

# PUBLIC PURCHASING

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Association of Indiana Counties  
NEWLY-ELECTED OFFICIALS TRAINING  
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# INTRODUCTION

## Topic Summary – Public Purchasing

- Procedures and requirements relating to:
  - Retention of Services
  - Construction of Public Work Projects
    - » Ind. Code 36-1-12
  - Procurement of Supplies
    - » Ind. Code 5-22

# RETENTION OF SERVICES

General Rule – Very few rules

Ind. Code 5-22 – Codified common law

- Definition of “Services” – Ind. Code 5-22-2-30: “... **furnishing of labor, time or effort** by a person, **not involving the delivery of specific supplies** other than printed documents that are merely incidental to the required performance.”
- Public owner has broad discretion in retaining service providers – Ind. Code 5-22-6-1: a governmental body may purchase services “**using any procedure the governmental body... considers appropriate.**”
- Ability to promulgate own rules – Ind. Code 5-22-6-2: a governmental body “**may**” adopt rules governing the purchases of services.”

# RETENTION OF SERVICES

## Architects and Engineers

- Ind. Code 5-16-11.1: Retention of architects, engineers and land surveyors for Public Projects.
  - Section 5 – Public Owner may contract for professional services “on the basis of **competence and qualifications...** and **negotiate compensation** that the public agency determines to be reasonable.”
  - Section 4(a) – Public Owner has broad discretion of **whether** to give notice regarding the employment opportunity.
  - Section 4(b) – **If notice is provided**, must include:
    - Location of Project
    - General description of Project
    - Criteria to be used to select design professional
    - Where additional information regarding the Project can be attained
    - Business hours of the public agency
    - Last date for accepting statement of qualifications

# RETENTION OF SERVICES

## Construction Managers

- Construction Managers also provide a “service”
- Ind. Code 5-16-10-2 – Limitations relative to Construction Managers on Public Projects
  - Owner may not employ the architect or engineer who designed the Project, to also serve as Construction Manager
  - Construction Manager cannot compete for, be awarded or perform any portion of the construction work.

## E-Verify Program – Ind. Code 22-5-1.7

- All public contracts for services entered into by a state agency or political subdivision
- Certain provisions must be included in the public contract
- Affidavit required affirming enrollment and participation in E-Verify program

# RETENTION OF SERVICES

- Antidiscrimination – Ind. Code 22-9-1-10
  - Applies to **all** contracts entered into by the State or any of its political or civil subdivisions
  - Requires a provision to be included in contract whereby the contractor or vendor agrees not to discriminate in accordance with requirements of Ind. Code 22-9-1-10.
- Disqualification of Contractors Dealing with the Government of Iran – Ind. Code 5-22-16.5 and Ind. Code 36-1-12-23.
  - Applies to all contracts for public works, supplies and services.
  - Contracts must contain certification that contractor, vendor or service provider is not engaged in investment activities in Iran.

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

### Ind. Code 36-1-12-4: Key elements to competitive bidding

- Scope of Ind. Code 36-1-12
  - Governs public work performed on property owned or leased by political subdivisions – Ind. Code 36-1-12-1(a)
  - Other statutory options to perform public work
    - Design-Build contract – Ind. Code 5-30; and
    - Utility efficiency program or guaranteed savings contract – Ind. Code 36-1-12.5
  - Chapter does not apply to a person who has entered into an “operating agreement” with a political subdivision under Ind. Code 5-23.
  
- Definition of Public Work – Ind. Code 36-1-12-2
  - Means the “construction, reconstruction, alteration or renovation of a public building ... or other structure that is paid for out of a public fund or out of a special assessment.”
  - The term includes the construction, alteration, or repair of a highway, street, alley, bridge, sewer, drain, or other improvement that is paid for out of public fund or special assessment.

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- Competitive bid – Ind. Code 36-1-12-4
  - Required when cost of the public work will be at least \$150,000 – Ind. Code 36-1-12-4(a)
  - Develop plans and specs – avoid specs which might unduly limit competition – Ind. Code 36-1-12-4(b)(1)
  - Plans and specs made accessible to public as specified in the Invitation to Bid – Ind. Code 36-1-12-4(b)(2)
  - Publish notice soliciting bids (per Ind. Code 5-3-1) – Ind. Code 36-1-12-4(b)(3), (4) & (5)
    - Publish twice
    - At least one week apart
    - Date between the first notice and bid date may not be more than 6 weeks if estimated cost is less than \$25,000,000 and not more than 10 weeks if estimated cost is at least \$25,000,000
    - Second publication at least seven days before bid date
    - Notice must specify where the plans and specs are on file and the bid place, date and time



# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- Requirement for State Board of Accounts Form 96 – Ind. Code 36-1-12-4(b)(6)
  - Financial statement
  - Statement of experience
  - Proposed plan for performing work
  - Available equipment
- Requirement for Bidders to submit Non-Collusion Affidavit – Ind. Code 36-1-2-4(b)(12)
- Bid bond or certified check shall be required on projects estimated to be more than \$200,000 (optional for projects under \$200,000) – amount of bid bond not to exceed 10% of the bid - Ind. Code 36-1-12-4.5
- Bids to be opened publicly and read aloud at designated time and place – Ind. Code 36-1-12-4(b)(7)

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- The award of the contract is to be made to the “lowest responsible and responsive bidder” or “reject all bids” – Ind. Code 36-1-12-4(b)(8)
  
- Factors to consider in determining whether a bidder has submitted a responsive bid – Ind. Code 36-1-12-4(b)(10)
  - Does bid or quote conform in all material respects to the specifications
  - Does bid comply specifically with the invitation to bid and instructions to bidders
  - Does bid comply with all applicable statutes, ordinances, resolutions or rules
  
- Factors to consider in determining whether a bidder is “responsible” – Ind. Code 36-1-12-4(b)(11)
  - Ability and capacity of the bidder to perform the work
  - Integrity, character and reputation of the bidder
  - Competence and experience of bidder

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- “Responsive” and “Responsible” are threshold tests and cannot be used to rank bidders.

The Board has *not* been given the discretion to award a contract to the *most* responsible bidder, rather, the statute merely provides that the Board must require the winning bidder to be responsible.

The definition of “responsible contractor” . . . suggests the determination for “responsibleness” is to be made *independently* for each bidder. The Board may not make comparisons of bidders to determine responsibleness. Responsibleness is a minimal requirement of bidders, not a competitive standard among bidders. A bidder can be irresponsible only if the awarding body would not award the contract to the bidder *even if* that bidder had submitted the sole bid.

Bowen Engineer Corp. v. W.P.M. Inc., 557 N.E.2d 1358, 1366 (Ind. App. 1990) (Court’s emphasis)

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- If public owner awards contract to someone other than the apparent low bidder (low bidder was found to be not responsive or not responsible) – Ind. Code 36-1-12-4(b)(9)
  - Board must state, in minutes or memorandum at the time of award, the factors used to determine which was the lowest responsible and responsive bidder
  - Keep copy of minutes or memorandum for public inspection

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

### Additional requirements applicable to Public Work Projects

- Payment and performance bond
  - Payment Bond – Ind. Code 36-1-12-13.1
    - Required if cost of public work exceeds \$200,000
    - At Board’s discretion if cost of public work is \$200,000 or less
  - Performance Bond – Ind. Code 36-1-12-14
    - Required is cost of public work exceeds \$200,000
    - At Board’s discretion if cost of public work is \$200,000 or less

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- Prevailing/Common wage – Ind. Code 36-1-12-15: REPEALED
  - Common Construction Wage not in effect after June 30, 2015
  - No wage scale may be established or mandated
  - New statute (Ind. Code 5-16-13) establishes four “contractor tiers”
  - Tier 1 contractors (general contractors) must self-perform at least 15% of the total contract price
  - Tier 1 and Tier 2 contractors with at least 50 laborers must (a) provide access to a training program, and (b) participate in an apprenticeship training program
  - All tiers of contractors have insurance requirements, must comply with E-Verify program, and must preserve payroll records for 3 years after completion of the project
  - All contractors must be qualified by the public board

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- Retainage requirements and limitations
  - Limitations on retainage for typical public works project – Ind. Code 36-1-12-14(c)
    - No more than 10% nor less than 6% until the public work project is 50% complete, and no retainage thereafter, or
    - No more than 5% nor less than 3% throughout duration of the Project.
  - Highway, road, street, alley and bridge projects are excluded from Ind. Code 36-1-12-14
  
- Change Order Limitations – Ind. Code 36-1-12-18
  - Limited to 20% of the original contract price
  - Limitation does not apply to circumstances that could not have been reasonably foreseen

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- Public work in excess of \$100,000 may be undertaken by public owner only in accordance with plans and specifications approved by a licensed architect or engineer – Ind. Code 36-1-12-7.
  
- All plans and specifications for public buildings must be approved by the state department of health, the division of fire and building safety and other agencies designated by statute – Ind. Code 36-1-12-10.
  
