LOCAL GOVERNMENT PUBLIC WORKS AND PROCUREMENT LAW

UPDATED AUGUST 2025

UPDATED AUGUST 2022
ORIGINALLY PUBLISHED: AUGUST 2017

DAVID R. COOK
COOK & ASSOCIATES
cookassociateslegal.com

Table of Contents

I. Public Works: What is it and why does it matter? 1

II. Public Works and Procurement Laws 3

A. Public Works Construction Law 3

1. Applicability 3

2. Competitive Selection 3

a) Advertisement 3

b) Competitive Selection Methods 3

(i) Competitive Bidding 4

(ii) Competitive Proposals 4

c) Prequalification 4

d) Permissible and Impermissible Selection Criteria 5

3. Bonds: Bid Bonds, Performance Bonds, and Payment Bonds 5

4. Contracts 6

B. Public Road Works Law 6

1. Applicability 6

2. Competitive Selection 7

a) Advertisement 7

b) Prequalification 7

3. Bond: Bid Bonds, Performance Bonds, and Payment Bonds 7

4. Contracts 8
C. Other Georgia Public Works Laws 9
1. Payment and Retainage Law 9
2. Prompt Pay Act 9
3. E-Verify 9
4. Special Bidding Rules 10
5. Guaranteed Energy Savings Performance Contracts 10
D. Local Government Purchasing Laws 10
E. Other Procurement Laws 11
III. Problems and Pitfalls 11
A. Effect of Failure to Follow Public Works and Procurement Laws 11
B. New Debt and Multi-Year Contracts 14
C. Failure to Obtain Payment Bond 15
D. Failure to Consider the Statute of Limitations on Performance Bond Claims 16
IV. Additional Resources on Local Government Public Works and Procurement Law 16
V. Helpful Charts of Public Works Laws 1
A. Dollar Thresholds 1
B. Contract Award Bases 2

LOCAL GOVERNMENT PUBLIC WORKS AND PROCUREMENT LAW: THE BASICS AND BEYOND

Public works and procurement are essential functions of local governments.[1] Public works projects and procurement can account for a substantial portion of the local government's budget. As a result of their importance and use of public resources, public works procurement and contracting are subject to mandatory rules set by the General Assembly. These rules govern each step of the procurement and contracting processes. As a result, county and city attorneys should guide the local government to comply with these rules.

To assist local government attorneys, this paper discusses important laws governing most public works projects and procurement. The failure to follow these laws can have severe consequences, ranging from void or avoidable contracts to loss of funding to criminal proceedings.

I. PUBLIC WORKS: WHAT IS IT AND WHY DOES IT MATTER?

"Public works" is not defined in Georgia statutes. But it is generally regarded as any physical activity associated with public property.[2] Public works involves (i) the public – meaning the activity must "bear a relation to legitimate governmental interests or activities on behalf of the public at large" and (ii) "works" – meaning the activity must involve "physical action in connection with . . . physical subject matter."[3]

Certain public works projects are subject to certain statutory schemes. The scope of projects subject to each statutory scheme is set forth in the applicable statute. For example, public works projects that qualify as "public works construction" must adhere to the Georgia Local Government Public Works Construction Law.[4] Public works projects that involve the construction, maintenance, or repair of a "public road" must comply with the Georgia Public Road Construction Law.[5] These and other applicable statutes govern various aspects of the projects, including competitive procurement, selection, awarding, bonding, and contracting.

---

[1] GA. CONST. Art. IX, § 2, ¶ III(a) (Supplementary Powers of counties and cities to include providing for hospitals and public health facilities; construction and maintenance of roads and streets; parks and recreational facilities; storm water and sewage collection and disposal systems; water systems; public housing; public transportation; libraries and facilities for the arts; etc.); O.C.G.A. § 36-9-5(a) (county duty to construct, repair, and maintain buildings); O.C.G.A. § 32-4-41 (county duty to construct, repair, and maintain roads and bridges); O.C.G.A. § 36-34-3 (municipal authority to construct, operate, and improve streets, parks, recreational grounds, airports, parking facilities, educational buildings, libraries, etc.); O.C.G.A. § 36-34-5(a) (municipal authority to construct and improve water and sewer systems); O.C.G.A. § 32-4-91 (municipality duty to construct, repair, and maintain roads and bridges).

