of the contract price, or any portion thereof. The term "balance of the contract price," as used in this paragraph, shall mean the total amount payable by the Owner to the Contractor under the Construction Contract, and any amendments thereto, less the amount paid by the Owner to the Contractor; or, at the option of the Owner,

3) Allow Owner to compute the work and reimburse the Owner for all reasonable costs incurred in completing the work.

In addition to performing as required in the above paragraphs, the Surety shall indemnify and hold harmless the Owner from any and all losses, liability and damages, claims, judgments, liens, costs, and fees of every description, including reasonable attorney's fees, litigation costs and expert witness fees, which the Owner may incur, sustain, or suffer by reason of the failure or default on the part of the Principal in the performance of any or all of the terms, provisions, and requirements of the Construction Contract, including any and all amendments and modifications thereto, or incurred by the Owner in making good any such failure to performance on the part of the Principal.

The Surety shall commence performance of its obligations and undertakings under this Bond promptly and without delay, after written notice from the Owner to the Surety.

The Surety hereby waives notice of any and all modifications, omissions, additions, changes, alterations, extensions of time, changes in payment terms, and any other amendments in or about the Construction Contract, and agrees that the obligations undertaken by this bond shall not be impaired in any manner by reason of any such modifications, omissions, additions, changes, alterations, extensions of time, change in payment terms, and amendments.

The Surety hereby agrees that this bond shall be deemed amended automatically and immediately, without formal or separate amendments hereto, upon any amendment to the Construction Contract, so as to bind the Principal and the Surety to the full and faithful performance of the Construction Contract as so amended or modified, and so as to increase the penal sum to the adjusted Contract Price of the Construction Contract.

No right of action shall accrue on this bond to or for the use of any person, entity, or corporation other than the Owner and any other obligee named herein, or their executors, administrators, successors or assigns.

This Bond is intended to comply with O.C.G.A. § 36-91-70, and shall be interpreted so as to comply with the minimum requirements thereof. However, in the event the express language of this bond extends protection to the Owner beyond that contemplated by O.C.G.A. § 36-91-70, or any other statutory law applicable to this Project, then the additional protection shall be enforced in favor of the Owner, whether or not such protection is found in the applicable statutes.

IN WITNESS WHEREOF the undersigned have caused this instrument to be executed and their respective corporate seals to be affixed and attested by their duly authorized representatives this __ day of _____, 2____.

_____(SEAL)

(Principal)

By:_____

Attest:

_____

Secretary

_____(SEAL)

By:_____

_____

Attest:

_____

Secretary

[Attach Power of Attorney]

(Source: Robert L. Crewdson, Alston & Bird LLP, Atlanta, Georgia (404) 881-7291)

Payment Bond

KNOW ALL MEN BY THESE PRESENTS that _____ *[Insert name of contractor]* (hereinafter called the "Principal") and _____ *[Insert name of surety]* (hereinafter called the "Surety"), are held and firmly bound unto _____ County, (hereinafter called the "Owner"), its successors and assigns as obligee, in the penal sum of *[Insert contract amount*], lawful money of the United States of America, for the payment of which the Principal and the Surety bind themselves, their administrators, executors, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered, or is about to enter, into a certain written contract with the Owner, dated *[insert date of contract]*, which is incorporated herein by reference in its entirety (hereinafter called the "Construction Contract"), for the construction of a project known as *[insert name of project]*, as more particularly described in the Construction Contract (hereinafter called the "Project");

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall promptly make payment to all persons working on or supplying labor or materials under the Construction Contract, and any amendments thereto, with regard to labor or materials furnished and used in the Project, and with regard to labor or materials furnished but not so used, then this obligation shall be void; but otherwise it shall remain in full force and effect.

1. A "Claimant" shall be defined herein as any subcontractor, person, party, partnership, corporation or other entity furnishing labor, services, or materials used, or reasonably required for use, in the performance of the Construction Contract, without regard to whether such labor, services, or materials were sold, leased, or rented, and without regard to whether such Claimant is or is not in privity of contract with the Principal or any subcontractor performing work on the Project, including, but not limited to, the following labor, services, or materials: water, gas, power, light, heat, oil, gasoline, telephone service, or rental of equipment directly applicable to the Construction Contract.
2. In the event a Claimant files a claim against the Owner, or the property of the Owner, and the Principal fails or refuses to satisfy or discharge it promptly, the Surety shall satisfy or discharge the claim promptly upon written notice from the Owner, either by bond or as otherwise provided in the Construction Contract.
3. The Surety hereby waives notice of any and all modifications, omissions, additions, changes, alterations, extensions of time, changes in payment terms, and any other amendments in or about the Construction Contract and agrees that the obligations undertaken by this bond shall not be impaired in any manner by reason of any such modifications, omissions, additions, changes, alterations, extensions of time, changes in payment terms, and amendments.

4. The Surety hereby agrees that this Bond shall be deemed amended automatically and immediately, without formal or separate amendments hereto, upon any amendment or modification to the Construction Contract, so as to bind the Principal and Surety, jointly and severally, to the full payment of any Claimant under the Construction Contract, as amended or modified, provided only that the Surety shall not be liable for more than the penal sum of the Bond, as specified in the first paragraph hereof.

5. This Bond is made for the use and benefit of all persons, firms, and corporations who or which may furnish any materials or perform any labor for or on account of the construction to be performed or supplied under the Construction Contract, and any amendments thereto, and they and each of them may sue hereon.

6. No action may be maintained on this Bond after one (1) year from the date the last services, labor, or materials were provided under the Construction Contract by the Claimant prosecuting said action.

7. This Bond in intended to comply with O.C.G.A. § 36-91-90, and shall be interpreted so as to comply with the minimum requirements thereof. However, in the event the express language of this Bond extends protection to the Owner beyond that contemplated by O.C.G.A. § 36-91-90, or any other statutory law applicable to this Project, then the additional protection shall be enforced in favor of the Owner, whether or not such protection is found in the applicable statutes.

IN WITNESS WHEREOF, the Principal and Surety have hereunto affixed their corporate seals and caused this obligation to be signed by their duly authorized representatives this _____ of _____, 2____.

Attest: *[Principal]*

_____ _____

Title

Attest: *[Surety]*

_____ _____

Title

(Source: Robert L. Crewdson, Alston & Bird LLP, Atlanta, Georgia (404) 881-7291)

Part VI.

Relevant Code Sections

Title 13: Retainage and Progress Payments

§ 13-10-80.

(a) As used in this Code section, the term:

(1) "Contractor" means a person having a direct contract with the owner.

(2) "Lower tier subcontractor" means a person other than a contractor having a direct contract with a subcontractor.

(3) "Owner" means the state, any county, municipal corporation, authority, board of education, or other public board, public body, department, agency, instrumentality, or political subdivision of the state.

(4) "Owner's authorized contract representative" means the architect or engineer in charge of the project for the owner or such other contract representative or officer as designated in the contract documents as the party representing the owner's interest regarding administration and oversight of the project.

(5) "Subcontractor" means a person other than an owner having a direct contract with the contractor.

(b) In any public works construction contract entered into on or after July 1, 2001, with an owner, as defined in paragraph (3) of subsection (a) of this Code section, such contract shall provide for the following:

(1) After work has commenced at the construction site, progress payments to be made on some periodic basis, and at least monthly, based on the value of work completed as may be provided in the contract documents plus the value of materials and equipment suitably stored, insured, and protected at the construction site and at the owner's discretion such materials and equipment suitably stored, insured, and protected off site at a location approved by the owner's authorized contract representative when allowed by the contract documents, less retainage; and

(2)(A) Retainage to a maximum of 10 percent of each progress payment; provided, however, when 50 percent of the contract value including change orders and other additions to the contract value provided for by the contract documents is due and the manner of completion of the contract work and its progress are reasonably satisfactory to the owner's authorized contract representative, the owner shall withhold no more retainage. At the discretion of the owner and with the approval of the contractor, the retainage of each subcontractor may be released separately as the subcontractor completes his or her work.

(B) If, after discontinuing the retention, the owner's authorized contract representative determines that the work is unsatisfactory or has fallen behind schedule, retention may be resumed at the previous level. If retention is resumed by an owner, the contractor and subcontractors shall be entitled to resume withholding retainage accordingly.

