CHAPTER 7

PUBLIC WORKS LAW

GENERAL PROVISIONS

The **"Public Works Law"** [IC 36-1-12] applies to all public work performed or contracted by political subdivisions and their agencies. Any public work performed on property leased with an option to purchase is also included. [IC 36-1-12-1]

The hospital is required to follow the provisions of the Public Works Law, IC 36-1-12, only when the public work is financed in whole or in part with cumulative building fund revenue. [IC 36-1-12-1(c)]

The term **"public work"** means the construction, reconstruction, alteration, or renovation of a public building, airport facility, or other structure that is paid for out of a public fund or out of a special assessment. [IC 36-1-12-2]

A contract for public work by a political subdivision or agency is void if it is not let in accordance with IC 36-1-12. [IC 36-1-12-16]

PUBLIC WORK PROJECTS FOR WHICH ADVERTISING AND BIDDING IS REQUIRED

Whenever the cost of a public work project will be at least $25,000 in a political subdivision or an agency not described in IC 36-1-12-4(1 or 2) the board must comply with the following procedures:

Plans and Specifications

The board shall prepare general plans and specifications describing the kind of public work required, but shall avoid specifications which might unduly limit competition. [IC 36-1-12-4(b)(1)]

The board shall file the plans and specifications in a place reasonably accessible to the public, which shall be specified in the notice required. [IC 36-1-12-4(b)(2)]

All plans and specifications for public buildings must be approved by the State Board of Health, State Fire Marshal, State Building Commissioner, and other state agencies designated by statute. [IC 36-1-12-10]

Notice

Upon filing of the plans and specifications, the board shall publish a notice two times, at least one week apart, with the second publication made at least ten days before the date the bids will be received, calling for sealed proposals for the public work. [IC 36-1-12-4(b)(3)]

The notice must specify the place where the plans and specifications are on file, the date fixed for receiving bids, and the amount of the bond or certified check to be filed with each bid. [IC 36-1-12-4(b)(4); IC 36-1-12-4.5]

The period of time between the date of the first publication and the date of receiving bids may not be more than six weeks. [IC 36-1-12-4(b)(5)]

Evidence of Financial Responsibility

A bond or certified check shall be filed with each bid by a bidder in the amount specified by the board. The amount may not be more than 10% of the contract price. The bond or certified check shall be made payable to the political subdivision.

All checks of unsuccessful bidders shall be returned to them by the board upon selection of successful bidders. Checks of successful bidders shall be held until delivery of the performance bond. [IC 36-1-12-4.5]

Bidder's Affidavit

The board shall require the bidder to submit an affidavit that the bidder has not entered into a combination or agreement:

1. Relative to the price to be bid by a person;

2. To prevent a person from bidding; or,

3. To induce a person to refrain from bidding and that his bid is made without reference to any other bid. [IC 36-1-12-4(b)(12)]

Public Meeting

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. Bids shall be submitted on prescribed General Form 96 (Bid for Construction). [IC 36-1-12-4(b)(7)]

Responsive Bidder

In determining whether a bidder is responsive, the board may consider the following factors:

1. Whether the bidder has submitted a bid or quote that conforms in all material respects to the specifications.

2. Whether the bidder has submitted a bid that complies specifically with the invitation to bid and the instructions to bidders.

3. Whether the bidder has complied with all applicable statutes, ordinances, resolutions, or rules pertaining to the award of a public contract. [IC 36-1-12-4(b)(10)]

Responsible Bidder

In determining whether a bidder is a responsible bidder, the board may consider the following factors:

1. The ability and capacity of the bidder to perform the work.

2. The integrity, character, and reputation of the bidder.

3. The competence and experience of the bidder. [IC 36-1-12-4(b)(11)]

Award of Contract

The board shall award the contract for public work or improvements to the lowest responsible and responsive bidder or the board may reject all bids submitted. [IC 36-1-12-4(b)(8)]

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 justify the award. The board shall keep a copy of the minutes or memoranda available for public inspection. [IC 36-1-12-4(b)(6)]

Except as provided below, the board shall award the contract and shall provide the successful bidder with written notice to proceed within sixty (60) days after the date on which bids are opened.

1. If general obligation bonds are to be sold to finance the construction that is the subject of the bid, the board shall allow the bidder ninety (90) days.

2. If revenue bonds are to be issued and sold to finance the construction, the board shall allow the bidder one hundred fifty (150) days.