[2] Russell G. Donaldson, J.D., "What Constitutes 'Public Work' within Statute Relating to Contractor's Bond," 48 A.L.R. 4th 1170 at § 2(a) (2017).

[3] *Id*; see e.g., *Board of Regents of Univ. Sys. of Ga. v. Brooks*, 324 Ga. App. 15, 18 (2013).

[4] O.C.G.A. Title 36, Chapter 91.

[5] O.C.G.A. Title 32, Chapter 4, Articles 3 & 4.

The following is a list of common statutes applicable to local government public works contracting and procurement:

- Georgia Local Government Public Works Construction Law, O.C.G.A. Title 36, Chapter 91 (Public Works Bidding) ("Public Works Construction Law")
- Georgia Local Government Road Construction Law, O.C.G.A. Title 32, Chapter 4, Articles 3 & 4 (County and Municipal Road Systems) ("Public Road Works Law")
- Georgia Public Works Construction Law, O.C.G.A. Title 13, Chapter 10, Article 2 (Retainage Laws)
- Georgia Public Works Construction Law, O.C.G.A. Title 13, Chapter 10, Article 3 (E-Verify Law)
- Other authority statutes contained in O.C.G.A. Title 36 (Local Government), including Chapter 10 (County bidding rules) and Chapter 60 (County and municipality waste-water treatment, multi-year lease-purchase and installment contracts, and private toll roads and bridges)
- Guaranteed Energy Savings Performance Contracting Act, O.C.G.A. Title 50, Chapter 37
- Municipal Street Improvements Law, O.C.G.A. Title 36, Chapter 39
- Local Government Air Facilities Law, O.C.G.A. Title 6, Chapter 3
- P3 Projects, O.C.G.A. Title 36, Chapter 91, Article 5 (Partnership for Public Facilities and Infrastructure)
- Development Authorities Law, O.C.G.A. Title 36, Chapter 62
- Downtown Development Authorities Law, O.C.G.A. Title 36, Chapter 42

In addition, a few statutes govern purchases by local governments, including purchases incident to a public works project. These statutes include:

- Local Government Purchases, O.C.G.A. Title 50, Chapter 5, Article 3, Part 2
- Local Preferences, O.C.G.A. § 36-84-1
- Other Georgia Goods and Service Preferences and Mandates, O.C.G.A. Title 50, Article 5
- Multi-Year Lease-Purchase Contracts and Installment-Purchase Contracts, O.C.G.A. §§ 36-60-13 & 36-60-15

Pursuant to their constitutional or statutory authority, local governments enact local ordinances, rules, and regulations for public works and procurement. For local government officials and attorneys, these rules are just as important as the statutory schemes listed above. But they cannot vary or undermine the statutory requirements.

Some of the statutes listed above can be unclear, cumbersome, duplicative without explanation, and ambiguous. So why should a local government attorney bother reviewing them? Besides the fact that they are mandatory obligations imposed on local governments, a local government's failure to follow these statutes could render an improperly awarded contract as void. As discussed below, local governments and their contractors and suppliers are put in a precarious position when they discover a contract is void, especially when work has been performed, goods have been provided, and public money has been spent.

Additionally, the failure to obtain a payment bond or the failure to ensure it complies with the applicable statute may render the local government directly liable to laborers, subcontractors, and suppliers. This result can be extremely harsh, especially when public funds for the same work or materials have already been paid out to the contractor.