(C) At substantial completion of the work or such other standard of completion as may be provided in the contract documents and as the owner's authorized contract representative determines the work to be reasonably satisfactory, the owner shall, within 30 days after invoice and other appropriate documentation as may be required by the contract documents are provided, pay the retainage to the contractor. If at that time there are any remaining incomplete minor items, an amount equal to 200 percent of the value of each item as determined by the owner's authorized contract representative shall be withheld until such item or items are completed. The reduced retainage shall be shared by the contractor and subcontractors as their interests may appear.

(D) The contractor shall, within ten days from the contractor's receipt of retainage from the owner, pass through payments to subcontractors and shall reduce each subcontractor's retainage in the same manner as the contractors retainage is reduced by the owner; provided, however, that the value of each subcontractor's work complete and in place equals 50 percent of his or her subcontract value, including approved change orders and other additions to the subcontract value, provided, further, that the work of the subcontractor is proceeding satisfactorily and the subcontractor has provided or provides such satisfactory reasonable assurances of continued performance and financial responsibility to complete his or her work including any warranty work as the contractor in his or her reasonable discretion may require, including, but not limited to, a payment and performance bond.

(E) The subcontractor shall, within ten days from the subcontractor's receipt of retainage from the contractor, pass through payments to lower tier subcontractors and shall reduce each lower tier subcontractor's retainage in the same manner as the subcontractors retainage is reduced by the contractor; provided, however, that the value of each lower tier subcontractor's work complete and in place equals 50 percent of his or her subcontract value, including approved change orders and other additions to the subcontract value; provided, further, that the work of the lower tier subcontractor is proceeding satisfactorily and the lower tier subcontractor has provided or provides such satisfactory reasonable assurances of continued performance and financial responsibility to complete his or her work including any warranty work as the subcontractor in his or her reasonable discretion may require, including, but not limited to, a payment and performance bond.

(c) This Code section shall not apply to:

(1) Any contracts let by the Department of Transportation of this state for the construction, improvement, or maintenance of roads or highways in this state or purposes incidental thereto; or

(2) Any contracts whose value or duration at the time of the award does not exceed $150,000.00 or 45 days in duration.

(d) Contract and subcontract provisions inconsistent with the benefits extended to contractors, subcontractors, and lower tier subcontractors by this Code section shall be unenforceable; provided, however, that nothing in this Code section shall render unenforceable any contract or subcontract provisions allowing greater benefits to be extended to such contractors, subcontractors, or lower tier subcontractors, the provisions and benefits of this Code section being minimal only.

(e) Nothing shall preclude a payor under this Code section, prior to making a payment, from requiring the payee to submit satisfactory evidence that all payrolls, material bills, and other indebtedness connected with the work have been paid.

§ 13-10-81.

(a) Any department, agency, or instrumentality of the state or any political subdivision of the state is authorized to insert in the specifications of all contracts relating to the installation, extension, improvement, maintenance, or repair of any water or sewer facility a clause providing for the retention of amounts not exceeding 10 percent of the gross value of the completed work as may be provided for in the contract; provided, however, that no amounts shall be retained on estimates or progress payments submitted after 50 percent of the work on the project has been completed if in the opinion of the department, agency, or instrumentality of the state or any political subdivision thereof such work is satisfactory and has been completed on schedule. This will not affect the retained amounts on the first 50 percent of the work on the project which may continue to be held to ensure satisfactory completion of the project. If, after discontinuing the retention, the department, agency, or instrumentality of the state or any political subdivision thereof determines that the work is unsatisfactory or has fallen behind schedule, retention may be resumed at the previous level. Retainage shall be invested at the current market rate and any interest earned on the retained amount by such department, agency, or instrumentality of the state or any political subdivision of the state shall be paid to the contractor when the project has been completed within the time limits specified and for the price specified in the contract, or in any amendments or change orders approved in accord with the terms of the contract, as certified pursuant to subsection (b) of this Code section.

(b) Final payment of the retained amounts to the contractor under the contract to which the retained amounts relate shall be made after certification by the engineer in charge of the project covered by the contract that the work has been satisfactorily completed and is accepted in accordance with the contract, plans, and specifications. Payment to the contractor of interest earned on the retained amounts shall be made after certification by the engineer in charge of the project covered by the contract that the work has been completed within the time specified and within the price specified in the contract.

(c) At substantial completion of the work and as the governmental entity's authorized contract representative determines the work to be reasonably satisfactory, the governmental entity shall within 30 days after invoice and other appropriate documentation as may be required by the contract documents are provided pay the retainage to the contractor.

If at that time there are any remaining incomplete minor items, an amount equal to 200 percent of the value of each item as determined by the governmental entity's authorized contract representative shall be withheld until such item or items are completed.

§ 13-10-82.

(a) In lieu of the retained amounts provided for in Code Section 13-10-81, any department, agency, or instrumentality of the state or any political subdivision of the state is authorized to insert a clause in the specifications of all contracts provided for in Code Section 13-10-81, providing for an alternate procedure for the maintenance of an escrow account in an amount at least equal to the amount authorized to be retained by the contract.
(b) Any such escrow agreement entered into pursuant to this Code section must contain as a minimum the following provisions:

(1) Only state or national banks chartered within the State of Georgia may serve as an escrow agent;

(2) The escrow agent must limit the investment of funds of the contractor held in escrow in lieu of retained amounts provided for in Code Section 13-10-81 to negotiable certificates of deposits issued by any state or national bank in the State of Georgia (including, but not limited to, certificates of deposit issued by the bank acting as escrow agent) registered in the name of the escrow agent as such under escrow agreement with the contractor;

(3) As interest on certificates of deposit held in escrow becomes due, it shall be collected by the escrow agent and paid to the contractor;

(4) The escrow agent shall promptly acknowledge to the appropriate fiscal officer the amount and value of the escrow account held by the escrow agent, and any additions to the escrow account shall be reported immediately. Withdrawals from the escrow account shall only be made subject to the written approval of the fiscal officer of the department, agency, or instrumentality of the state or any political subdivision entering into the contract;

(5) Upon default or overpayment of any contract subject to the procedure provided for in this Code section and upon the written demand of the fiscal officer provided for in paragraph (4) of this subsection, the escrow agent shall within ten days deliver a certified check to the appropriate fiscal officer in the amount of the escrow account balance relating to the contract in default;

(6) The escrow account may be terminated upon completion and acceptance of the contract as provided for in Code Section 13-10-81;

(7) All fees and expenses of the escrow agent shall be paid by the contractor to the escrow agent and, if not paid, shall constitute a lien on the interest accruing to the escrow account and shall be paid therefrom;

(8) The escrow account shall constitute a specific pledge to the state or any political subdivision and the contractor shall not, except to his or her surety, otherwise assign, pledge, discount, sell, or transfer his or her interest in said escrow account, the funds of which shall not be subject to levy, garnishment, attachment, or any other process whatsoever; and

(9) The form of the escrow agreement and provisions thereof in compliance with this Code section, as well as such other provisions as the appropriate fiscal officer shall from time to time prescribe, shall be subject to written approval of the fiscal officer. The approval of the escrow agreement by the appropriate fiscal officer shall authorize the escrow agent to accept appointment in such capacity.

(c) The department, agency, or instrumentality of the state or political subdivision of this state shall not be liable to the contractor or his or her surety for the failure of the escrow agent to perform under the escrow agreement or for the failure of any bank to honor certificates of deposit issued by it which are held in the escrow account.

§ 13-10-83.

Nothing in this article shall be construed or deemed to affect any contract covered by the provisions of Code Sections 32-2-75 through 32-2-77.

Title 32: Georgia D.O.T. Contracts

§ 32-2-61 (Excerpt)

(d)(1) The department is prohibited from negotiating any contract for the construction or maintenance of a public road involving the expenditure of $100,000.00 or more except any contract:

(a) With counties, municipalities, and state agencies, provided that such negotiated contract shall be made at the average bid price of the same kind of work let to contract after advertisement during a period of 60 days prior to the making of the contract;

(b) With a railroad company or utility concerning relocation of its tracks or facilities where the same are not then located on a public road and such relocation is necessary as an incident to the construction or improvement of a public road. However, nothing contained in this subsection shall be construed as requiring the department to furnish a site or right of way for railroad or railway lines or tracks or utility facilities required to be removed from a public road. Furthermore, this subsection shall not prevent the department from assisting in the removal and relocation of publicly owned utilities from locations on public roads as provided in Code Section 32-6-170;

(c) For emergency construction or maintenance involving the expenditure of $100,000.00 or more when the public interest requires that the work be done without the delay of advertising for public bids;

(d) For the procurement of business, professional, or other services from any person, firm, or corporation as an independent contractor;

(e) With the State Road and Tollway Authority; or

(f) Through the provisions of a design-build contract as provided for in Code Section 32-2-81

Title 32: County Road Construction Law

§ 32-4-40.

