

STATE OF MISSISSIPPI

OFFICE OF THE STATE AUDITOR

SHAD WHITE, AUDITOR



Everything You Need to Know About Sole Source Purchasing

MMAA June 24, 2024

Presented by:

Division of Technical Assistance

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SOLE SOURCE PURCHASING

§ 31-7-13

(m) **Exceptions from bidding requirements.** Excepted from bid requirements are:

(viii) **Single-source items.** Noncompetitive items available from one (1) source only. In connection with the purchase of noncompetitive items only available from one (1) source, a certification of the conditions and circumstances requiring the purchase shall be filed by the agency with the Department of Finance and Administration and by the governing authority with the board of the governing authority. Upon receipt of that certification the Department of Finance and Administration or the board of the governing authority, as the case may be, may, in writing, authorize the purchase, which authority shall be noted on the minutes of the body at the next regular meeting thereafter. In those situations, a governing authority is not required to obtain the approval of the Department of Finance and Administration. Following the purchase, the executive head of the state agency, or his designees, shall file with the Department of Finance and Administration, documentation of the purchase, including a description of the commodity purchased, the purchase price thereof and the source from whom it was purchased.

2012 WL 1071288 (Miss.A.G.)

Office of the Attorney General

State of Mississippi
Opinion No. 2012-00035
February 10, 2012

Re: Single Source purchase

*1 Ms. Sally Garland
Mayor
City of Crystal Springs
Post Office Box 473
Crystal Springs, Mississippi 39059

Dear Ms. Garland:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response.

Issues Presented

You inquire as to whether a municipality may declare a specific brick a “single source” item, which is a listed exemption to the public purchasing statute found at Mississippi Code Annotated Section 31-7-13. Specifically, you provide the following: As mayor for the city of Crystal Springs, Mississippi, I am requesting an opinion on the following facts and questions.

The city sustained a major fire loss of a unique historic privately owned brick building which was almost one hundred years old. The current owner of the building salvaged most of the brick from the remains of the building. The loss of this historic building has been the impetus for the city applying for a self help grant through Mississippi Development Authority which would allow the city to purchase the salvaged brick and incorporate them into the downtown block area for sidewalks and crossings. It appears that the brick purchase will exceed the bid threshold limit of \$50,000.00. The city desires to use the original salvaged brick for this project due to their historic ties to the city.

Under the facts as stated, may the city declare these specific bricks, which are unique to our city history, as “sole source” and negotiate the purchase price with the owner without the necessity of competitive bids or quotes where the expenditure will exceed \$50,000.00.

Response

Yes, assuming that the governing authorities determine that the procurement of the subject brick may only be obtained from one source, and no others, as contemplated in Mississippi Code Annotated Section 31-7-13(m)(viii), the governing authorities may declare the item a single source item and will not be required to comply with the bidding mandates when purchasing such item.

Applicable Law and Discussion

In accordance with Mississippi Code Annotated Section 31-7-13, a public entity is required to competitively bid commodities with a purchase price that exceeds \$50,000.00, unless the procurement qualifies as one of the exemptions enumerated in Section 31-7-13(m). As you acknowledge in your request, a commodity that qualifies as a single source item, as contemplated in Section 31-7-13(m)(viii), is exempt from the bidding requirements. Section 31-7-13(m)(viii) provides the following:

(viii) **Single source items.** Noncompetitive items available from one (1) source only. In connection with the purchase of noncompetitive items only available from one (1) source, a certification of the conditions and circumstances requiring the purchase shall be filed by the agency with the Department of Finance and Administration and by the governing authority with the board of the governing authority. Upon receipt of that certification the Department of Finance and Administration or the board of the governing authority, as the case may be, may, in writing, authorize the purchase, which authority shall be noted on the minutes of the body at the next regular meeting thereafter. In those situations, a governing authority is not required to obtain the approval of the Department of Finance and Administration.

*2 We have previously opined that, if a commodity of the same kind or brand is available from more than one source, then the commodity is not a qualified "single source item" and the public entity would be required to advertise for bids. MS AG Op., Sams (May 10, 1982). Provided that the subject commodity is available from only one source, the procurement of it would not be subject to the bidding mandates of Section 31-7-13. MS AG Op., Stebbins (July 2, 1993); MS AG Op., Stebbins (June 2, 1993); MS AG Op., Holleman (March 22, 1979). Based upon your factual scenario, the specific brick you reference appears to be a "single source item" as contemplated in Section 31-7-13(m)(viii), assuming that the owner of the brick is truly the only source of the item. Ultimately, whether an item is a single source item or not is a factual determination to be made by the governing authorities. MS AG Op., Thomas (February 29, 2008). In the event that the governing authorities determine that the subject brick is, in fact, a single source item, a certification of the conditions and circumstances must be filed with the appropriate authorities as outlined in Section 31-7-13(m)(viii). MS AG Op. Montague (July 13, 2001).