II. PUBLIC WORKS AND PROCUREMENT LAWS

The two primary laws governing public works are the Public Works Construction Law and Public Road Works Law. While these laws are similar in many ways, they have important distinctions. The best way to understand them is to track their similarities and differences.

Both laws authorize the local government to self-perform public works,[6] but the majority of their provisions are targeted toward contracting with private entities for the performance of such work. This article focuses on the latter.

A. Public Works Construction Law

1. Applicability

The Public Works Construction Law applies to "public works construction," which means the "building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property."[7] But it does not apply to projects under the Public Road Works Law;[8] "routine operation, repair, or maintenance of existing structures, buildings, or real property"; projects costing less than $250,000;[9] projects self-performed by the local government; projects necessitated by emergencies;[10] legitimate sole-source contracts; and other exclusions.[11] Various other rules under the Public Works Construction Law apply depending on the project details.

2. Competitive Selection

For contracting opportunities of public works construction contracts, local governments must advertise and award them based on competitive selection.[12]

a) Advertisement

Contracting opportunities must be publicly advertised, for the time and manner required by statute, (i) conspicuously at the governing authority's office and (ii) on the Georgia Procurement Registry.[13]

b) Competitive Selection Methods

Local governments may competitively select contractors by competitive bidding or competitive proposals.[14]

---

[6] O.C.G.A. §§ 36-91-22(g) (local government public works self-performance) & 32-4-42 (county road self-performance) & 32-4-92(a)(6) (municipal road work self-performance).
[7] O.C.G.A. § 36-91-2(12).
[8] As discussed below, the Public Road Works Statute is very broad.
[9] Contracts may not be divided in an attempt to avoid the $250,000 threshold. O.C.G.A. § 36-91-22. Similarly, the use of change orders to avoid the $250,000 threshold or other requirements is prohibited. O.C.G.A. § 36-91-20(e).
[10] An emergency is any situation resulting in imminent danger to the public health or safety or the loss of an essential government service. O.C.G.A. § 36-91-2(7).
[11] *Id*.; O.C.G.A. § 36-91-22.
[12] O.C.G.A. § 36-91-20(c).
[13] O.C.G.A. § 36-91-20(b)(1).
[14] Under either method, no changes to the plans and specifications may occur within 72 hours (excluding weekends and holidays) prior to bid day, unless such time is extended. O.C.G.A. § 36-91-20(d).

(i) Competitive Bidding

Under the bidding method, the local government must obtain and make available plans and specifications by the first day of the advertisement.[15] The plans and specifications must include other information such as details concerning alternates, permitting, and rights of way and easements.[16]

Offerors must submit sealed bids that comply with the solicitation.[17] The local government must open the bids publicly and award the contract to the "lowest responsible and responsive bidder."[18] There is no negotiation; however, if the lowest bid exceeds the budget, the local government may negotiate with the lowest bidder.[19]

(ii) Competitive Proposals

Under the proposal method, the local government must prepare a request for proposal ("RFP"). The RFP must include the conceptual program information and details and specifications concerning the work, with the level of detail based on the type of delivery method.[20] It must also include notice of any pre-bid conferences and, to the extent prequalification (discussed below) is required, the RFP must include any mandatory prequalification requirements.[21]

Of particular importance to offerors, the RFP must include the "relative importance of evaluation factors."[22] On opening day, all proposals are opened without disclosing their contents to others.[23] The local government must award the contract to the "responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the" local government, based on the evaluation factor and their relative importance.[24]

If provided in the RFP, the local government may choose to negotiate with the offerors to obtain their best and final offers, keeping other offerors' proposals confidential.[25]

c) Prequalification

Local governments may require prequalification as a condition to submitting a bid or proposal. To do so, the prequalification criteria must be reasonably related to the work and must be made available to offerors upon request, and there must be a procedure to allow an offeror to respond to disqualification.[26] Notably, once qualified, an offeror cannot be disqualified without cause.[27]