Each county shall, by resolution, designate roads to be a part of its county road system; and such resolutions shall be recorded in the minutes of the county. All such roads shall be laid out on the shortest and best route to their intended destination and with as little injury to private property as possible. When a road has been designated as a part of a county road system, this change shall be recorded on the official map of the county road system, as provided for in subsection (a) of Code Section 32-4-2, and in the written record of the county road system, as provided for in subsection (b) of Code Section 32-4-2.

§ 32-4-41.

The duties of a county with respect to its county road system, unless otherwise expressly limited by law, shall include but not be limited to the following:

(1) A county shall plan, designate, improve, manage, control, construct, and maintain an adequate county road system and shall have control of and responsibility for all construction, maintenance, or other work related to the county road system. Such work may be accomplished through the use of county forces, including inmate labor, by contract as authorized in paragraph (5) of Code Section 32-4-42, or otherwise as permitted by law. Nothing in this paragraph shall be construed to prevent a county from entering into a contract providing for a municipality to maintain an extension of the county road system within the municipal limits;

(2) A county shall control, administer, and account for funds received for the county road system and activities incident thereto from any source whatsoever, whether federal, state, county, municipal, or any other; and it shall expend such funds for and on behalf of the county in connection with the county road system and for any purpose in connection therewith which may be authorized in this title or by any other law;

(3) A county shall inspect and determine the maximum load, weight, and other vehicular dimensions which can be safely transported over each bridge on the county road system and shall post on each bridge and on each approach thereto on the county road a sign containing a legible notice showing such maximum safe limits, each such sign to conform to the department regulations promulgated under authority of Code Section 32-6-50. However, the department is authorized to give technical assistance to counties, when so requested, in carrying out this paragraph. It shall be unlawful for any person to haul, drive, or bring on any bridge any vehicle, load, or weight which in any manner exceeds the maximum limits so ascertained and posted on such bridge; and any person hauling, driving, or otherwise bringing on such bridge any load or weight exceeding the maximum limits so ascertained and posted shall do so at his own risk; and the county shall not be liable for any damages to persons or property that may result there from;

(4) A county shall keep on file in the office of the county clerk, available for public inspection, the map of the county road system prepared by the department as provided for in subsection (a) of Code Section 32-4-2.

In addition to keeping on file a map of the county road system, the county shall notify the department within three months after a county road is added to the local road or street system and shall further notify the department within three months after a local road or street has been abandoned. This notification shall be accompanied by a map or plat depicting the location of the new or abandoned road;

(5) A county shall procure the necessary rights of way for public roads of the state highway system within the county in compliance with subsection (e) of Code Section 32-3-3 and Code Section 32-5-25; and

(6) In acquiring property for rights of way for federal-aid highway projects on its county road system, the county shall comply with the requirements of the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, as amended by the Uniform Relocation Act Amendments of 1987, Title IV of Public Law 100-17, and in general shall be guided by the policies applicable to the department as set forth in Code Section 32-8-1.

§ 32-4-42.

The powers of a county with respect to its county road system, unless otherwise expressly limited by law, shall include but not be limited to the following:

(1) A county shall have the authority to negotiate, let, and enter into contracts with any person or any agency, county, or municipality of the state for the construction, maintenance, administration, or operation of any public road or activities incident thereto in such manner and subject to such express limitations as may be provided by Part 2 of this article or any other provision of law. A county shall also have the authority to perform such road work with its own forces or with a combination of its own forces and the work of a contractor, notwithstanding any contrary provisions of Chapter 91 of Title 36;

(2) A county shall have the authority to accept and use federal and state funds and to do all things necessary, proper, or expedient to achieve compliance with the provisions and requirements of all applicable federal-aid or state-aid acts and programs in connection with the county's public roads. Nothing in this title is intended to conflict with any federal law and, in case of such conflict, such portion as may be in conflict with such federal law is declared of no effect to the extent of the conflict;

(3)(A) A county shall have the authority to acquire and dispose of real property or any interest therein for public road purposes, as provided in Article 1 of Chapter 3 of this title and in Chapter 7 of this title. In any action to condemn property or interests therein for such purposes, notice thereof shall be signed by the condemning county; and such notice shall be deemed to be the official action of the county in regard to the commencement of such condemnation proceedings.

For good cause shown a county, at any time after commencement of condemnation proceedings and prior to final judgment therein, may dismiss its condemnation action, provided that (i) the condemnation proceedings have not been instituted under Article 1 of Chapter 3 of this title, and (ii) the condemnor has first paid to the condemnee all expenses and damages accrued to the condemnee up to the date of the filing of the motion for dismissal of the condemnation action.

(B) Pursuant to the requirements of Part 2 of this article, a county shall have the power to purchase, borrow, rent, lease, control, manage, receive, and make payment for all personal property, such as equipment, machinery, vehicles, supplies, material, and furniture, which may be needed in the operation of its county road system; to lease, rent, lend, or otherwise transfer temporarily county property used for road purposes, as authorized by law; to sell or otherwise dispose of all personal property owned by the county and used in the operation of the county road system which is unserviceable; and to execute such instruments as may be necessary in connection with the exercise of the powers described in this subparagraph;

(4) A county and its authorized agents and employees may enter upon any lands in the county for the purpose of making such surveys, soundings, drillings, and examinations as the county may deem necessary or desirable to accomplish the purposes of this title; and such entry shall not be deemed a trespass nor shall it be deemed an entry which would constitute a taking in a condemnation proceeding, provided that reasonable notice of such entry shall be given the owner or occupant of such property, such entry shall be done in a reasonable manner with as little inconvenience as possible to the owner or occupant of the property, and the county shall make reimbursement for any actual damages resulting from such entry;

(5) A county shall have the authority to employ, discharge, promote, set and pay the salaries and compensation of its personnel, and determine the duties, qualifications, and working conditions for all persons whose services are needed in the construction, maintenance, administration, operation, and development of its county road system; to work inmates maintained in the county correctional institution or inmates hired from the Department of Corrections and maintained by the latter; and to employ or contract with such engineers, surveyors, attorneys, consultants, and all other employees as independent contractors whose services may be required, subject to the limitations of existing law;

(6) A county may grant permits and establish reasonable regulations for the installation, construction, maintenance, renewal, removal, and relocation of pipes, mains, conduits, cables, wires, poles, towers, traffic and other signals, and other equipment, facilities, or appliances of any utility in, on, along, over, or under the public roads of the county which are a part of the county road system lying outside the corporate limits of a municipality. However, such regulations shall not be more restrictive with respect to utilities affected thereby than are equivalent regulations promulgated by the department with respect to utilities on the state highway system under authority of Code Section 32-6-174.

As a condition precedent to the granting of such permits, the county may require application in writing specifically describing the nature, extent, and location of the portion of the utility affected and may also require the applicant to furnish an indemnity bond or other acceptable security conditioned to pay any damages to any part of the county road system or to any member of the public caused by work of the utility performed under authority of such permit. At all times it shall be the duty of the county to ensure that the normal operation of the utility does not interfere with the use of the county road system. The county may also order the removal or discontinuance of the utility, equipment, facility, or appliances where such removal and relocation are made necessary by the construction or maintenance of any part of the county road system lying outside the corporate limits of a municipality. In so ordering the removal and relocation of a utility or in performing such work itself, the county shall conform to the procedure set forth for the department in Code Sections 32-6-171 and 32-6-173, except that when the removal and relocation have been performed by the county, it shall certify the expenses thereof for collection to its county attorney;

(7) A county shall have the power to purchase supplies for county road system purposes through the state as authorized by Code Sections 50-5-100 through 50-5-102;

(8) In addition to any taxes authorized by Article 4 of Chapter 5 of Title 48 to be levied and collected for the construction and maintenance of its county road system and activities incident thereto, a county is authorized to levy and collect any millage as may be necessary for such purposes;

(9) A county may provide for surveys, maps, specifications, and other things necessary in designating, supervising, locating, abandoning, relocating, improving, constructing, or maintaining the county road system, or any part thereof, or any activities incident thereto or necessary in doing such other work on public roads as the county may be given responsibility for or control of by law;

(10) In addition to the powers specifically delegated to it in this title and except as otherwise provided by Code Section 12-6-24, a county shall have the authority to adopt and enforce rules, regulations, or ordinances; to require permits; and to perform all other acts which are necessary, proper, or incidental to the efficient operation and development of the county road system; and this title shall be liberally construed to that end. Any power vested in or duty placed on a county but not implemented by specific provisions for the exercise thereof may be executed and carried out by a county in a reasonable manner subject to such limitations as may be provided by law; and

(11) In all counties of this state having a population of 550,000 or more according to the United States decennial census of 1970 or any future such census, the county governing authority shall be empowered by ordinance or resolution to assess against any property the cost of reopening, repairing, or cleaning up from any public way, street, road, right of way, or highway any debris, dirt, sediment, soil, trash, building materials, and other physical materials originating on such property as a result of any private construction activity carried on by any developer, contractor, subcontractor, or owner of such property.