If our office may be of further assistance, please advise.

Sincerely,

Jim Hood
Attorney General
By: Leigh Triche Janous
Special Assistant Attorney General

2012 WL 1071288 (Miss.A.G.)

1980 WL 28558 (Miss.A.G.)

Office of the Attorney General

State of Mississippi

January 15, 1980

***1 Warren County Port Commission - Contracts and Purchases - Advertising for Bids**

Honorable Gerald E. Braddock
Attorney
Warren County Board of Supervisors
Post Office Drawer 1099
Vicksburg, Mississippi 39180

Dear Mr. Braddock:

Your letter request of January 11, 1980, addressed to Honorable A. F. Summer, Attorney General, has been received and assigned to this writer for research and reply. Your letter states:

“The Warren County Port Commission is in the process of enlarging the industrial properties of the Port, and it is necessary that the Port construct a lead track from the Illinois Central Gulf Railroad's lead track into the industrial park. Before constructing the Port's lead track it will be necessary for a switch to be constructed on the railroad's right-of-way and approximately 159 feet of trackage for turnout be constructed leading from the switch into the industrial park.

“The Illinois Central Gulf Railroad will not allow anyone but the railroad to construct the switch, turnout and necessary 159 feet of trackage.

“The Illinois Central Gulf Railroad has agreed to install the switch on its property and the 159 feet for the turnout and trackage at a cost of \$22,558.00. This is in excess of the \$5,000.00 limitation on Port expenditures without putting same out for bids under Section 59-7-205 of the Mississippi Code of 1972.

“As the railroad requires that the switch, turnout and trackage be constructed only by the railroad, then we are dealing with a single source supplier. I would appreciate getting an opinion from you that the Board of Supervisors of Warren County, and the Warren County Port Commission could proceed to enter into a Contract in excess of \$5,000.00 with the Illinois Central Gulf Railroad for the construction of the switch, turnout and trackage, referred to hereinabove, without necessity of putting same out for bids. I have discussed this with John Weston of your office, and he is familiar with our problem.

“The Port has already advertised for bids for the construction of the Port's lead track, but cannot proceed with same until an agreement is reached with the Illinois Central Gulf Railroad Company for the construction of the switch, turnout and 159 feet of trackage. . . .”

Section 59-7-205 states, in part, that:

“ . . . Said port commission, in the performance of its duties, may make any contract and authorize any purchases from any funds on hand in the port fund of any such county, which said contracts and purchases may, in the sound business judgment of the commission, be made without the necessity of prior advertisement or public bids, provided such contracts or purchases do not involve the expenditure of sums in excess of five thousand dollars (\$5,000.00). Said contracts and purchases shall include all contracts and purchases incidental to or necessary for the proper establishment, insurance, maintenance, repair, improvement and operation of said port facilities,”

*2 This office has previously ruled that Boards of Supervisors fall within the purview of § 31-7-13 in an opinion to Honorable Boyce Holleman, dated March 29, 1979, attached hereto and incorporated herein by reference. It is the opinion of this office that County Port Commissions, operating under Chapter 7 of Title 59, likewise fall within the scope of said § 31-7-13.

Consequently, under the particular facts and circumstances set forth in your letter, it is the opinion of this office that the Commission, upon a finding and determination consistent with the facts you relate, could enter into a contract with the railroad without advertising for bids for the construction of the switch, turnout and necessary trackage. ^

With kind regards, I am
Sincerely yours,

A. F. Summer
Attorney General

1980 WL 28558 (Miss.A.G.)

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2019 WL 7820662 (Miss.A.G.)

Office of the Attorney General

State of Mississippi
Opinion No. 2019-00373
December 3, 2019

Re: Procurement Practices

*1 Paul B. Watkins, Jr., Esq.
Attorney
Oxford School District
5 University Office Park
2094 Old Taylor Road, Suite 200
Oxford, Mississippi 38655

Dear Mr. Watkins:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response.

