
HOUSE BILL No. 1295

DIGEST OF INTRODUCED BILL

Citations Affected: IC 4-13.6-2-4; IC 5-16-13; IC 35-44-1-8; IC 36-1-12.

Synopsis: Public works bidding procedures. Provides that specifications for public works projects must be written to encourage free, open, and competitive bidding and must refrain from calling for unique or proprietary materials. Provides that a person who prepared, participated in the preparation of, or conferred any property on another person who prepared or participated in the preparation of the specifications for a public works project may not be awarded a contract for the public works project. Provides that if the attendance of a bidder at a prebid meeting or conference is a condition to the acceptance of a bid from that bidder, the date and time of the prebid meeting or conference must be published in the same fashion and for the same period as the board must advertise the date for receiving bids. Provides that the noncollusion affidavit submitted with a public works bid must be affirmed under the penalties for perjury and must affirm that the bidder did not violate the requirements for public works specifications. Provides that a person who has certain responsibilities relating to the award of a public works contract and who recklessly, knowingly, or intentionally solicits, accepts, or agrees to accept any property from another person in return for an agreement to: (1) purchase or recommend the purchase of the other person's supplies, materials, or services with respect to the public works project; (2) incorporate or recommend incorporation of the other person's supplies, materials, or services into specifications for the public works project; (3) award or recommend the award of the public works contract to that other person; or (4) recommend, promote, or endorse that person's supplies, materials, or services with respect to the public works project; commits a Class D felony. Provides that a person who recklessly, knowingly, or

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Effective: July 1, 2011.

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January 12, 2011, read first time and referred to Committee on Employment, Labor and Pensions.



Digest Continued

intentionally offers, gives, or agrees to give any property to a contract officer in return for doing any of these acts commits a Class D felony. Provides that a person who recklessly, knowingly, or intentionally solicits, accepts, or agrees to accept any property in return for an agreement not to bid or compete on a public works project or to participate in an arrangement to suppress or eliminate full and unrestricted competition for the award of a public works contract commits a Class D felony. Repeals a superseded statute. Makes other technical changes.

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Introduced

First Regular Session 117th General Assembly (2011)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2010 Regular Session of the General Assembly.

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HOUSE BILL No. 1295

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 4-13.6-2-4 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 4. The division shall
3 comply with this article and the following statutes in the administration
4 of public works contracts:

- 5 (1) IC 5-16-3.
6 (2) IC 5-16-6.
7 (3) IC 5-16-7, if the estimated cost of the public works project is
8 at least twenty-five thousand dollars (\$25,000).
9 (4) IC 5-16-8.
10 (5) IC 5-16-9.
11 **(6) IC 5-16-13.**

12 SECTION 2. IC 5-16-13 IS ADDED TO THE INDIANA CODE AS
13 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY
14 1, 2011]:

15 **Chapter 13. Specifications**



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Sec. 1. This chapter applies to the specifications for a public works contract awarded by:

- (1) the state; or**
- (2) a political subdivision (as defined in IC 36-1-2-13).**

Sec. 2. For purposes of this chapter, materials or services are considered to be "brand name" if the materials or services are unique or proprietary to one (1) manufacturer or service provider.

Sec. 3. (a) As used in this chapter, "contract officer" refers to the board or individual responsible for awarding a public works contract.

(b) If the contract officer consists of more than one (1) individual, an action authorized or required of a contract officer must be taken by a majority of the individuals who constitute the contract officer.

(c) For purposes of this chapter, a contract officer is considered to have full knowledge of the content of the specifications issued by the contract officer and of all acts and omissions of the individuals who prepared the specifications.

Sec. 4. As used in this chapter, "materials" refers to materials, products, or supplies to be used on a public works project.

Sec. 5. As used in this chapter, "specifications" refers to specifications for either of the following:

- (1) Supplying materials for a public works project.**
- (2) Providing services, including professional services, for a public works project.**

Sec. 6. (a) Specifications shall be written to do the following:

- (1) Encourage free, open, and competitive bidding.**
- (2) Prevent corruption, extravagance, favoritism, graft, and improvidence.**
- (3) Ensure honest competition for the best work and materials for a public works project at the lowest reasonable cost.**

(b) Specifications:

- (1) must be based upon generally accepted standards in the applicable industry;**
- (2) must refrain from calling for unique or proprietary materials; and**
- (3) subject to subsection (c), must refrain from calling for materials that can be provided by fewer than three (3) potential bidders.**

(c) Notwithstanding subsection (b)(3) or any other provision of this chapter, if this chapter provides that not fewer than three (3) potential bidders must be able to provide the goods or services, and

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1 there are only two (2) potential bidders in existence that can meet
2 the specifications, the specifications may be written so that only
3 two (2) potential bidders can provide the goods or services.