A failure to award and execute the contract and to issue notice within the time required entitles the successful bidder to reject the contract and withdraw his bid without prejudice, or extend the time to award the contract and provide notice to proceed at an agreed later date. If the successful bidder elects to reject the contract and withdraw his bid, notice of that election must be given to the board in writing within fifteen (15) days of the sixty (60) day expiration date or any other extension date. [IC 36-1-12-6]

Contract Provision - Payment of Subcontractors

A contract for public work must contain a provision for the payment of subcontractors, laborers, material supplies, and those performing services. The board shall withhold money from the contract price in a sufficient amount to pay the subcontractors, laborers, material suppliers, and those furnishing services. [IC 36-1-12-13]

Change Orders

If, in the course of construction, reconstruction or repair of a public work project, it becomes necessary to change or alter the original specifications, a change order may be issued to add, delete, or change an item or items in the original contract. All change orders must be directly related to the original public work project.

Change Orders (Continued)

Addendum. The change order becomes an addendum to the contract and must be approved and signed by the board and the contractor.

Architect or Engineer. If a licensed architect or engineer is assigned to the public work project the change order must be prepared by that person.

Increase in Scope of Project. The total of all change orders issued that increase the scope of the project may not exceed twenty percent (20%) of the amount of the original contract. A change order issued as a result of circumstances that could not have been reasonably foreseen does not increase the scope of the project.

Cost of Materials. If additional units of materials included in the original contract are needed, the cost of these units in the change order must be the same as those shown in the original contract.

A change order may not be issued before commencement of the actual construction, reconstruction, or repairs except in the case of an emergency. In that case, the board must make a declaration, and the board's minutes must show the nature of the emergency. [IC 36-1-12-18]

Installation of Plumbing

A person who submits a bid for a public works contract that involves the installation of plumbing must submit evidence that the person is a licensed plumbing contractor under Indiana Code 25-28.5-1. [IC 36-1-12-12]

Final Payment

The board shall withhold final payment to the contractor until the contractor has paid the subcontractors, material suppliers, laborers, or those furnishing services. However, if there is not a sufficient sum owed to the contractor to pay those bills, the sum owed to the contractor shall be prorated in payment of the bills among the parties entitled. To receive payment the subcontractor or subcontractors, material suppliers, laborers, or those furnishing services shall file their claims with the board within sixty days after the last labor performed, last material furnished, or last service rendered by them. [IC 36-1-12-12]

PUBLIC WORK PROJECTS COSTING MORE THAN $100,000 - ADDITIONAL PROCEDURES

In addition to the foregoing items applying to major public work projects, the following items apply to public work projects costing more than $100,000.

Approval of Plans and Specifications

If the cost of the project is more than $100,000, the plans and specifications must be approved by an architect or engineer licensed under IC 25-34. [IC 36-1-12-7]

Bidder Information

If the cost of a project is $100,000 or more, the board shall require the bidder to submit a financial statement, a statement of experience, his proposed plan or plans for performing the public work, and the equipment that he has available for the performance of the public work. [IC 36-1-12-4(b)(6)]

Payment Bond

IC 36-1-12-13.1 requires a payment bond to be filed with a contract for public work only if the cost exceeds $100,000. The contractor shall execute a payment bond to the appropriate political subdivision or agency, approved by and for the benefit of the political subdivision or agency, in an amount equal to the contract price. The payment bond is binding on the contractor, the subcontractor, and their successors and assigns for the payment of all indebtedness to a person for labor and service performed, material furnished, or services rendered. The payment bond must state that it is for the benefit of the subcontractors, material suppliers, laborers, and those performing services. The payment bond shall be deposited with the board. [IC 36-1-12-13.1]

Performance Bonds

For public works contracts of less than two hundred fifty thousand dollars ($250,000), the board may waive the performance bond requirement and accept from a contractor an irrevocable letter of credit for an equivalent amount from an Indiana financial institution instead of a performance bond. [IC 36-1-12-14(h)]

Actions against a surety on a performance bond must be brought within one year after the date of the board's final settlement with the contractor. [IC 36-1-12-14(g)]

Filing of Final Record Drawings

The board must, within sixty (60) days after the completion of the public work project, file in the office of the State Building Commissioner a complete set of final record drawings for the public work project. [IC 36-1-12-11]

Retainage and Escrow Agreement

A board that enters into a contract for public work, and a contractor who subcontracts parts of that contract, shall include in their respective contracts provisions for the retainage of portions of payments by the board to contractors, by contractors to subcontractors, and for the payment of subcontractors. Either the board or contractor, or both, shall place the retainage in an escrow account, with a bank, savings and loan institution, or the state as the escrow agent. The escrow agent shall be selected by mutual agreement between board and contractor or subcontractor under a written agreement among the bank or savings and loan institution and: (1) the board and the contractor; or (2) the subcontractor and the contractor. [IC 36-1-12-14(b)]

To determine the amount of retainage to be withheld, the board shall:

1. Withhold no more than 10% of the dollar value of all work satisfactorily completed until the public work is 50% completed, and nothing further after that; or

Retainage and Escrow Agreement (Continued)

2. Withhold no more than 5% of the dollar value of all work satisfactorily completed until the public work is substantially completed.