Issues Presented

Your inquiry asks whether the public purchasing statutes require a public entity to solicit written competitive quotes for the procurement of individual items that are valued at an amount less than Five Thousand Dollars (\$5,000.00) when a public entity has made multiple purchases from the same vendor. In other words, must the public entity consider the aggregate amount of purchases made from a single vendor when determining which procurement process, i.e., competitive sealed bids versus competitive written quotes, to use when making future purchases. Specifically, you ask the following:

I represent the Oxford School District, which has asked me to seek your opinion on the following questions:

First, each year the District makes numerous separate purchases from the same vendors. Examples are a local hardware store, a local office supply store, and online marketplaces such as Amazon. Over the course of a fiscal year, or even a single month, the total aggregate cost of unrelated purchases from one vendor could easily exceed \$5,000.00, or even \$50,000.00. Different schools or departments within the District frequently make such purchases with no knowledge of the types of purchases made by other schools or departments from the same vendors. It has recently been suggested that the District should solicit competitive written bids for each purchase from any vendor from which the District anticipates making total purchases in excess of \$5,000.00 during a particular time period.

The District is, of course, aware that it must solicit written bids for purchases between \$5,000.00 and \$50,000.00 under Miss. Code Ann. Section 31-7-13(b). We are also aware of the prohibition on bid-splitting and the penalties provided in Section 31-7-13(o). However, I am aware of nothing requiring public entities to solicit quotes for small, unrelated purchases from the same vendor because the total amount of those purchases exceeds the \$5,000.00 threshold. Such a requirement would place an undue burden on public entities' day-to-day operations.

Is the District required to solicit written competitive quotes for purchases that do not exceed \$5,000.00 and are not part of the same contract or commodity, where the total amount of such purchases over time from the same vendor will exceed \$5,000.00? If so, what is that time period for which the District must estimate the total amount of purchases?

Second, the District regularly purchases Apple computer equipment, including laptop computers and iPad tablets, for use by its faculty, staff, and students. This computer equipment uses proprietary operating systems and other software that are not available

on computer equipment made by any other manufacturer. The District's technology systems rely heavily on functionality only available on Apple computers, and nearly every device issued to District users is manufactured by Apple.

*2 The District's existing device management systems are all geared toward Apple equipment and software. In fact, some of those systems only support Apple equipment. The District would have to implement a completely new device management tool to manage non-Apple equipment. The District's technical staff is also well trained to support Apple products, and its staff and students have all been trained in the use of Apple devices and application. A switch to another computer environment would require extensive training for support staff and end users.

Furthermore, Apple does not allow third party-sellers to sell its computer equipment to schools. Each time the District has sought competitive bids for Apple computer equipment during the past several years, Apple has been the only legitimate bidder. Under these circumstances, may the District's board of trustees authorize the purchase of Apple computer equipment from Apple as single source items under Section 31-7-13(m)(viii)?

Response

To the extent that the Oxford School District is making purchases on an as-needed basis without the intent to circumvent the competitive bidding requirements contained in Section 31-7-13 of the Mississippi Code, it is not required to use the aggregate amount paid to a vendor when determining which bidding procedure to use. If the District determines that the subject computer equipment constitutes a single source item pursuant to Section 31-7-13(m)(viii), the procurement of said equipment would be exempt from the provisions of Section 31-7-13. The determination of whether the subject equipment is a single source item must be made by the District, consistent with fact, in accordance with the requirements and procedure set forth in Section 31-7-13(m)(viii).

Applicable Law and Discussion

You ask whether the Oxford School District ("District") must solicit written quotes/bids for "small, unrelated purchases from the same vendor" because the aggregate amount of the purchases made from this vendor may exceed \$5,000.00 or, potentially in some instances, \$50,000.00. We are not aware of any statutory provision that requires a state agency or governing authority to consider the aggregate amount paid to a vendor for small, unrelated purchases. With respect to the splitting of bids, when asked whether it was proper for a municipality to bid materials of a construction project separate from the installation and whether to do so would constitute "bid splitting", we opined that:

... there is no prohibition against a public owner advertising for bids for the materials described in your letter and later advertising for the installation of the materials as long as it is not done to circumvent the public purchasing and contracting laws. For example, if the project is split to steer the contract to a particular vendor or contractor, or if the project is split to avoid advertising or obtaining competitive written bids, then such activities would constitute a circumvention of the public purchasing and contracting laws and would be prohibited by Section 31-7-13(o).

*3 MS AG Op., Gabriel (January 28, 2005). *See also* MS AG Op., Webb (April 21, 2017)(our office found no prohibition preventing weekly purchase of non-perishable food for prisoners provided that such purchases were not split so as to circumvent the bidding process). Thus, to the extent that the District is making "small, unrelated" purchases on an as-needed basis without the intent to circumvent the competitive bidding requirements contained in Section 31-7-13, it is not required to use the aggregate purchase amount paid to a vendor when determining which bidding procedure to use.¹ *See* Mississippi Code Annotated Section 31-7-13(a), (b), and (c).