Any assessment authorized under this paragraph, the interest thereon, and the expense of collection shall be a lien against the property so assessed coequal with the lien of other taxes and shall be enforced in the same manner as are state and county ad valorem property taxes by issuance of a fi. fa. and levy and sale as set forth in Title 48, known as the "Georgia Public Revenue Code."

§ 32-4-60.

As used in this part, the term "contract" means a contract or subcontract entered into by a county with any person, with the state or federal government or an agency of either, with another county or counties, with a municipality or municipalities, or with any combination of the foregoing entities for the construction, reconstruction, or maintenance of all or part of a public road, including but not limited to a contract for the purchase of materials, for the hiring of labor, for professional services, or for other things or services incident to such work.

§ 32-4-61.

A county shall have the authority to contract as set forth in this part and in paragraph (1) of Code Section 32-4-42. Any contract for work on all or part of the county road system shall be in writing and shall be approved by resolution which shall be entered on the minutes of such county.

§ 32-4-62.

(a) Subject to the limitations of this Code section, in addition to the authority to contract with a private contractor, a county may enter into a contract with the state, a state agency, another county or municipality, or with any combination or number of the foregoing entities for work on any public road system of Georgia.

(b) Such a contract with a state agency is subject to the limitations of Code Section 32-2-61, including the cost of the negotiated contract, and the right of the department to supervise performance of the contract.

(c) A county shall have authority to enter into a contract with adjoining counties for the joint work on a road constituting a part of the county road system of those counties which are parties to such contract.

(d) A county shall have the authority provided in subsection (b) of Code Section 32-4-112 to contract with a municipality and expend funds for work on public roads within a municipality in the county.

§ 32-4-63.

A county is prohibited from negotiating a contract except a contract:

(1) Involving the expenditure of less than $20,000.00;

(2) With a state agency or county or municipality with which a county is authorized to contract in accordance with the provisions of Code Sections 32-4-61 and 32-4-62;

(3) For the purchase of those materials, supplies, and equipment necessary for the county's construction and maintenance of its public roads and for the support and maintenance of the county's forces used in such work, as authorized by Chapter 91 of Title 36;

(4) Subject to Article 6 of Chapter 6 of this title, with a railroad or railway company or a publicly or privately owned utility concerning relocation of its line, tracks, or facilities where the same are not then located in a public road and such relocation or grade-crossing elimination is necessary as an incident to the construction of a new public road or to the reconstruction or maintenance of an existing public road. Nothing contained in this paragraph shall be construed as requiring a county to furnish a site or right of way for railroad or railway lines or tracks of public utility facilities required to be removed from a public road;

(5) For engineering or other kinds of professional or specialized services;

(6) For emergency maintenance requiring immediate repairs to a public road, including but not limited to bridge repairs, snow and ice removal, and repairs due to flood conditions; or

(7) Otherwise expressly authorized by law.

§ 32-4-64.

Except as authorized by Code Section 32-4-63, all contracts shall be let by public bid.

§ 32-4-65.

(a) Notwithstanding any provision of Chapter 91 of Title 36 and of any other provision of law to the contrary, on all contracts to be let by public bid a county shall advertise for competitive sealed bids for at least two weeks.

The public advertisement shall be inserted once a week for two weeks in such newspaper wherein the county sheriff's sales are advertised or in such other newspapers or publications, or both, as will ensure adequate publicity, the first insertion to be two weeks prior to the opening of the sealed bids, the second to follow one week after the publication of the first insertion.

(b) Such advertisement shall include but not be limited to the following:

(1) A description sufficient to enable the public to know the approximate extent and character of the work to be done;

(2) The time allowed for performance;

(3) The terms and time of payment;

(4) Where and under what conditions and costs the detailed plans and specifications and proposal forms may be obtained;

(5) The amount of the proposal guaranty, if one is required;

(6) The time and place for submission and opening of bids;

(7) The right of the county to reject any one or all bids; and

(8) Such further notice as the county may deem advisable as in the public interest.

§ 32-4-66.

A county may require each bidder to pay a reasonable sum sufficient to cover the cost to the county, where applicable, of the bid proposal form, the contract, and its specifications.

§ 32-4-67.

(a) No bid, other than a bid solely for engineering or other kinds of professional services, will be considered by a county unless it is accompanied by a proposal guaranty in the form of a certified check or other acceptable security payable to the county for an amount deemed by the county in the public interest necessary to ensure that the successful bidder will execute the contract on which he bid.

(b) A proposal guaranty will be returned to a bidder upon receipt by the county of the bidder's written withdrawal of his bid if such receipt is before the time scheduled for the opening of bids.

Upon the determination by a county of the lowest reliable bidder, the county will return the proposal guaranties to all bidders except that of the lowest reliable bidder. If no contract award is made within 30 days after the date set for the opening of bids, all bids shall be rejected and all proposal guaranties shall be returned unless the county and the successful bidder agree in writing to a longer period of time.

§ 32-4-68.

Where a contract has been let for bid, the county, by resolution entered in its minutes, shall award the contract to the lowest reliable bidder, provided that the county shall have the right to reject any and all such bids whether such right is reserved in the public notice or not and, in such case, may re-advertise, perform the work itself, or abandon the project.

§ 32-4-69.

Notwithstanding any provision of Chapter 91 of Title 36 to the contrary, when the price of a contract let to bid, other than a contract solely for engineering or other kinds of professional services, is $5,000.00 or more, no contract of a county shall be valid unless the contractor first gives:

(1) A performance bond that meets the requirements established in Parts 1 and 3 of Article 3 of Chapter 91 of Title 36 in the amount of the bid, with one good and solvent surety, for the faithful performance of the contract and to indemnify the county for any damages occasioned by a failure to perform the same within the prescribed time;

(2) A payment bond that meets the requirements established in Parts 1 and 4 of Article 3 of Chapter 91 of Title 36; and

(3) Such other bonds required by the county in its advertisement for bids, including but not limited to public liability and property damage insurance bonds.

§ 32-4-70.

(a) As used in this Code section, the term "bridge" shall include the approaches to such bridge within 50 feet of either end except when the bridge itself measures 100 feet or more, in which case the term "bridge" shall include the approaches within 100 feet of either end of the bridge.

(b) Where the contract relates to the construction or reconstruction of all or a part of a bridge, the county or counties affected may require the successful contractor to add to the conditions of the performance bond required under paragraph (1) of Code Section 32-4-69 the following condition: to keep the bridge in good condition for a period of not less than seven years.

§ 32-4-71.

(a) If the payment bond required by paragraph (2) of Code Section 32-4-69 is not taken, the county shall be liable to subcontractors, laborers, material-men, and other persons, as provided in Part 4 of Article 3 of Chapter 91 of Title 36, for losses to them resulting from failure to take such bond.

(b) If the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county or counties, provided that the county shall be discharged from all liability upon the inclusion in the performance bond of the aforesaid bridge repair condition.

(c) Nothing in this Code section shall be construed so as to impose personal liability on the county governing authority.

§ 32-4-72.

If the successful bidder fails to sign the contract or furnish the bonds required under authority of Code Section 32-4-71, his proposal guaranty, if one had been required by the county, will become the property of the county as liquidated damages. The contract then may be re-advertised, performed with county forces, or the project abandoned.

§ 32-4-73.