---

[15] O.C.G.A. § 36-91-20(b)(4).
[16] *Id*.
[17] O.C.G.A. § 36-91-21(b).
[18] *Id*.
[19] *Id*.
[20] O.C.G.A. § 36-91-20(b)(5).
[21] O.C.G.A. § 36-91-20(b)(7).
[22] O.C.G.A. § 36-91-21(c)(1)(A).
[23] O.C.G.A. § 36-91-21(c)(1)(B).
[24] O.C.G.A. § 36-91-21(c)(1)(C). The statute emphasizes the importance of written documentation. The basis of the award must be maintained in the contract file. *Id*.
[25] O.C.G.A. § 36-91-21(c)(2).
[26] O.C.G.A. § 36-91-20(f).
[27] O.C.G.A. § 36-91-20(f)(4).

d) Permissible and Impermissible Selection Criteria

Local governments cannot disqualify offerors based on (i) their lack of experience with a job of the same size – scope or cost – as the job being advertised or (ii) lack of experience with the applicable construction delivery method.[28] If the offeror has never performed a contract of the same size as the contract opportunity, the local government cannot disqualify it on that basis. This rule applies only when the job is 30% or less in size than the offeror's previous experience, the offeror has previous experience with the type of job being advertised, and the offeror can secure bonding for the job.[29] So if the job is greater than 30% in size that the offeror's experience, the local government may consider such lack of experience in making an award or in prequalifying offerors. No such exception is allowed for the bidder's lack of experience with the construction delivery method.

3. Bonds: Bid Bonds, Performance Bonds, and Payment Bonds

The Public Works Construction Law requires bid bonds, performance bonds, and payment bonds on all bids and contracts over $100,000.[30] Note, however, the applicability of Public Works Construction Law is limited to projects at a cost of $250,000 or more.[31] So it is not entirely clear whether projects valued less than $250,000 but more than $100,000 must be supported by bid bonds, performance bonds, and payment bonds.

All bonds must be issued by an acceptable surety and must be approved as to form and as to the surety's solvency by the local government's contracting officer.[32]

When required, no bid or proposal is valid without a bid bond[33] in the amount of at least 5% of the proposed contract price. A bid bond must remain valid (i) for bids, until 60 days after opening day, unless the offeror agrees to an extension, or (ii) for proposals, for the period stated in the RFP, but after 60 days, the local government must release the bid bond of any offeror who is not likely to be selected.[34] Under certain circumstances, a bid bond may be withdrawn by the offeror due to an "appreciable error in calculation."[35]

When performance and payment bonds are required, no contract is valid unless the contractor has provided them.[36] Often overlooked, the definition of a performance bond requires the surety to commit to: (i) faithful performance of the contract and (ii) indemnification for damages arising from default.[37]

---

[28] O.C.G.A. § 36-91-23.
[29] *Id*.
[30] O.C.G.A. §§ 36-91-50 (bid bonds), 36-91-70 (payment bonds) & 36-91-90 (performance bonds). Bid bonds may not be required for proposals if price is not a factor in the RFP. O.C.G.A. § 36-91-41.
[31] O.C.G.A. § 36-91-22(a).
[32] O.C.G.A. § 36-91-40(a).
[33] The statute authorizes other forms of security in lieu of a bid bond, such as a cashier's check, certified check, cash, or irrevocable letter of credit. O.C.G.A. § 36-91-51.
[34] O.C.G.A. § 36-91-50(b).
[35] O.C.G.A. § 36-91-51.
[36] O.C.G.A. §§ 36-91-70 & 36-91-90. In certain circumstances, an irrevocable letter of credit is acceptable in lieu of a performance bond, O.C.G.A. § 36-91-71, and a cashier's check, certified check, or cash are acceptable in lieu of a payment bond, O.C.G.A. § 36-91-90.
[37] O.C.G.A. § 36-91-2(11).

