

LOCAL GOVERNMENT CAPITAL PROJECTS

2003 GENERAL SESSION

STATE OF UTAH

Sponsor: Howard A. Stephenson

This act modifies provisions relating to certain capital projects of certain local government entities. The act requires that counties, municipalities, special districts, and local districts request bids for certain capital projects and establishes a bid process, including the amount of the project for which a bid is required. The act provides for the amount of the cost of a project required to be submitted to bids to be adjusted for inflation. The act provides for attorney's fees and costs to be awarded to a successful party in a civil action against the local government entity for a violation of the act's requirements. The act repeals redundant provisions. The act also makes technical changes.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

17A-2-1314, as last amended by Chapter 133, Laws of Utah 2000

17A-3-208, as last amended by Chapters 86 and 133, Laws of Utah 2000

72-6-109, as renumbered and amended by Chapter 270, Laws of Utah 1998

ENACTS:

11-39-101, Utah Code Annotated 1953

11-39-102, Utah Code Annotated 1953

11-39-103, Utah Code Annotated 1953

11-39-104, Utah Code Annotated 1953

11-39-105, Utah Code Annotated 1953

11-39-106, Utah Code Annotated 1953

11-39-107, Utah Code Annotated 1953

REPEALS:

10-7-20, as last amended by Chapter 365, Laws of Utah 1999

17-53-308, as renumbered and amended by Chapter 133, Laws of Utah 2000

17A-2-531, as last amended by Chapters 86 and 254, Laws of Utah 2000

17A-2-723, as last amended by Chapter 285, Laws of Utah 2002

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 11-39-101 is enacted to read:

CHAPTER 39. BUILDING IMPROVEMENTS AND PUBLIC WORKS PROJECTS

11-39-101. Definitions.

As used in this chapter:

(1) "Bid limit" means:

(a) for a building improvement:

(i) for the year 2003, \$40,000; and

(ii) for each year after 2003, the amount of the bid limit for the previous year, plus an amount calculated by multiplying the amount of the bid limit for the previous year by the lesser of 3% or the actual percent change in the Consumer Price Index during the previous calendar year; and

(b) for a public works project:

(i) for the year 2003, \$125,000; and

(ii) for each year after 2003, the amount of the bid limit for the previous year, plus an amount calculated by multiplying the amount of the bid limit for the previous year by the lesser of 3% or the actual percent change in the Consumer Price Index during the previous calendar year.

(2) "Building improvement":

(a) means the construction or repair of a public building or structure; and

(b) does not include construction or repair at an international airport.

(3) "Consumer Price Index" means the Consumer Price Index for All Urban Consumers as published by the Bureau of Labor Statistics of the United States Department of Labor.

(4) "Emergency repairs" means a building improvement or public works project undertaken on an expedited basis to:

(a) eliminate an imminent risk of damage to or loss of public or private property;

(b) remedy a condition that poses an immediate physical danger; or

(c) reduce a substantial, imminent risk of interruption of an essential public service.

(5) "Independent special district" means an independent special district under Title 17A, Chapter 2, Independent Special Districts, excluding a special service district under Title 17A, Chapter 2, Part 13, Utah Special Service District Act.

(6) "Local district" has the same meaning as defined in Section 17B-2-101.

(7) "Local entity" means a county, city, town, special district, or local district.

(8) "Lowest responsive responsible bidder" means a prime contractor who:

(a) has submitted a bid in compliance with the invitation to bid and within the requirements of the plans and specifications for the building improvement or public works project;

(b) is the lowest bidder that satisfies the local entity's criteria relating to financial strength, past performance, integrity, reliability, and other factors that the local entity uses to assess the ability of a bidder to perform fully and in good faith the contract requirements;

(c) has furnished a bid bond or equivalent in money as a condition to the award of a prime contract; and

(d) furnishes a payment and performance bond as required by law.

(9) "Procurement code" means the provisions of Title 63, Chapter 56, Utah Procurement Code.

(10) "Public works project":

(a) means the construction of:

(i) a park or recreational facility; or

(ii) a pipeline, culvert, dam, canal, or other system for water, sewage, storm water, or flood control; and

(b) does not include:

(i) the replacement or repair of existing infrastructure on private property;

(ii) construction commenced before June 1, 2003; and

(iii) construction or repair at an international airport.

(11) "Special district" has the same meaning as defined in Section 17A-1-101.