If upon substantial completion of the public work minor items remain uncompleted, an amount equal to 200% of the value of each item as determined by the architect-engineer shall be withheld until the item is completed. [IC 36-1-12-14(c)]

The escrow agreement must contain the following provisions:

1. The escrow agent shall invest all escrowed principal in obligations selected by the escrow agent.

2. The escrow agent shall hold the escrowed principal and income until receipt of notice from the board and the contractor, or the contractor and the subcontractor, specifying the part of the escrowed principal to be released from the escrow and the person to whom that portion is to be released. After receipt of the notice, the escrow agent shall remit the designated part of escrowed principal and the same proportion of then escrowed income to the person specified in the notice.

3. The escrow agent shall be compensated for his services, to be paid from the escrowed income.

4. The contractor shall furnish the board with a performance bond equal to the contract price. If acceptable to the board, the bond may provide for incremental bonding in the form of multiple or chronological bonds that, when taken as a whole, equal the contract price. The surety on the performance bond may not be released until one year after the date of the board's final settlement with the contractor. [IC 36-1-12-14(e)]

Final Payment

The contractor shall be paid in full, including all escrowed principal and escrowed income, by the board and escrow agent, within sixty-one (61) days after the date of substantial completion. If within sixty-one (61) days after the date of substantial completion there remains uncompleted minor items, an amount equal to 200% of the value of each item as determined by the architect-engineer shall be withheld until the item is completed. [IC 36-1-12-14(f)]

PUBLIC WORK COSTING LESS THAN $25,000 [IC 36-1-12-5]

If the board wishes to award a contract for a public work costing less than $25,000, the procedures outlined for public works costing $25,000 or more may be followed, or the following procedures may be used:

PUBLIC WORK COSTING LESS THAN $25,000 (IC 36-1-12-5) (Continued)

Plans and Specifications

All plans and specifications for public buildings must be approved by the State Board of Health, State Fire Marshal, State Building Commissioner, and other state agencies designated by statute. [IC 36-1-12-10]

Inviting Quotes

The board shall invite quotes from at least three persons known to deal in the class of work proposed to be done by mailing them a notice stating that plans and specifications are on file in a specified office. The notice must be mailed not less than seven days before the time fixed for receiving quotes. [IC 36-1-12-5]

Public Meeting

The board may not require a person to submit a quote before the meeting at which quotes are to be received. The meeting for receiving quotes must be open to the public. All quotes received shall be opened publicly and read aloud at the time and place designated. [IC 36-1-12-5]

Award of Contract

The board shall award the contract for the public work to the lowest responsible and responsive quoter. [IC 36-1-12-5]

Rejection of All Quotes

The board may reject all quotes submitted. If the board rejects all quotes, the board may negotiate and enter into agreements for the work in the open market without inviting or receiving quotes if the board establishes in writing the reasons for rejecting the quotes. [IC 36-1-12-5]

USE OF OWN WORK FORCE

The political subdivision may purchase or lease materials in the manner provided in IC 36-1-9 and perform any public work by means of its own work force, without awarding a contract whenever the cost of that public work project is estimated to be less than $100,000. Before the political subdivision may perform any work under this section by means of its own work force, the political subdivision must have a group of employees on its staff who are capable of performing the construction, maintenance, and repair applicable to that work. For purposes of this subsection, the cost of a public work project includes the actual cost of materials, labor, equipment, rental, a reasonable rate for use of trucks and heavy equipment owned, and all other expenses incidental to the performance of the project. [IC 36-1-12-3]

DIVISION OF PUBLIC WORK PROJECTS [IC 36-1-12-19]

The cost of a single public work project may not be divided into two or more projects for the purpose of avoiding the requirement to solicit bids. The cost is defined by IC 36-1-12-19(a) to include cost of materials, labor, equipment rental, and all other expenses incidental to the performance of the project.

Any board member or officer of the political subdivision, bidder, quoter, or other person who is party to a public work contract who knowingly violates IC 36-1-12-19 commits a Class A infraction.

EMERGENCY CONTRACTS

In case of an emergency the board may contract for a public work project without advertising for bids if bids or quotes are invited from at least two persons know to deal in the public work required to be done. The minutes of the board must show the declaration of emergency and the names of the persons invited to bid or provide quotes. The notice requirements for hiring of an architect or engineer may also be waived. [IC 36-1-12-9]

USE OF UNITED STATES STEEL PRODUCTS

IC 5-11-1-26 requires the State Board of Accounts to include in its examination report a political subdivision's compliance with IC 5-16-8, which requires use of steel products made in the United States for construction and alterations of public buildings except under certain circumstances.