As discussed below, if the local government fails to obtain a payment bond, if required, then it is liable to all laborers, subcontractors, and suppliers for nonpayment.[38]

4. Contracts

Public works construction contracts must be in writing and on file and available for public inspection.[39] In addition, they must be expressly entered into the minutes of the governing authority.[40]

Before beginning performance, the contractor must submit an oath in writing that it has not engaged in anti-competitive behavior.[41] Effective May 2013, local governments are expressly authorized to include provisions in public works construction contracts that impose liquidated damages for delayed completion or require incentive payments for early completion, as long as the project schedule is deemed to have value.[42]

B. Public Road Works Law

Local governments are responsible for the construction and maintenance of their public road systems.[43] With this responsibility comes the authority to enter into contracts with private entities or governmental entities to accomplish these goals.[44] As always, with the authority comes rules and restrictions, which are set forth in the Public Road Works Law.

1. Applicability

The Public Road Works Law is extremely broad. It governs contracts for the "construction, reconstruction, or maintenance of all or part of a public road," and includes the purchase of materials and hiring of labor and professional services.[45] A "public road" is defined broadly to include highways, roads, and similar ways intended for public transportation; bridges, causeways, ferries, overpasses and underpasses, railroad grade crossings, and signs, signals, markings, and other traffic control devices; and building for public equipment and personnel engaged in the public road system; parking facilities, drainage ditches, rest areas, truck-weighing stations, and other similar facilities.[46] In this context, "construction" means "location, surveying, designing, supervising, inspecting, and actual building of a new road; or the paving, striping, restriping, modifying for safety purposes, grading, widening, relocation, reconstruction, or other major improvement of a substantial portion of an existing public road together with all activities incident to any of the foregoing."[47] "Maintenance" includes all other activities for the preservation of public roads.[48]

---

[38] O.C.G.A. § 36-91-91.
[39] O.C.G.A. § 36-91-20
[40] O.C.G.A. § 36-10-1.
[41] O.C.G.A. § 36-91-21(e).
[42] O.C.G.A. § 36-91-24. The statute was, unfortunately, written with less clarity. Local government attorneys are recommended to review the statute carefully.
[43] O.C.G.A. §§ 32-4-41 & 32-4-91.
[44] O.C.G.A. §§ 32-4-42 & 32-4-92.
[45] O.C.G.A. §§ 32-4-60 & 32-4-110.
[46] O.C.G.A. § 32-1-3(24).
[47] O.C.G.A. § 32-1-3(6).
[48] O.C.G.A. § 32-1-3(15).

Whereas the Public Works Construction Law applies to contracts of $250,000 or more, the Public Road Works Law does not grant complete exemption based on the contract price. Instead, as discussed below, it exempts particular requirements based on the contract price.

2. Competitive Selection

Under the Public Road Works Law, a local government must competitively bid projects except:[49]

- Contracts costing less than $250,000;[50]
- Contracts with other governmental entities;
- Contracts for engineering and other professional services;
- Contracts for emergency maintenance requiring immediate repairs;
- Other exceptions; and
- Design-build contracts of counties under O.C.G.A. § 32-4-74.[51]

Unlike the Public Works Construction Law, the Public Road Works Law requires local governments to publicly bid contract opportunities.[52] There is no option for competitive proposals, except for the design-build option.

The local government must award the contract to the "lowest reliable bidder."[53]

a) Advertisement

The Public Road Works Law requires advertisement of the opportunity for two weeks before the opening of the bids.[54] The advertisement must include a description of the project, time for performance, terms of payment, how to obtain plans and specifications, the amount of a proposal guaranty, the right of the local government to reject bids, and other information.[55]

b) Prequalification

Under Public Road Works Law, there is no express provision for prequalification.