Section 2. Section **11-39-102** is enacted to read:

11-39-102. Requirement for plans and specifications and cost estimate.

Each local entity intending to undertake a building improvement or public works project paid for by the local entity shall cause:

(1) plans and specifications to be made for the building improvement or public works project; and

(2) an estimate of the cost of the building improvement or public works project to be made.

Section 3. Section **11-39-103** is enacted to read:

11-39-103. Requirements for undertaking a building improvement or public works project -- Request for bids -- Authority to reject bids.

(1) If the estimated cost of the building improvement or public works project exceeds the bid limit, the local entity shall, if it determines to proceed with the building improvement or public works project:

(a) request bids for completion of the building improvement or public works project by:

(i) publishing notice at least twice in a newspaper published or of general circulation in the local entity at least five days before opening the bids; or

(ii) if there is no newspaper published or of general circulation in the local entity, posting notice at least five days before opening the bids in at least five public places in the local entity and leaving the notice posted for at least three days; and

(b) except as provided in Subsection (3), enter into a contract for the completion of the building improvement or public works project with the lowest responsive responsible bidder.

(2) (a) Each notice under Subsection (1)(a) shall indicate that the local entity may reject any or all bids submitted.

(b) (i) The cost of a building improvement or public works project may not be divided to avoid:

(A) exceeding the bid limit; and

(B) subjecting the local entity to the requirements of this section.

(ii) Notwithstanding Subsection (2)(b)(i), a local entity may divide the cost of a building improvement or public works project that would, without dividing, exceed the bid limit if the local entity complies with the requirements of this section with respect to each part of the building improvement or public works project that results from dividing the cost.

(3) (a) The local entity may reject any or all bids submitted.

(b) If the local entity rejects all bids submitted but still intends to undertake the building improvement or public works project, the local entity shall again request bids by following the procedure provided in Subsection (1)(a).

(c) If, after twice requesting bids by following the procedure provided in Subsection (1)(a), the local entity determines that no satisfactory bid has been submitted, the legislative body may undertake the building improvement or public works project as it considers appropriate.

Section 4. Section **11-39-104** is enacted to read:

11-39-104. Exceptions.

(1) The requirements of Section 11-39-103 do not apply to:

(a) emergency repairs;

(b) a building improvement or public works project if the estimated cost under Section 11-39-102 is less than the bid limit; or

(c) the conduct or management of any of the departments, business, or property of the local entity.

(2) This section may not be construed to limit the application of Section 72-6-108 to an improvement project, as defined in Section 72-6-109, that would otherwise be subject to Section 72-6-108.

Section 5. Section **11-39-105** is enacted to read:

11-39-105. Retained payments.

Each payment that the local entity retains on a contract with a private person, firm, or corporation shall be retained and released as provided in Section 13-8-5.

Section 6. Section **11-39-106** is enacted to read:

11-39-106. Attorney's fees and costs in civil action.

In a civil action to enforce the provisions of this part against a local entity, the court may award attorney's fees and costs to the prevailing party.

Section 7. Section **11-39-107** is enacted to read:

11-39-107. Procurement code.

(1) This chapter may not be construed to:

(a) prohibit a county legislative body from adopting the procedures of the procurement code; or

(b) limit the application of the procurement code to a special district or local district.

(2) (a) In seeking bids and awarding a contract for a building improvement or public works project, a county legislative body may elect to follow the provisions of the procurement code, as the county legislative body considers appropriate under the circumstances, for specification preparation, source selection, or contract formation.

(b) A county legislative body's election to adopt the procedures of the procurement code may not excuse the county from complying with the requirements to award a contract for work in excess of the bid limit and to publish notice of the intent to award.

(c) An election under Subsection (2)(a) may be made on a case-by-case basis, unless the county has previously adopted the procurement code as permitted by Subsection 63-56-2(3)(e).

(d) The county legislative body shall:

(i) make each election under Subsection (2)(a) in an open meeting; and

(ii) specify in its action the portions of the procurement code to be followed.

(3) If the estimated cost of the building improvement or public works project proposed by a special district or local district exceeds the bid limit, the legislative body of the special district or local district may, if it determines to proceed with the building improvement or public works project, use the competitive procurement procedures of the procurement code in place of the comparable provisions of this chapter.

Section 8. Section **17A-2-1314** is amended to read:

17A-2-1314. Rights, powers, and authority of special service district.

(1) In addition to all other rights, powers, and authority granted by law or by other provisions of this part, a service district has the following rights, powers and authority:

(a) The right to sue and be sued.