- Cannot divide public work project into multiple projects to avoid bidding – Ind. Code 36-1-12-19
  - For purposes of this section, “the cost of the public work project includes the cost of material, labor, equipment rental, and all other expenses incidental to the performance of the project” – Ind. Code 36-1-12-19(a)
  - Knowing violation constitute a Class A infraction – Ind. Code 36-1-12-19(c) and (d)



# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

### Statutory Alternatives to full competitive bid

- Use of the owner's own workforce – Ind. Code 36-1-12-3
  - When public work project is estimated to be less than \$250,000, the owner may
    - Purchase and lease materials in the manner provided in Ind. Code 5-22; and
    - Perform the public work with its own workforce
  - The owner must have employees on its workforce that are capable of performing the construction, maintenance and repair applicable to that work.
  - In determining whether the cost of the project falls within the \$250,000 limitation, must consider the cost of:
    - materials, labor, equipment and rental;
    - reasonable rate for use of trucks or heavy equipment owned by the owner; and
    - all other expenses incidental to performance of the project.
  - Public work performed by the owner's own workforce, must be inspected and accepted as complete in the same manner as a bid project.

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- A public owner “may not artificially divide the project to bring any part of the project under this section” – Ind. Code 36-1-12-3(f)
  
- Small dollar projects – Ind. Code 36-1-12-4.7 and 5
  - Projects between \$50,000 and \$150,000
  - Invite quotes from 3 persons
  - Notice mailed not less than 7 days before time fixed for receiving quotes
  - Open quotes publically and read aloud
  - Except as provided in Ind. Code 36-1-12-22 (Price Preferences), award the contract to the lowest responsible and responsive quoter or reject all quotes
  - If the project is under \$50,000 and the owner rejects all quotes, establishing in writing the reasons for rejecting the quotes, the owner may negotiate and enter into agreements for the work in the open market without inviting or receiving new quotes
  - If public works project is less than \$25,000, the owner may solicit 3 quotes by telephone or facsimile transmission and the 7 day notice period does not apply

# PUBLIC WORK PROJECTS

## IND. CODE 36-1-12

- Routine operation or maintenance – Ind. Code 36-1-12-4.9
  - If the cost of “routine operation, routine repair or routine maintenance of existing structures, buildings or real property” is estimated to be less than \$150,000, the owner may award in the manner provided in Ind. Code 5-22
- Declaration of emergency – Ind. Code 36-1-12-9
  - Board must declare an emergency
  - Invite quotes from 2 persons
  - Board minutes must reflect the emergency declaration and identify the persons invited to quote

# AWARD OF PUBLIC CONTRACTS

## Authority/Discretion of Public Board and Scope of Judicial Review

- General Rule – Public Boards have fairly broad authority and discretion
  - Public authorities are vested with discretion and their decisions are not to be interfered with in the absence of collusion, fraud, favoritism or ill will – Haywood Publishing Co. v. West, et al., 110 Ind. App. 508, 39 N.E.2d 785 (Ind. App. 1942)
  - Decision of board cannot be overturned unless arbitrary, corrupt or fraudulent – School City of Gary v. Continental Electric Co., Inc., 273 N.E.2d 293 (Ind. App. 1971)
  - Courts must not substitute their judgment for that of public boards and their decisions will be reserved only when clearly arbitrary, illegal, corrupt or fraudulent – Bowen Engineering Corp. v. W.P.M., Inc., 557 N.E.2d 1358 (Ind. App. 1990)

# AWARD OF PUBLIC CONTRACTS

- Board's authority and discretion is not, however, unlimited – Court's will set aside a board's action if found to be arbitrary, capricious or an abuse of discretion
- Extent of Judicial Relief
  - Should be limited to vacating the decision and remanding to the public owner for further consideration
  - Court should not award the contract – should not assume the public owner's discretion and authority

# PROCUREMENT OF SUPPLIES

## IND. CODE 5-22

Supplies defined as “equipment, goods and materials” – Ind. Code 5-22-2-38

Four procedures available for purchasing supplies:

- Competitive Bidding – Ind. Code 5-22-7
  - Similar to competitive bid under Ind. Code 36-1-12
  - Award to lowest responsible and responsive bidder
  - Some variations to procurement procedure
  
- Invitation for Quotes – Ind. Code 5-22-8
  - Used for small purchases under \$150,000
  - Invite quotes from 3 persons
  - Award to the lowest responsible and responsive quoter