A successful bidder, before commencing the work, shall execute a written oath, as required by subsection (e) of Code Section 36-91-21, stating that he or she has not violated such Code section, which makes it unlawful to restrict competitive bidding.

§ 32-4-74.

Except as indicated to the contrary in this part, Chapter 91 of Title 36 shall not apply to this part.

Title 36: Georgia Local Government Public Works Construction Contracts Law

Article 1
General Provisions

§ 36-91-1.

This chapter shall be known and may be cited as the "Georgia Local Government Public Works Construction Law."

§ 36-91-2.

As used in this chapter, the term:

(1) 'Alternate bids' means the amount stated in the bid or proposal to be added to or deducted from the amount of the base bid or base proposal if the corresponding change in project scope or alternate materials or methods of construction is accepted.

(2) 'Base bid' or 'base proposal' means the amount of money stated in the bid or proposal as the sum for which the bidder or proposer offers to perform the work.

(3) 'Bid bond' means a bond with good and sufficient surety or sureties for the faithful acceptance of the contract payable to, in favor of, and for the protection of the governmental entity for which the contract is to be awarded.

(4) 'Change order' means an alteration, addition, or deduction from the original scope of work as defined by the contract documents to address changes or unforeseen conditions necessary for project completion.

(5) 'Competitive sealed bidding' means a method of soliciting public works construction contracts whereby the award is based upon the lowest responsive, responsible bid in conformance with the provisions of subsection (b) of Code Section 36-91-21.

(6) 'Competitive sealed proposals' means a method of soliciting public works contracts whereby the award is based upon criteria identified in a request for proposals in conformance with the provisions of subsection (c) of Code Section 36-91-21.

(7) 'Emergency' means any situation resulting in imminent danger to the public health or safety or the loss of an essential governmental service.

(8) 'Governing authority' means the official or group of officials responsible for governance of a governmental entity.

(9) 'Governmental entity' means a county, municipal corporation, consolidated government, authority, board of education, or other public board, body, or commission but shall not include any authority, board, department, or commission of the state, or a public transportation agency as defined by Chapter 9 of Title 32.

(10) 'Payment bond' means a bond with good and sufficient surety or sureties payable to the governmental entity for which the work is to be done and intended for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of the work provided for in the public works construction contract.

(11) 'Performance bond' means a bond with good and sufficient surety or sureties for the faithful performance of the contract and to indemnify the governmental entity for any damages occasioned by a failure to perform the same within the prescribed time. Such bond shall be payable to, in favor of, and for the protection of the governmental entity for which the work is to be done.

(12) 'Public works construction' means the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property other than those projects covered by Chapter 4 of Title 32. Such term does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.

(13) 'Responsible bidder' or 'responsible offeror' means a person or entity that has the capability in all respects to perform fully and reliably the contract requirements.

(14) 'Responsive bidder' or 'responsive offeror' means a person or entity that has submitted a bid or proposal that conforms in all material respects to the requirements set forth in the invitation for bids or request for proposals.

(15) 'Scope of project' means the work required by the original contract documents and any subsequent change orders required or appropriate to accomplish the intent of the project as described in the bid documents.

(16) 'Scope of work' means the work that is required by the contract documents.

(17) 'Sole source' means those procurements made pursuant to a written determination by a governing authority that there is only one source for the required supply, service, or construction item.

Article 2
Contracting and Bidding Requirements

§ 36-91-20.

(a) All public works construction contracts subject to this chapter entered into by a governmental entity with private persons or entities shall be in writing and on file and available for public inspection at a place designated by such governmental entity. Municipalities and consolidated governments shall execute and enter into contracts in the manner provided in applicable local legislation or by ordinance.

(b)(1) Prior to entering into a public works construction contract other than those exempted by Code Section 36-91-22, a governmental entity shall publicly advertise the contract opportunity.
Such notice shall be posted conspicuously in the governing authority's office and shall be advertised in the legal organ of the county or by electronic means on an Internet website of the governmental entity or an Internet website identified by the governmental entity which may include the Georgia Procurement Registry as provided by Code Section 50-5-69.

(2) Contract opportunities that are advertised in the legal organ shall be advertised a minimum of two times, with the first advertisement occurring at least four weeks prior to the opening of the sealed bids or proposals. The second advertisement shall follow no earlier than two weeks from the first advertisement.

(3) Contract opportunities that are advertised solely on the Internet shall be posted continuously for at least four weeks prior to the opening of sealed bids or proposals. Inadvertent or unintentional loss of Internet service during the advertisement period shall not require the contract award or bid or proposal opening to be delayed.

(4) Contract opportunities that will be awarded by competitive sealed bids shall have plans and specifications available on the first day of the advertisement and shall be open to inspection by the public. The plans and specifications shall indicate if the project will be awarded by base bid or base bid plus selected alternates and:

(A) A statement listing whether all anticipated federal, state, or local permits required for the project have been obtained or an indication of the status of the application for each such permit including when it is expected to be obtained; and

(B) A statement listing whether all anticipated rights of way and easements required for the project have been obtained or an indication of the status as to when each such rights of way or easements are expected to be obtained.

(5) Contract opportunities that will be awarded by competitive sealed proposals shall be publicly advertised with a request for proposals which request shall include conceptual program information in the request for proposals describing the requested services in a level of detail appropriate to the project delivery method selected for the project.

(6) The advertisement shall include such details and specifications as will enable the public to know the extent and character of the work to be done.

(7) All required notices of advertisement shall also advise of any mandatory prequalification requirements or pre-bid conferences as well as any federal requirements pursuant to subsection (d) of Code Section 36-91-22. Any advertisement which provides notice of a mandatory pre-bid conference or prequalification shall provide reasonable advance notice of said conference or for the submittal of such prequalification information.

(c) Governmental entities are authorized to utilize any construction delivery method, provided that all public works construction contracts subject to the requirements of this chapter that:

(1) Place the bidder or offeror at risk for construction; and

(2) Require labor or building materials in the execution of the contract shall be awarded on the basis of competitive sealed bidding or competitive sealed proposals. Governmental entities shall have the authority to reject all bids or proposals or any bid or proposal that is non-responsive or not responsible and to waive technicalities and informalities.

(d) No governmental entity shall issue or cause to be issued any addenda modifying plans and specifications within a period of 72 hours prior to the advertised time for the opening bids or proposals, excluding Saturdays, Sundays, and legal holidays.

However, if the necessity arises to issue an addendum modifying plans and specifications within the 72 hour period prior to the advertised time for the opening of bids or proposals, excluding Saturdays, Sundays, and legal holidays, then the opening of bids or proposals shall be extended at

least 72 hours, excluding Saturdays, Sundays, and legal holidays, from the date of the original bid or proposal opening without need to re-advertise as required by subsection (b) of this Code section.

(e) Bid and contract documents may contain provisions authorizing the issuance of change orders, without the necessity of additional requests for bids or proposals, within the scope of the project when appropriate or necessary in the performance of the contract. Change orders may not be used to evade the purposes of this article.

(f) Any governmental entity may, in its discretion, adopt a process for mandatory prequalification of prospective bidders or offerors; provided, however, that:

(1) Criteria for prequalification must be reasonably related to the project or the quality of work;

(2) Criteria for prequalification must be available to any prospective bidder or offeror requesting such information for each project that requires prequalification;

(3) Any prequalification process must include a method of notifying prospective bidders or offerors of the criteria for or limitations to prequalification; and

(4) Any prequalification process must include a procedure for a disqualified bidder to respond to his or her disqualification to a representative of the governmental entity; provided, however, that such procedure shall not be construed to require the governmental entity to provide a formal appeals procedure. A pre-qualified bidder or offeror can not be later disqualified without cause."

§ 36-91-21.

(a) It shall be unlawful to let out any public works construction contracts subject to the requirements of this chapter without complying with the competitive award requirements contained in this Code section. Any contractor who performs any work of the kind in any other manner and who knows that the public works construction contract was let out without complying with the notice and competitive award requirements of this chapter shall not be entitled to receive any payment for such work.

(b) Any competitive sealed bidding process shall comply with the following requirements:

(1) The governmental entity shall publicly advertise an invitation for bids;

(2) Bidders shall submit sealed bids based on the criteria set forth in such invitation;

(3) The governmental entity shall open the bids publicly and evaluate such bids without discussions with the bidders; and

(4) The contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids; provided, however, that if the bid from the lowest responsible and responsive bidder exceeds the funds budgeted for the public works construction contract, the governmental entity may negotiate with such apparent low bidder to obtain a contract price within the budgeted amount. Such negotiations may include changes in the scope of work and other bid requirements.