(b) The power to exercise all powers of eminent domain possessed by the county or municipality which established the service district.

(c) The power to enter into contracts considered desirable by the governing authority of the service district to carry out the functions of the service district, including, without limitation, the power to enter into contracts with the government of the United States or any of its agencies, the State of Utah, counties, municipalities, school districts, and other public corporations, districts, or political subdivisions including institutions of higher education. These contracts may include, without limitation, provisions concerning the use, operation, and maintenance of any facilities of the service district and the collection of fees or charges with respect to commodities, services, or facilities provided by the service district.

(d) The power to acquire or construct facilities, to purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use, finance, and otherwise deal in and with real and personal property, or any interest in them, wherever situated, either within or outside of the service district, including water and water rights, and including the power to acquire other than by condemnation property or interests in property owned or held by institutions of higher education.

(e) The power to sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of or contract with respect to the use, operation, and maintenance of, all or any part of its property and assets, including water and water rights.

(f) The power to accept governmental grants, loans, or funds and to comply with the conditions of them.

(g) The right to utilize any officers, employees, property, equipment, offices, or facilities of the county or municipality which established the service district, and for which the governing authority of the service district shall reimburse the county or municipality from service district funds, a reasonable amount for the services so rendered or for the property, equipment, offices, or

facilities so used.

(h) The right to employ officers, employees, and agents for the service district, including engineers, accountants, attorneys, and financial consultants, and to fix their compensation.

(i) The right to adopt an official seal for the service district.

(2) The county legislative body shall by ordinance establish those classes of contracts of a service district which shall be subject to the requirements of ~~[Section 17-53-308]~~ Title 11, Chapter 39, Building Improvements and Public Works Projects, or of any law hereafter enacted for the same purpose.

(3) The governing authority of a municipality shall by ordinance establish those classes of contracts of a service district which shall be subject to the requirements of ~~[Section 10-7-20]~~ Title 11, Chapter 39, Building Improvements and Public Works Projects, or of any law hereafter enacted for the same purpose.

Section 9. Section **17A-3-208** is amended to read:

17A-3-208. Contract required for improvement -- Bidding requirements --

Exceptions.

(1) As used in this section, the word "sealed" does not preclude acceptance of electronically sealed and submitted bids or proposals in addition to bids or proposals manually sealed and submitted.

(2) (a) Except as otherwise provided in this section, improvements in a special improvement district shall be made only under contract duly let to the lowest responsible bidder for the kind of service or material or form of construction which may be desired. The improvements may be divided into parts, and separate contracts let for each part, or several parts may be combined in the same contract. A contract may be let on a unit basis. A contract shall not be let until a notice to contractors that sealed bids for the construction of the improvements will be received by the governing body at a specified time and place, and this notice has been published at least one time in a newspaper having general circulation in the county at least 15 days before the date specified for the receipt of bids.

(b) If by inadvertence or oversight, the notice is not published or is not published for a

sufficient period of time prior to the receipt of bids, the governing body, however, may still proceed to let a contract for the improvements if at the time specified for the receipt of bids it has received not less than three sealed and bona fide bids from contractors.

(c) If, under the construction contract, periodic payments for work performed are to be made by the issuance of interim warrants, this fact shall be disclosed in the notice to contractors. The notice to contractors may be published simultaneously with the notice of intention.

(3) The governing body, or its designated agent, shall at the time specified in the notice, open, examine, and publicly declare the bids. From these bids, the governing body may award a contract to the lowest, responsible bidder if that party's bid is responsive to the request for proposal or invitation to bid; but the governing body shall not be obligated or required to award a contract to any bidder and may reject any or all bids. In the event no bids are received or no responsive or acceptable bids are received after one public invitation to bid, the governing body may take any of the following actions:

(a) publicly rebid the project using the original plans, specifications, cost estimates, and contract documents;

(b) negotiate a contract privately using the original project plans, specifications, cost estimates, and contract documents;

(c) publicly rebid the project after revising the original plans, specifications, cost estimates, or contract documents;

(d) cancel the project;

(e) abandon or dissolve the improvement district; or

(f) perform the project work with the governing entity's work forces and be reimbursed for this work out of the special assessments levied.

(4) A contract need not be let for any improvement or part of any improvement the cost of which or the making of which is donated or contributed by any individual, corporation, the county, a municipality, the state, the United States, or any political subdivision of the state or of the United States. These donations or contributions may be accepted by the governing entity, but no assessments shall be levied against the property in the district for the amount of the donations

or contributions.