As to your second inquiry, Section 31-7-13(m)(viii) expressly exempts single source items from the bidding requirements imposed in Section 31-7-13. Section 31-7-13(m)(viii) provides the following:

Single source items. Noncompetitive items available from one (1) source only. In connection with the purchase of noncompetitive items only available from one (1) source, a certification of the conditions and circumstances requiring the purchase shall be filed by the agency with the Department of Finance and Administration and by the governing authority with the board of the governing authority. Upon receipt of that certification the Department of Finance and Administration or the board of the governing authority, as the case may be, may, in writing, authorize the purchase, which authority shall be noted on the minutes of the body at the next regular meeting thereafter. In those situations, a governing authority is not required to obtain the approval of the Department of Finance and Administration. Following the purchase, the executive head of the state agency, or his designees, shall file with the Department of Finance and Administration, documentation of the purchase, including a description of the commodity purchased, the purchase price thereof and the source from whom it was purchased.

If the District determines that the subject computer equipment constitutes a single source item pursuant to Section 31-7-13(m) (viii), the procurement of said equipment would be exempt from the provisions of Section 31-7-13. The determination of single source items, i.e., noncompetitive items available from one source only, must be made by the District, consistent with fact, in accordance with the requirements and procedure set forth in Section 31-7-13(m)(viii) above. We direct your attention to our recent opinion to Laura D. Jackson, dated October 18, 2019, regarding a similar issue with Apple products in school districts. In that opinion, the requestor inquired about the authority of a governing board to issue restrictive specifications when seeking bids for certain equipment. We opined that:

[i]t is clear, based upon the language contained in Section 31-7-13(c)(iv)(1), that the board of a governing authority may approve, upon receipt of valid justification, a request for specific equipment necessary to perform a specific job. Once approved by the board and placed on its minutes, the governing authority may write specifications which require a specific item of equipment to perform a specific job. In this instance, assuming the board of trustees of a school district is presented with a request for specific equipment necessary to perform a specific job, supported by valid justification, said school district may issue specifications which require brand specific equipment.

*4 With regard to the issuance of restrictive specifications, we previously opined that:

[a] bid specification serves the primary purpose of providing a basis for obtaining a product that will satisfy a particular need. As a result, bid specifications often have the effect of eliminating those items that fall outside the terms of the bid specifications. However, the ultimate goal of the public purchasing statutes is to encourage competition to ensure efficiency and economy in purchases made by public entities. In fact, Section 31-7-13(c)(iv)(1) specifically prohibits a public entity from writing bid specifications that exclude comparable equipment. Having said that, the Legislature recognized, in its passage of said section, that in some instances it might be appropriate for a public entity to issue restrictive bid specifications because a public entity “must be able to determine how its needs may be fulfilled and which features are indispensable to fulfilling those needs.

MS AG Op., Long (June 11, 2010). Whether the justification presented constitutes a valid one, as contemplated in Section 31-7-13(c)(iv)(1), is a factual determination. While the justification you describe, in our opinion, seems reasonable and does not appear to be undertaken for the purpose of circumventing the intent of the public purchasing statutes, such determination is one to be made by the governing authority subject to review by the Office of the State Auditor and a court of competent jurisdiction.

MS AG Op., Jackson (October 18, 2019). Because we are prohibited from making factual determinations pursuant to Section 7-5-25, we make no comment on the issue of whether the single source exemption applies in this scenario. We refer you to the Office of the State Auditor on that matter.

If our office may be of further assistance, please advise.

Sincerely,

Jim Hood
Attorney General

By: Leigh Triche Janous
Special Assistant Attorney General

Footnotes

- 1 Alternatively, school districts are authorized to purchase commodities from the state contract established by Section 31-7-12. *See* MS AG Op., Adams (June 7, 2019).

2019 WL 7820662 (Miss.A.G.)

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USING FEDERAL DOLLARS

§ 31-7-13

(c) **Bidding procedure for purchases over \$75,000.00.**

4. Agencies and governing authorities using federal funds for the procurement of any good or service, including exempt personal and professional services, must comply with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards - Subpart D - Post Federal Award Requirements Procurement Standards, in accordance with 2 CFR 200.317 through 2 CFR 200.327.

2 CFR Part 200 Subpart D

§ 200.319 Competition.

(f) Noncompetitive procurements can only be awarded in accordance with § 200.320(c).

(c) Noncompetitive procurement. There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:

- (1) The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (see paragraph (a)(1) of this section);
- (2) The item is available only from a single source;
- (3) The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;
- (4) The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity; or
- (5) After solicitation of a number of sources, competition is determined inadequate.