4 **Sec. 7. Specifications may not do any of the following:**

5 (1) Exclude prospective bidders by reason of the impossibility
6 of performance by fewer than three (3) bidders.

7 (2) Exclude prospective bidders by reason of the impossibility
8 of performance by all bidders except those bidders
9 incorporating the products or services of fewer than three (3)
10 manufacturers.

11 (3) Incorporate requirements applicable to alternate or
12 substitute materials or services or bidders proposing the use
13 of alternate or substitute materials or services that differ
14 substantially from the requirements to be met by materials or
15 services named in the specifications.

16 (4) Confer authority to accept or reject alternate or substitute
17 materials upon persons other than:

18 (A) the contract officer; or

19 (B) the licensed architect or engineer who prepared the
20 specifications.

21 (5) Prescribe testing requirements that may be met by fewer
22 than three (3) manufacturer's materials.

23 (6) Prescribe testing requirements for alternate or substitute
24 materials that are exclusionary due to time or expense for
25 compliance.

26 (7) Require a standard, restriction, condition, or limitation
27 not directly related to the purpose, function, or activity for
28 which the contract is awarded.

29 (8) Require any of the following:

30 (A) The use of materials produced by fewer than three (3)
31 manufacturers.

32 (B) The use of a process or procedure utilized by fewer
33 than three (3) manufacturers.

34 (C) A requirement that in fact may be met by the products
35 or services of fewer than three (3) manufacturers.

36 **Sec. 8. (a) For purposes of this section, materials are considered**
37 **the equivalent of materials of a brand name if, in the opinion of the**
38 **contract officer, the materials:**

39 (1) are at least equal to the materials of a brand name in
40 quality, durability, strength, appearance, and design;

41 (2) will perform at least as well as the materials of a brand
42 name the function imposed by the general design for the

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public works project; or

(3) conform substantially, even with deviations, to the requirements for the materials in the specifications.

(b) A specification may state the kind or quality of materials by referring to a brand name.

(c) Referring to materials by a brand name is considered to mean that the materials supplied must be of the general style, type, character, and quality of the materials identified by the brand name.

(d) A bidder may furnish:

(1) brand name material; or

(2) material that is equivalent to the materials identified by the brand name.

The determination under subdivision (2) that a material is equivalent to a material of a brand name must be specifically endorsed by the contract officer in writing.

Sec. 9. (a) This section does not prohibit a person from providing free technical assistance to a contract officer.

(b) This section does not prohibit design-build contracts awarded in compliance with IC 5-30.

(c) A contract officer may not award a public works contract to a person if:

(1) the bid documents or the contract specifies materials or services to be furnished by the person; and

(2) the person:

(A) prepared;

(B) participated in the preparation of; or

(C) conferred any property on another person who prepared or participated in the preparation of; the specifications for the public works project.

(d) A contract officer may not award a public works contract to a person if:

(1) the bid documents or the contract specifies materials or services to be furnished by the person; and

(2) the person is affiliated with an architect, engineer, design consultant, or other consultant employed by the contract officer on the public works project.

Sec. 10. A contract awarded in violation of this chapter is voidable:

(1) by the state, if the state awarded the contract; or

(2) by the political subdivision that awarded the contract.