(5) A contract need not be let as provided in this section where the improvements consist of the furnishing of utility services or maintenance of improvements. This work may be done by the governing entity itself. Assessments may be levied for the actual cost incurred by the governing entity for the furnishing of these services or maintenance, or in case the work is done by the governing entity, to reimburse the governing entity for the reasonable cost of supplying the services or maintenance.

(6) A contract need not be let as provided in this section where any labor, materials, or equipment to make any of the improvements are supplied by the governing entity. Assessments may be levied to reimburse the governing entity for the reasonable cost of supplying such labor, materials or equipment. The provisions of [~~Sections 17-53-308~~] Title 11, Chapter 39, Building Improvements and Public Works Projects, and Section 72-6-108 shall not apply to the improvements to be placed in a special improvement district created under this part.

Section 10. Section **72-6-109** is amended to read:

72-6-109. Class B and C roads -- Construction and maintenance -- Definitions -- Estimates lower than bids -- Accountability.

(1) As used in this section and Section 72-6-108:

(a) "Bid limit" means [~~\$100,000~~];

(i) for the year 2003, \$125,000; and

(ii) for each year after 2003, the amount of the bid limit for the previous year, plus an amount calculated by multiplying the amount of the bid limit for the previous year by the lesser of 3% or the actual percent change in the Consumer Price Index during the previous calendar year.

(b) "Consumer Price Index" means the Consumer Price Index for All Urban Consumers as published by the Bureau of Labor Statistics of the United States Department of Labor.

~~(b)~~ (c) (i) "Construction" means the work that would apply to:

(A) any new roadbed either by addition to existing systems or relocation;

(B) resurfacing of existing roadways with more than two inches of bituminous pavement;

or

(C) new structures or replacement of existing structures, except the replacement of drainage culverts.

(ii) "Construction" does not include maintenance, emergency repairs, or the installation of traffic control devices as described in Section 41-6-20.

~~[(e)]~~ (d) "Improvement project" means construction and maintenance as defined in this section except for that maintenance excluded under Subsection (2).

~~[(d)]~~ (e) "Maintenance" means the keeping of a road facility in a safe and usable condition to which it was constructed or improved, and includes:

(i) the reworking of an existing surface by the application of up to and including two inches of bituminous pavement;

(ii) the installation or replacement of guardrails, seal coats, and culverts;

(iii) the grading or widening of an existing unpaved road or flattening of shoulders or side slopes to meet current width and safety standards; and

(iv) horizontal or vertical alignment changes necessary to bring an existing road in compliance with current safety standards.

~~[(e)]~~ (f) "Project" means the performance of a clearly identifiable group of associated road construction activities or the same type of maintenance process, where the construction or maintenance is performed on any one class B or C road, within a half-mile proximity and occurs within the same calendar year.

(2) The following types of maintenance work are not subject to the contract or bid limit requirements of this section:

(a) the repair of less than the entire surface by crack sealing or patching; and

(b) road repairs incidental to the installation, replacement, or repair of water mains, sewers, drainage pipes, culverts, or curbs and gutters.

(3) (a) (i) If the estimates of a qualified engineer referred to in Section 72-6-108 are substantially lower than any responsible bid received or in the event no bids are received, the county or municipality may perform the work by force account.

(ii) In no event shall "substantially lower" mean estimates that are less than 10% below the lowest responsible bid.

(b) If a county or municipality performs an improvement project by force account, it shall:

(i) provide an accounting of the costs and expenditures of the improvement including material, labor, and direct equipment costs to be calculated using the Cost Reference Guide for Construction Equipment by Dataquest Inc.;

(ii) disclose the costs and expenditures to any person upon request and allow the person to make a copy and pay for the actual cost of the copy; and

(iii) perform the work using the same specifications and standards that would apply to a private contractor.

Section 11. Repealer.

This act repeals:

Section 10-7-20, Definition -- Necessity for contract -- Call for bids -- Acceptance or rejection -- Retainage.

Section 17-53-308, Repair, alteration, or construction of public buildings -- Contracts -- Bids -- Payment and performance bonds -- Retainage.

Section 17A-2-531, Bids for construction -- Contracts -- Payment and performance bonds -- Retainage.

Section 17A-2-723, Construction -- Notice -- Awarding contracts -- Contractor's bonds.