(c) (1) In making any competitive sealed proposal, a governmental entity shall:

(A) Publicly advertise a request for proposals, which request shall include conceptual program information in the request for proposals describing the requested services in a level of detail

appropriate to the project delivery method selected for the project, as well as the relative importance of the evaluation factors;

(B) Open all proposals received at the time and place designated in the request for proposals so as to avoid disclosure of contents to competing offerors during the process of negotiations; and

(C) Make an award to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the governmental entity, taking into consideration the evaluation factors set forth in the request for proposals. The evaluation factors shall be the basis on which the award decision is made. The contract file shall indicate the basis on which the award is made.

(2) As set forth in the request for proposals, offerors submitting proposals may be afforded an opportunity for discussion, negotiation, and revision of proposals. Discussions, negotiations, and revisions may be permitted after submission of proposals and prior to award for the purpose of obtaining best and final offers. In accordance with the request for proposals, all responsible offerors found by the governmental entity to have submitted proposals reasonably susceptible of being selected for award shall be given an opportunity to participate in such discussions, negotiations, and revisions. During the process of discussion, negotiation, and revision, the governmental entity shall not disclose the contents of proposals to competing offerors.

(d) Whenever a public works construction contract for any governmental entity subject to the requirements of this chapter is to be let out by competitive sealed bid or proposal, no person, by himself or herself or otherwise, shall prevent or attempt to prevent competition in such bidding or proposals by any means whatever. No person who desires to procure such work for himself or herself or for another shall prevent or endeavor to prevent anyone from making a bid or proposal therefor by any means whatever, nor shall such person so desiring the work cause or induce another to withdraw a bid or proposal for the work.

(e) Before commencing the work, any person who procures such public work by bidding or proposal shall make an oath in writing that he or she has not directly or indirectly violated subsection (d) of this Code section. The oath shall be filed by the officer whose duty it is to make the payment. If the contractor is a partnership, all of the partners and any officer, agent, or other person who may have represented or acted for them in bidding for or procuring the contract shall also make the oath. If the contractor is a corporation, all officers, agents, or other persons who may have acted for or represented the corporation in bidding for or procuring the contract shall make the oath. If such oath is false, the contract shall be void, and all sums paid by the governmental entity on the contract may be recovered by appropriate action.

(f) If any member of a governmental entity lets out any public works construction contract subject to the requirements of this article and receives, takes, or contracts to receive or take, either directly or indirectly, any part of the pay or profit arising out of any such contract, he or she shall be guilty of a misdemeanor.

(g) No public works construction contract with a governing authority shall be valid for any purpose unless the contractor shall comply with all bonding requirements of this chapter. No such contract shall be valid if any governmental entity lets out any public works construction contract subject to the requirements of this chapter without complying with the requirements of this chapter.

§ 36-91-22.

(a) The requirements of this chapter shall not apply to public works construction projects, when the same can be performed at a cost of less than $100,000.00. Public works construction projects shall not be subdivided in an effort to evade the provisions of this chapter.

(b) Any governmental entity having a correctional institution shall have the power and authority to purchase material for and use inmate labor in performing public works construction projects; and in such cases, this chapter shall not apply. Any governmental entity may contract with a governmental entity having a correctional institution for the use of inmate labor from such institution and use the inmates in the performance of any public works construction project; and in such cases, this chapter shall not apply.

(c) In the event that the labor used or to be used in a public works construction project is furnished at no expense by the state or federal government or any agency thereof, the governing authority shall have the power and authority to purchase material for such public works construction project and use the labor furnished free to the governmental entity; and in such case, this chapter shall not apply.

(d) Where a public works construction contract involves the expenditure of federal assistance or funds, the receipt of which is conditioned upon compliance with federal laws or regulations regarding the procedures for awarding public works construction contracts, a governmental entity shall comply with such federal requirements and shall not be required to comply with the provisions of this chapter that differ from the federal requirements. The governmental entity shall provide notice that federal procedures exist for the award of such contracts in the advertisement required by subsection (b) of Code Section 36-91-20. The availability and location of such federal requirements shall be provided to any person requesting such information.

(e) The requirements of this chapter shall not apply to public works construction projects necessitated by an emergency; provided, however, that the nature of the emergency shall be described in the minutes of the governing authority. Any contract let by a county pursuant to this subsection shall be ratified, as soon as practicable, on the minutes of the governing authority, and the nature of the emergency shall be described therein.

(f) Except as otherwise provided in Chapter 4 of Title 32, the requirements of this chapter shall not apply to public works construction projects subject to the requirements of Chapter 4 of Title 32.

(g) The requirements of this chapter shall not apply to public works construction projects or any portion of a public works construction project self-performed by a governmental entity. If the governmental entity contracts with a private person or entity for a portion of such project, the provisions of this chapter shall apply to any such contract estimated to exceed $100,000.00.

(h) The requirements of this chapter shall not apply to sole source public works construction contracts.

(i) The requirements of this chapter shall not apply to hospital authorities; provided, however, that a public works construction contract entered into by a hospital authority shall be subject to the requirements of this chapter if, in connection with such contract, the hospital authority either:

(1) Incurs indebtedness and secures such indebtedness by pledging amounts to be received by such authority from one or more counties or municipalities through an intergovernmental contract entered into in accordance with Code Section 31-7-85; or

(2) Receives funds from the state or one or more counties or municipalities for the purpose of financing a public works construction project, which moneys are not for reimbursement of health services provided.

Article 3
Bonds Part 1
General Provisions

§ 36-91-40.

(a)(1) Any bid bond, performance bond, payment bond, or security deposit required for a public works construction contract shall be approved and filed with the treasurer or the person performing the duties usually performed by a treasurer of the obligee named therein. At the option of the governmental entity, if the surety named in the bond is other than a surety company authorized by law to do business in this state pursuant to a current certificate of authority to transact surety business by the Commissioner of Insurance, such bond shall not be approved and filed unless such surety is on the United States Department of Treasury's list of approved bond sureties.

(2) Any bid bond, performance bond, or payment bond required by this Code section shall be approved as to form and as to the solvency of the surety by an officer of the governmental entity negotiating the contract on behalf of the governmental entity. In the case of a bid bond, such approval shall be obtained prior to acceptance of the bid or proposal. In the case of payment bonds and performance bonds, such approval shall be obtained prior to the execution of the contract.

(b) Whenever, in the judgment of the obligee:

(1) Any surety on a bid, performance, or payment bond has become insolvent;

(2) Any corporate surety is no longer certified or approved by the Commissioner of Insurance to do business in the state; or

(3) For any cause there are no longer proper or sufficient sureties on any or all of the bonds, the obligee may require the contractor to strengthen any or all of the bonds or to furnish a new or additional bond or bonds within ten days. Thereupon, if so ordered by the obligee, all work on the contract shall cease unless such new or additional bond or bonds are furnished. If such bond or bonds are not furnished within such time, the obligee may terminate the contract and complete the same as the agent of and at the expense of the contractor and his or her sureties.

Part 2
Bid Bonds

§ 36-91-50.

(a) Bid bonds shall be required for all public works construction contracts subject to the requirements of this article with estimated bids or proposals over $100,000.00; provided, however, that a governmental entity may require a bid bond for projects with estimated bids or proposals of $100,000.00 or less.

(b) In the case of competitive sealed bids, except as provided in Code Sections 36-91-52 and 36-91-53, a bid may not be revoked or withdrawn until 60 days after the time set by the governmental entity for opening of bids.

Upon expiration of this time period, the bid will cease to be valid, unless the bidder provides written notice to the governmental entity prior to the scheduled expiration date that the bid will be extended for a time period specified by the governmental entity.

(c) In the case of competitive sealed proposals, the governmental entity shall advise offerors in the request for proposals of the number of days that offerors will be required to honor their proposals; provided, however, that if an offeror is not selected within 60 days of opening the proposals, any offeror that is determined by the governmental entity to be unlikely of being selected for contract award shall be released from his or her proposal.