PROCEDURE FOR HIRING ARCHITECTS, ENGINEERS, OR LAND SURVEYOR [IC 5-16-11.1]

Whenever the political subdivision decides to hire an architect, engineer, or land surveyor, the political subdivision may:

1. Publish a notice in accordance with the requirements of publishing legal notices as found in IC 5-3-1;

2. Provide for notice (other than notice in accordance with IC 5-3-1) as it determines is reasonably calculated to inform those performing professional services of the proposed project;

3. Provide for notice in accordance with both subdivision (1) and (2); or

4. Determine not to provide any notice.

If the political subdivision provides for notice in accordance with the above, each notice must include:

1. The location of the project;

2. A general description of the project;

PROCEDURE FOR HIRING ARCHITECTS, ENGINEERS, OR LAND SURVEYOR (IC 5-16-11.1) (Continued)

3. The general criteria to be used in selecting professional services firms for the project.

4. The place where any additional project description or specifications are on file;

5. The hours of business of the public agency; and

6. The last date for accepting statements of qualifications from interested parties.

PREVAILING WAGE/COMMON CONSTRUCTION WAGE

A contract by the board for a public work project must conform to the wage scale provisions of IC 5-16-7. [IC 36-1-12-15]

DISCRIMINATION BY CONTRACTORS AND SUBCONTRACTORS PROHIBITED

A contract by the board for public work must conform with the antidiscrimination provisions of IC 5-16-6. The board may consider a violation of IC 5-16-6 a material breach of contract, as provided in IC 22-9-1-10. [IC 36-1-12-15]

Every contract for the construction, alteration, or repair of any public building or public work in the State of Indiana shall contain provisions by which the contractor agrees:

1. That in the hiring of employees for the performance of work under this contract or any subcontract hereunder, no contractor, or subcontractor, nor any person acting on behalf of such contractor or subcontractor, shall, by reason of race, religion, color, sex, national origin, or ancestry, discriminate against any citizen of the State of Indiana who is qualified and available to perform the work to which the employment relates;

2. That no contractor, subcontractor, nor any person on his behalf shall, in any manner, discriminate against or intimidate any employee hired for the performance of work under this contract on account of race, religion, color, sex, national origin or ancestry.

3. That there may be deducted from the amount payable to the contractor by the State of Indiana or any municipal corporation thereof, under this contract, a penalty of five dollars for each person for each calendar day during which such person was discriminated against or intimidated in violation of the provisions of the contract; and

4. That this contract may be cancelled or terminated by the State of Indiana or by any municipal corporation thereof, and all money due or to become due hereunder may be forfeited, for a second or any subsequent violation of the terms or conditions of this section of the contract.

OVERPAYMENT COLLECTIONS

Governmental units should collect any overpayments made.

ADVANCE PAYMENTS

Compensation and any other payments for goods and services should not be paid in advance of receipt of the goods or services unless specifically authorized by statute. Payments made for goods or services which are not received may be the personal obligation of the responsible official or employee.

PURCHASING BONUSES

Any compensation, premium, bonus, or product earned as a result of the purchase of goods or services by the governmental unit becomes the property of the governmental unit.

PUBLIC-PRIVATE AGREEMENTS [IC 5-23]

A political subdivision may enter into a public-private agreement under IC 5-23. The procedures of IC 5-23 must be specifically adopted by resolution or ordinance of the legislative body of the political subdivision, or if the political subdivision does not have a legislative body, the fiscal body of the political subdivision. [IC 5-23-1-1]

Definitions

Definitions are contained in IC 5-23-2. Three terms are defined below.

BOT Agreement. BOT Agreement means any agreement between a governmental body and an operator to construct, operate, and maintain a public facility and to transfer the public facility back to the governmental body at an established future date.

Operating Agreement. Operating Agreement means any agreement between an operator and the governmental body for the operation, maintenance, repair, or management of a public facility.

Public Facility. Public Facility means a facility located on, or to be located on, real property owned or leased by a governmental body and upon which a public service is or may be provided.

BOT Agreements

A governmental body may enter into a BOT agreement with an operator for the acquisition, planning, design, development, reconstruction, repair, maintenance, or financing of any public facility on behalf of the governmental body. Items which should be contained in the BOT Agreement are found in IC 5-23-3.

Operating Agreements

A governmental body may enter into an operating agreement with an operator for the operation, maintenance, repair, management, or any combination of operation, maintenance, repair, or management of any public facility for any public service to be performed on behalf of the governmental body. Other provisions relating to operating agreements are located in IC 5-23-4.

Other Provisions

Other provisions contained in IC 5-23 cover the selection of contractor by request for proposals, contract terms and conditions, and records.

Consult Attorney

Before entering into a public-private agreement, it is recommended that the governing body consult with the political subdivision's attorney in order to ensure the provisions of IC 5-23 are complied with as well as any other applicable laws.