# PROCUREMENT OF SUPPLIES

## IND. CODE 5-22

- Requests for Proposals – Ind. Code 5-22-9
  - Public Owner must issue a written determination that use of competitive bids is either not practical or not advantageous to the County
  - Allows Public Owner to identify selection criteria
  - Price to be a factor, but not necessarily controlling
  - Allows for discussions and negotiations after proposals are submitted
  - Statutory procedure must be followed
  
- Special Purchases – Ind. Code 5-22-10
  - Normal procurement procedures can be avoided in special cases
  - What qualifies as a special purchase
    - Emergency
    - Substantial Savings
    - Auctions
    - Single Source for Supply
    - Compatibility
    - No offer received under other procurement methods
    - Government Discount Available
    - General Services Administration Price
    - Gift

# PROCUREMENT OF SUPPLIES

## IND. CODE 5-22

- State of Indiana Quantity Purchase Agreement Plan
  - May purchase supplies under certain Quantity Purchase Agreements (QPAs) entered into by the State of Indiana – Ind. Codes 5-22-17-9 and 36-1-7-12.
  - May purchase supplies under a QPA if:
    - The terms and conditions of the QPA require the vendor to make supplies available to political subdivisions under the same terms and conditions stipulated in the QPA.
    - The award of the QPA complies with state procurement laws.
  - The Indiana Department of Administration provides a list of QPAs on its website ([www.in.gov/idoa](http://www.in.gov/idoa))



# PROCUREMENT OF SUPPLIES

## IND. CODE 5-22

- Miscellaneous Provisions (apply to all purchases)
  - Purchasing Preferences – Ind. Code 5-22-15
    - Any steel products used in the manufacture of supplies or the performance of services shall be manufactured in the United States subject to the exceptions provided in Ind. Code 5-22-15-25.
    - Contracts for supplies must contain antidiscrimination provision – Ind. Code 22-9-1-10.

# PROCUREMENT OF SUPPLIES

## IND. CODE 5-22

- Determination of Responsibility – Ind. Code 5-22-16-1
  - In determining whether an offeror is responsible, a political subdivision may consider the following factors:
    - The ability and capacity of the offeror to provide the supplies;
    - The integrity, character and reputation of the offeror; and
    - The competency and experience of the offeror.
  - An offeror may not be considered responsible if the offeror fails to provide information necessary to make a determination as to whether the offeror is responsible.
  - A determination that an offeror is not responsible must be made in writing.

# PROCUREMENT OF SUPPLIES

## IND. CODE 5-22

- Determination of Responsiveness – Ind. Code 5-22-16-2
  - In determining whether an offeror is responsive, a political subdivision may consider the following:
    - Whether the offeror has submitted an offer that conforms in all material respects to the specifications for the supplies solicited;
    - Whether the offeror has submitted an offer that complies specifically with the solicitation and the instructions to offerors; and
    - Whether the offeror has complied with all applicable statutes, ordinances, resolutions, or rules pertaining to the award of a public contract.

# PROCUREMENT OF SUPPLIES

## IND. CODE 5-22

- Evidence of Financial Responsibility – Ind. Code 5-22-16-5
  - A political subdivision may specify in the solicitation that an offeror must provide evidence of financial responsibility in order to be considered responsible.
  - Evidence of financial responsibility may be in the form of a bond, certified check or other evidence specified in the solicitation.
  - A bond or certified check may not be set at more than ten percent (10%) of the contract price.
  - A performance bond may also be required if disclosed in the solicitation.

# PROCUREMENT OF SUPPLIES

## IND. CODE 5-22

- Affirmation of Offeror – Ind. Code 5-22-16-6
  - An offeror must file an affirmation, made under the penalties of perjury, that states the following:
    - The offeror has not entered into a combination or an agreement:
      - Relative to the price to be offered by a person;
      - To prevent a person from making an offer; or
      - To induce a person to refrain from making an offer; and
    - The offeror’s offer is made without reference to any other offer.
      - This requirement may be stated in the contract documents.
- Cancellation of Solicitation; Rejection of Offer
  - A solicitation may be cancelled or offers may be rejected when determined to be in the best interests of the political subdivision.
  - This determination must be made a part of the contract file.

## **Grantland M. Clapacs**

Bingham Greenebaum Doll LLP

[gclapacs@bgdlegal.com](mailto:gclapacs@bgdlegal.com)

2700 Market Tower

10 West Market Street

Indianapolis, IN 46204

Telephone: (317) 635-8900

Facsimile: (317) 236-9907

Follow us on Twitter [@BGDlegal](https://twitter.com/BGDlegal)