(d) If a governmental entity requires a bid bond for any public works construction contract, no bid or proposal for a contract with the governmental entity shall be valid for any purpose unless the contractor shall give a bid bond with good and sufficient surety or sureties approved by the governing authority. The bid bond shall be in the amount of not less than 5 percent of the total amount payable by the terms of the contract. No bid or proposal shall be considered if a proper bid bond or other security authorized in Code Section 36-91-51 has not been submitted. The provisions of this subsection shall not apply to any bid or proposal for a contract that is required by law to be accompanied by a proposal guaranty and shall not apply to any bid or proposal for a contract with any public agency or body which receives funding from the United States Department of Transportation and which is primarily engaged in the business of public transportation.

§ 36-91-51.

(a) In lieu of the bid bond provided for in Code Section 36-91-50, the governmental entity may accept a cashier's check, certified check, or cash in the amount of not less than 5 percent of the total amount payable by the terms of the contract payable to and for the protection of the governmental entity for which the contract is to be awarded.

(b) When the amount of any bid bond required under this article does not exceed $750,000.00, the governmental entity may, in its sole discretion, accept an irrevocable letter of credit issued by a bank or savings and loan association, as defined in Code Section 7-1-4, in the amount of and in lieu of the bond otherwise required under Code Section 36-91-50.

§ 36-91-52.

(a) As used in this Code section, the term "bid" includes proposal and the term "bidder" includes offeror.

(b) Any governmental entity receiving bids subject to this article shall permit a bidder to withdraw a bid from consideration after the bid opening without forfeiture of the bid security if the bidder has made an appreciable error in the calculation of his or her bid and if:

(1) Such error in the calculation of his or her bid can be documented by clear and convincing written evidence;

(2) Such error can be clearly shown by objective evidence drawn from inspection of the original work papers, documents, or materials used in the preparation of the bid sought to be withdrawn;

(3) The bidder serves written notice upon the governmental entity which invited proposals for the work prior to the award of the contract and not later than 48 hours after the opening of bids, excluding Saturdays, Sundays, and legal holidays;

(4) The bid was submitted in good faith and the mistake was due to a calculation or clerical error, an inadvertent omission, or a typographical error as opposed to an error in judgment; and

(5) The withdrawal of the bid will not result in undue prejudice to the governmental entity or other bidders by placing them in a materially worse position than they would have occupied if the bid had never been submitted.

(c) In the event that an apparent successful bidder has withdrawn his or her bid as provided in subsection (b) of this Code section, action on the remaining bids should be considered as though the withdrawn bid had not been received. In the event the project is relet for bids, under no circumstances shall a bidder who has filed a request to withdraw a bid be permitted to resubmit a bid for the work.

(d) No bidder who is permitted to withdraw a bid pursuant to subsection (b) of this Code section shall for compensation supply any material or labor to, or perform any subcontract or other work agreement for, the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

§ 36-91-53.

(a) As used in this Code section, the term:

(1) "Affiliated corporation" means, with respect to any corporation, any other corporation related thereto:

(A) As a parent corporation;

(B) As a subsidiary corporation;

(C) As a sister corporation;

(D) By common ownership or control; or

(E) By control of one corporation by the other.

(2) The term "bid" includes proposals.

(b) In any case where two or more affiliated corporations bid for a contract under this Code section and any one or more of such affiliated corporations subsequently rescind or revoke their bid or bids in favor of another such affiliated corporation whose bid is for a higher amount and the contract is awarded at such higher amount to such other affiliated corporation, then the bid bond, proposal guaranty, or other security otherwise required under this article of each affiliated corporation rescinding or revoking its bid shall be forfeited.

Part 3
Performance Bonds

§ 36-91-54.

The obligee in any bid bond required to be given in accordance with this article shall be entitled to maintain an action thereon at any time upon any breach of such bond; provided, however, that no action may be instituted on the bonds or security deposits after one year from the completion of the contract and the acceptance of the public work by the governmental entity.

§ 36-91-70.

Performance bonds shall be required for all public works construction contracts subject to the requirements of this chapter with an estimated contract amount greater than $100,000.00; provided, however, that a governmental entity may require a performance bond for public works construction contracts that are estimated at $100,000.00 or less. No public works construction contract requiring a performance bond shall be valid for any purpose unless the contractor shall give such performance bond. The performance bond shall be in the amount of at least the total amount payable by the terms of the contract and shall be increased as the contract amount is increased.

§ 36-91-71.

When the amount of the performance bond required under this article does not exceed $750,000.00 the governmental entity may, in its sole discretion, accept an irrevocable letter of credit by a bank or savings and loan association, as defined in Code Section 7-1-4, in the amount of and in lieu of the bond otherwise required under this article.

§ 36-91-72.

The obligee in any performance bond required to be given in accordance with this article shall be entitled to maintain an action thereon at any time upon any breach of such bond; provided, however, no action can be instituted on the bonds or security deposits after one year from the completion of the contract and the acceptance of the public work by the governmental entity.

Part 4
Payment Bonds

§ 36-91-90.

Payment bonds shall be required for all public works construction contracts subject to the requirements of this chapter with an estimated contract amount greater than $100,000.00; provided, however, that a governmental entity may require a payment bond for public works construction contracts that are estimated at $100,000.00 or less. No public works construction contract requiring a payment bond shall be valid for any purpose, unless the contractor shall give such payment bond;

provided, however, that, in lieu of such payment bond, the governmental entity, in its discretion, may accept a cashier's check, certified check, or cash for the use and protection of all subcontractors and all persons supplying labor, materials, machinery, and equipment in the prosecution of work provided in the contract. The payment bond or other security accepted in lieu of a payment bond shall be in the amount of at least the total amount payable by the terms of the initial contract and shall be increased if requested by the governmental entity as the contract amount is increased.

§ 36-91-91.

If a payment bond or security deposit is not taken in the manner and form required in this article, the corporation or body for which work is done under the contract shall be liable to all subcontractors and to all persons furnishing labor, skill, tools, machinery, or materials to the contractor or subcontractor thereunder for any loss resulting to them from such failure. No agreement, modification, or change in the contract, change in the work covered by the contract, or extension of time for the completion of the contract shall release the sureties of such payment bond.

§ 36-91-92.

(a) The contractor furnishing the payment bond or security deposit shall post on the public works construction site and file with the clerk of the superior court in the county in which the site is located a notice of commencement no later than 15 days after the contractor physically commences work on the project and supply a copy of the notice of commencement to any subcontractor, material-man, or person who makes a written request of the contractor. Failure to supply a copy of the notice of commencement within ten calendar days of receipt of the written request from the subcontractor, material-man, or person shall render the provisions of paragraph (1) of subsection (a) of Code Section 36-91-93 inapplicable to the subcontractor, material-man, or person making the request. The notice of commencement shall include:

(1) The name, address, and telephone number of the contractor;

(2) The name and location of the public work being constructed or a general description of the improvement;

(3) The name and address of the governmental entity that is contracting for the public works construction;

(4) The name and address of the surety for the performance and payment bonds, if any; and

(5) The name and address of the holder of the security deposit provided, if any.

(b) The failure to file a notice of commencement shall render the notice to contractor requirements of paragraph (1) of subsection (a) of Code Section 36-91-93 inapplicable.

(c) The clerk of the superior court shall file the notice of commencement within the records of that office and maintain an index separate from other real estate records or an index with the preliminary notices specified in subsection (a) of Code Section 44-14-361.3. Each such notice of commencement shall be indexed under the name of the governmental entity and the name of the contractor as contained in the notice of commencement.

§ 36-91-93.

(a) Every person entitled to the protection of the payment bond or security deposit required to be given who has not been paid in full for labor or material furnished in the prosecution of the work referred to in such bond or security deposit before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or the material or equipment or machinery was furnished or supplied by such person for which such claim is made, or when he or she has completed his or her subcontract for which claim is made, shall have the right to bring an action on such payment bond or security deposit for the amount, or the balance thereof, unpaid at the time of the commencement of such action and to prosecute such action to final execution and judgment for the sum or sums due such person; provided, however, that:

(1) Any person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such payment bond or security deposit on a public works construction project where the contractor has not complied with the notice of commencement requirements shall have the right of action upon the payment bond or security deposit upon giving written notice to the contractor within 90 days from the day on which such person did or performed the last of the labor or furnished the last of the material or machinery or equipment for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was performed or done. The notice to the contractor may be served by registered or certified mail, postage prepaid, or statutory overnight delivery, duly addressed to the contractor, at any place at which the contractor maintains an office or conducts his or her business or at his or her residence, by depositing such notice in any post office or branch post office or any letter box under the control of the United States Postal Service; alternatively, notice may be served in any manner in which the sheriffs of this state are authorized by law to serve summons or process; and

(2) Any person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such payment bond or security deposit on a public works construction project where the contractor has complied with the notice of commencement requirements in accordance with subsection

(a) of Code Section 36-91-92 shall have the right of action on the payment bond or security deposit, provided that such person shall, within 30 days from the filing of the notice of commencement or 30 days following the first delivery of labor, material, machinery, or equipment, whichever is later, give to the contractor a written notice setting forth:

(A) The name, address, and telephone number of the person providing labor, material, machinery, or equipment;

(B) The name and address of each person at whose instance the labor, material, machinery, or equipment is being furnished;

(C) The name and the location of the public works construction site; and

(D) A description of the labor, material, machinery, or equipment being provided and, if known, the contract price or anticipated value of the labor, material, machinery, or equipment to be provided or the amount claimed to be due, if any.