SECTION 3. IC 35-44-1-8 IS ADDED TO THE INDIANA CODE

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1 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 2 1, 2011]: **Sec. 8. (a) As used in this section, "contract officer"**
 3 **means:**
 4 **(1) the board or individual responsible for awarding a public**
 5 **works contract; or**
 6 **(2) an architect, engineer, or other individual retained by the**
 7 **board or individual described in subdivision (1) to advise the**
 8 **board or individual with respect to the award of a public**
 9 **works contract.**
 10 **(b) A contract officer may not solicit, accept, or agree to accept**
 11 **any property from a person in return for the contract officer's**
 12 **agreement to do any of the following:**
 13 **(1) To purchase or recommend the purchase of that person's**
 14 **supplies, materials, or services with respect to a public works**
 15 **project.**
 16 **(2) To incorporate or recommend incorporation of the**
 17 **person's supplies, materials, or services into specifications for**
 18 **a public works project.**
 19 **(3) To award or recommend the award of a public works**
 20 **contract to that person.**
 21 **(4) To recommend, promote, or endorse that person's**
 22 **supplies, materials, or services with respect to a public works**
 23 **project.**
 24 **(c) A person may not:**
 25 **(1) offer any property to;**
 26 **(2) confer any property on; or**
 27 **(3) agree to confer any property on;**
 28 **a contract officer in return for the contract officer's agreement to**
 29 **do any act described in subsection (b).**
 30 **(d) A person may not solicit, accept, or agree to accept any**
 31 **property in return for an agreement:**
 32 **(1) not to bid or compete on a public works project; or**
 33 **(2) to participate in an arrangement to suppress or eliminate**
 34 **full and unrestricted competition for the award of a public**
 35 **works contract.**
 36 **(e) A person who recklessly, knowingly, or intentionally violates**
 37 **this section commits a Class D felony.**
 38 SECTION 4. IC 36-1-12-1.2 IS AMENDED TO READ AS
 39 FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 1.2. The following
 40 definitions apply throughout this chapter:
 41 (1) "Board" means the board or officer of a political subdivision
 42 or an agency having the power to award contracts for public work.

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- 1 (2) "Contractor" means a person who is a party to a public work
- 2 contract with the board.
- 3 (3) "Subcontractor" means a person who is a party to a contract
- 4 with the contractor and furnishes and performs labor on the public
- 5 work project. The term includes ~~material men~~ **persons** who
- 6 **supply provide supplies or materials to** contractors or
- 7 subcontractors.
- 8 (4) "Escrowed income" means the value of all property held in an
- 9 escrow account over the escrowed principal in the account.
- 10 (5) "Escrowed principal" means the value of all cash and
- 11 securities or other property placed in an escrow account.
- 12 (6) "Operating agreement" has the meaning set forth in
- 13 IC 5-23-2-7.
- 14 (7) "Person" means any association, corporation, limited liability
- 15 company, fiduciary, individual, joint venture, partnership, sole
- 16 proprietorship, or any other legal entity.
- 17 (8) "Property" means all:
- 18 (A) personal property, fixtures, furnishings, inventory, and
- 19 equipment; and
- 20 (B) real property.
- 21 (9) "Public fund" means all funds that are:
- 22 (A) derived from the established revenue sources of a political
- 23 subdivision or an agency of a political subdivision; and
- 24 (B) deposited in a general or special fund of a municipal
- 25 corporation, or another political subdivision or agency of a
- 26 political subdivision.
- 27 The term does not include funds received by any person managing
- 28 or operating a public facility under a duly authorized operating
- 29 agreement under IC 5-23 or proceeds of bonds payable
- 30 exclusively by a private entity.
- 31 (10) "Retainage" means the amount to be withheld from a
- 32 payment to the contractor or subcontractor until the occurrence of
- 33 a specified event.
- 34 (11) "Specifications" means a description of the physical
- 35 characteristics, functional characteristics, extent, or nature of any
- 36 public work required by the board.
- 37 (12) "Substantial completion" refers to the date when the
- 38 construction of a structure is sufficiently completed, in
- 39 accordance with the plans and specifications, as modified by any
- 40 complete change orders agreed to by the parties, so that it can be
- 41 occupied for the use for which it was intended.

SECTION 5. IC 36-1-12-4, AS AMENDED BY P.L.113-2010,

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1 SECTION 108, IS AMENDED TO READ AS FOLLOWS
 2 [EFFECTIVE JULY 1, 2011]: Sec. 4. (a) This section applies whenever
 3 the cost of a public work project will be:

4 (1) at least seventy-five thousand dollars (\$75,000) in:

5 (A) a consolidated city or second class city;

6 (B) a county containing a consolidated city or second class
 7 city; or

8 (C) a regional water or sewage district established under
 9 IC 13-26; or

10 (2) at least fifty thousand dollars (\$50,000) in a political
 11 subdivision or an agency not described in subdivision (1).

12 (b) The board must comply with the following procedure:

13 (1) The board shall prepare general plans and specifications
 14 describing the kind of public work required, but shall avoid
 15 specifications which might unduly limit competition. If the
 16 project involves the resurfacing (as defined by IC 8-14-2-1) of a
 17 road, street, or bridge, the specifications must show how the
 18 weight or volume of the materials will be accurately measured
 19 and verified.

20 (2) The board shall file the plans and specifications in a place
 21 reasonably accessible to the public, which shall be specified in the
 22 notice required by subdivision (3).

23 (3) Upon the filing of the plans and specifications, the board shall
 24 publish notice in accordance with IC 5-3-1 calling for sealed
 25 proposals for the public work needed.