(b) Nothing contained in this Code section shall limit the right of action of a person entitled to the protection of the payment bond or security deposit required to be given pursuant to this article to the 90 day period following the day on which such person did or performed the last of the labor or furnished the last of the material or machinery or equipment for which such claim is made.

(c) Every action instituted under this Code section shall be brought in the name of the claimant without making the governmental entity for which the work was done or was to be done a party to such action.

§ 36-91-94.

The official who has the custody of the bond or security deposit required by this article is authorized and directed to furnish to any person making application therefor a copy of the bond or security deposit agreement and the contract for which it was given, certified by the official who has custody of the bond or security deposit. With his or her application, such person shall also submit an affidavit that he or she has supplied labor or materials for such work and that payment therefor has not been made or that he or she is being sued on any such bond or security deposit. Such copy shall be primary evidence of the bond or security deposit and contract and shall be admitted in evidence without further proof. Applicants shall pay for such certified copies and such certified statements such fees as the official fixes to cover the cost of preparation thereof, provided that in no case shall the fee fixed exceed the fees which the clerks of the superior courts are permitted to charge for similar copies.

§ 36-91-95.

No action can be instituted on the payment bonds or security deposits after one year from the completion of the contract and the acceptance of the public works construction by the proper public authorities. Every action instituted under this article shall be brought in the name of the claimant, without the governmental entity for which the work was done or was to be done being made a party thereto.

Title 48: Sales Tax Paid by Contractors

§ 48-8-63.

(a) As used in this Code section, the term "nonresident subcontractor" means a person who does not have a bona fide place of business in Georgia through the maintaining of a permanent domicile or business facility engaged in contracting real property work and who contracts with a prime or general contractor to perform all or any part of the contract of the prime or general contractor or who contracts with a subcontractor who has contracted to perform any part of the contract entered into by the prime or general contractor.

(b) Each person who orally, in writing, or by purchase order contracts to furnish tangible personal property and to perform services under the contract within this state shall be deemed to be the consumer of the tangible personal property and shall pay the sales tax imposed by this article at the time of the purchase. Any person so contracting who fails to pay the sales tax at the time of the purchase or at the time the sale is consummated outside the limits of this state shall be liable for the payment of the sales or use tax. This Code section shall not relieve the dealer who made the sale from such dealer's liability to collect and pay the tax on purchases by a contractor.

(c) Each person who contracts to perform services in this state and who is furnished tangible personal property for use under the contract by the person, or such person's agent or representative, for whom the contract is to be performed, when a sales or use tax has not been paid to this state by the person supplying the tangible personal property, shall be deemed to be the consumer of the tangible personal property so used and shall pay a use tax based on the fair market value of the tangible personal property so used irrespective of whether any right, title, or interest in the tangible personal property becomes vested in the contractors.

(d) Each person who orally, in writing, or by purchase order contracts to perform any service the principal part of which is the furnishing of machinery which will not be under the exclusive control of the contractor shall be liable to collect a sales tax on the rental value of the machinery so used. If labor and other charges are not separated from the rental charge, the person so contracting shall be liable to collect a sales tax on the entire contract price.

(e) (1) Any subcontractor who enters into a construction contract with a general or prime contractor shall be liable under this article as a general or prime contractor. Any general or prime contractor who enters into any construction contract or contracts with any nonresident subcontractor, where the total amount of such contract or contracts between such general or prime contractor and any nonresident subcontractors on any given project equals or exceeds $250,000.00 shall withhold up to 4 percent of the payments due the nonresident subcontractor in satisfaction of any sales or use taxes owed this state.

(2) The prime or general contractor shall withhold payments on all contracts that meet the criteria specified in paragraph (1) of this subsection until the nonresident subcontractor furnishes such prime or general contractor with a certificate issued by the commissioner showing that all sales taxes accruing by reason of the contract between the nonresident subcontractor and the general or prime contractor have been paid and satisfied. If the prime or general contractor for any reason fails to withhold up to 4 percent of the payments due the nonresident subcontractor under their contract,

such prime or general contractor shall become liable for any sales or use taxes due or owed this state by the nonresident subcontractor.

(f) Whenever a nonresident subcontractor holding a contract with a general or prime contractor has posted with the commissioner either a good and valid bond with a surety company authorized to do business in this state or legal securities in an amount of not less than $5,000.00 nor more than $50,000.00, as determined by the commissioner, conditioned that all sales and use taxes which may accrue to this state on account of the execution of contracts that meet the criteria established in paragraph (1) of subsection (e) of this Code section by nonresident subcontractors will be paid when due, no general or prime contractor shall withhold any sums due the nonresident subcontractor under their contract with respect to sales and use taxes.

(g) Nothing contained in this Code section shall be construed to impose any sales or use tax with respect to the use of tangible personal property owned by the United States in the performance of contracts with the United States when the property is not actually used up and consumed in the performance of the contract. Tangible personal property incorporated into real property construction which loses its identity as tangible personal property shall be deemed to be used up and consumed within the meaning of this subsection.

(h) (1) Nothing contained in this Code section shall be construed to impose any sales or use tax with respect to the use of tangible personal property owned by the State of Georgia, the University System of Georgia, or any county, municipality, local board of education, or other political subdivision of this state in the performance of contracts with such entities when the property is not actually used up and consumed in the performance of the contract. Tangible personal property incorporated into real property construction which loses its identity as tangible personal property shall be deemed to be used up and consumed within the meaning of this subsection. Any governmental entity which furnishes tangible personal property to a contractor for incorporation into a construction, renovation, or repair project conducted pursuant to a contract with such governmental entity shall issue advance written notice to such contractor of the amount of tax owed for such tangible personal property. The failure of the governmental entity to issue such advance written notice to the contractor of such tax liability shall render such governmental entity liable for such tax.

(2) This subsection shall not apply with respect to the use of tangible personal property owned by the United States. (i) The commissioner is authorized to prescribe forms and promulgate rules and regulations deemed necessary in order to administer and effectuate this Code section.

Title 50: Open Records Law

§ 50-18-72. (Excerpt)

(a) Public disclosure shall not be required for records that are…

(6)(A) Real estate appraisals, engineering or feasibility estimates, or other records made for or by the state or a local agency relative to the acquisition of real property until such time as the property has been acquired or the proposed transaction has been terminated or abandoned; and

(b) Engineers´ cost estimates and pending, rejected, or deferred bids or proposals until such time as the final award of the contract is made, or the project is terminated or abandoned. The provisions of this subparagraph shall apply whether the bid or proposal is received or prepared by the Department of Transportation pursuant to Article 4 of Chapter 2 of Title 32, by a county pursuant to Article 3 of Chapter 4 of Title 32, by a municipality pursuant to Article 4 of Chapter 4 of Title 32, or by a governmental entity pursuant to Article 2 of Chapter 91 of Title 36…

Title 50: Georgia Procurement Registry

§ 50-5-69 (Excerpt)

(b) The department shall establish a central bid registry to advertise the various procurement and bid opportunities of state government. Such central bid registry shall be entitled the Georgia Procurement Registry and shall operate in accordance with appropriate rules and regulations applicable to the department's responsibility to manage the state's procurement system. It shall be the responsibility of each agency, department, board, commission, authority, and council to report to the department its bid opportunities in a manner prescribed by the Department of Administrative Services. The commissioner of administrative services is authorized and directed to promulgate rules and regulations to carry out this responsibility and shall determine the most economical method to conduct public notification of such bid opportunities….