26 (4) The notice must specify the place where the plans and
 27 specifications are on file and the date fixed for receiving bids.

28 (5) The period of time between the date of the first publication
 29 and the date of receiving bids shall be governed by the size of the
 30 contemplated project in the discretion of the board. The period of
 31 time between the date of the first publication and receiving bids
 32 may not be more than:

33 (A) six (6) weeks if the estimated cost of the public works
 34 project is less than twenty-five million dollars (\$25,000,000);
 35 and

36 (B) ten (10) weeks if the estimated cost of the public works
 37 project is at least twenty-five million dollars (\$25,000,000).

38 (6) If the cost of a project is one hundred thousand dollars
 39 (\$100,000) or more, the board shall require the bidder to submit
 40 a financial statement, a statement of experience, a proposed plan
 41 or plans for performing the public work, and the equipment that
 42 the bidder has available for the performance of the public work.

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The statement shall be submitted on forms prescribed by the state board of accounts.

(7) If the board makes the attendance of a bidder at a prebid meeting or conference a condition to the acceptance of a bid from that bidder, the board shall publish notice of the date and time of the prebid meeting or conference in the same fashion and for the same period as the board must advertise the date for the receiving of bids under IC 5-3-1.

~~(7)~~ **(8)** The board may not require a bidder to submit a bid before the meeting at which bids are to be received. The meeting for receiving bids must be open to the public. All bids received shall be opened publicly and read aloud at the time and place designated and not before.

~~(8)~~ **(9)** Except as provided in subsection (c), the board shall:
(A) award the contract for public work or improvements to the lowest responsible and responsive bidder; or
(B) reject all bids submitted.

~~(9)~~ **(10)** If the board awards the contract to a bidder other than the lowest bidder, the board must state in the minutes or memoranda, at the time the award is made, the factors used to determine which bidder is the lowest responsible and responsive bidder and to justify the award. The board shall keep a copy of the minutes or memoranda available for public inspection.

~~(10)~~ **(11)** In determining whether a bidder is responsive, the board may consider the following factors:
(A) Whether the bidder has submitted a bid or quote that conforms in all material respects to the specifications.
(B) Whether the bidder has submitted a bid that complies specifically with the invitation to bid and the instructions to bidders.
(C) Whether the bidder has complied with all applicable statutes, ordinances, resolutions, or rules pertaining to the award of a public contract.

~~(11)~~ **(12)** In determining whether a bidder is a responsible bidder, the board may consider the following factors:
(A) The ability and capacity of the bidder to perform the work.
(B) The integrity, character, and reputation of the bidder.
(C) The competence and experience of the bidder.

~~(12)~~ **(13)** The board shall require the bidder to submit an affidavit, **signed and sworn under the penalties for perjury:**
(A) that the bidder has not entered into a combination or agreement:

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- 1 (i) relative to the price to be bid by a person;
- 2 (ii) to prevent a person from bidding; ~~or~~
- 3 (iii) to induce a person to refrain from bidding; ~~and or~~
- 4 **(iv) to use bid specifications that violate IC 5-16-13; and**
- 5 **(B) that the bidder's bid is made without reference to any other**
- 6 **bid.**

7 (c) Notwithstanding subsection ~~(b)(8)~~, **(b)(9)**, a county may award
 8 sand, gravel, asphalt paving materials, or crushed stone contracts to
 9 more than one (1) responsible and responsive bidder if the
 10 specifications allow for bids to be based upon service to specific
 11 geographic areas and the contracts are awarded by geographic area.
 12 The geographic areas do not need to be described in the specifications.

13 SECTION 6. IC 36-1-12-15 IS AMENDED TO READ AS
 14 FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 15. (a) A contract by
 15 the board for public work must conform to the wage scale provisions
 16 of IC 5-16-7.

17 ~~(b) A contract by the board for public work must conform with~~
 18 **following:**

- 19 **(1) The antidiscrimination provisions of IC 5-16-6.**
- 20 **(2) The wage scale provisions of IC 5-16-7.**
- 21 **(3) IC 5-16-8.**
- 22 **(4) IC 5-16-9.**
- 23 **(5) IC 5-16-10.**
- 24 **(6) IC 5-16-11.1.**
- 25 **(7) IC 5-16-13.**

26 **(b) The board may consider a violation of IC 5-16-6 a material**
 27 **breach of the contract, as provided in IC 22-9-1-10.**

28 SECTION 7. IC 36-1-12-7 IS REPEALED [EFFECTIVE JULY 1,
 29 2011].

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