3. Bond: Bid Bonds, Performance Bonds, and Payment Bonds

In contrast to the Public Works Construction Law's requirement of a bid bond, the Public Road Works Law contemplates a "proposal guaranty." A proposal guaranty is a form of guaranty from an acceptable surety securing the bidder's commitment to enter into a contract, if awarded, and to furnish payment and performance bonds.[56] Effectively, these are bid bonds. Without a proposal guaranty, when required, no

[49] O.C.G.A. §§ 32-4-63 & 32-4-113. In contrast to municipalities, counties need not competitively bid contracts for the purchase of materials, supplies, and equipment necessary for construction and maintenance of public roads and for the support and maintenance of the county's forces used in such work. O.C.G.A. § 32-4-63(a)(3).
[50] O.C.G.A. § 32-4-63(a)(1). Also note, local governments must receive at least two estimates for contracts less than $250,000 but more than $20,000. O.C.G.A. §§ 32-4-63(b) & 32-4-113(b).
[51] The new statute O.C.G.A. § 32-4-74 provides mandatory selection and award requirements for design-build contracts for transportation-related projects.
[52] O.C.G.A. §§ 32-4-64 & 32-4-114.
[53] O.C.G.A. §§ 32-4-68 & 32-4-118.
[54] O.C.G.A. §§ 32-4-65 & 32-4-115.
[55] *Id*.
[56] O.C.G.A. § 32-1-3(22).

competitive bid will be considered by a county.[57] Unlike the Public Works Construction Law, the Public Road Works Law permits withdrawal of a proposal guaranty only before opening day.[58] Another distinction is that the Public Road Works Law requires proposal guaranties to remain valid for 30 days, unless the bidder agrees in writing.[59]

Whereas the Public Works Construction Law requires performance and payment bonds for contracts in excess of $100,000 (or $250,000, depending on one's interpretation), the Public Road Works Law requires them for construction contracts of $5,000 or more.[60] The statute incorporates the specific bond requirements set forth in the Public Works Construction Law.[61] It also incorporates the rule that local governments are directly liable to laborers, subcontractors, and suppliers if they fail to obtain a payment bond, when required.[62]

If a county contract calls for the construction or reconstruction of a bridge, it may require the performance bond to secure the contractor's obligation to maintain the bridge in good repair for a period of seven years or more.[63] If a county requires such a provision in the performance bond but fails to obtain it, the county is "primarily liable for all injuries caused by reason of a defective bridge for damages occurring within seven years of the contractor's work."[64]

4. Contracts

All public road construction contracts must be in writing, approved by resolution, and entered on the minutes of the local government.[65] Before commencing any work, the contractor must provide a contractor's oath as provided in the Public Works Construction Law.[66]

Effective July 1, 2022, counties may execute design-build contracts for transportation-related projects that include buildings, bridges and approaches, rail corridors, technology deployments, and limited- or controlled-access project, or projects that may be constructed within existing rights of way when the work is clearly defined or when significant savings may result in project delivery time.[67] Additionally, counties may combine any environmental services, utility-relocation services, right-of-way services, design services, and construction phases of a public road or other project into a single design-build contract.

Before entering a design-build contract, the county must adopt procedures for administering them, including rules for selection and award, which must include requirements contained in the statute. The statute also includes several provisions that benefit design-build contractors.

---

[57] O.C.G.A. §§ 32-4-67(a) (mandatory for counties) & 32-4-117 ("A municipality *may* require . . . .") (emphasis added).
[58] O.C.G.A. §§ 32-4-67(b) & 32-4-117.
[59] *Id*.
[60] O.C.G.A. §§ 32-4-69 & 32-4-119.
[61] *Id*.
[62] O.C.G.A. §§ 32-4-71 & 32-4-120.
[63] O.C.G.A. § 32-4-70.
[64] O.C.G.A. § 32-4-71.
[65] O.C.G.A. §§ 32-4-61 & 32-4-111.
[66] O.C.G.A. §§ 32-4-73 & 32-4-122.
[67] O.C.G.A. § 32-4-74. The language of the new statute could use improvement, so the nuances of the requirements are unknown at this time.

C. Other Georgia Public Works Laws

There are many statutes that impose additional or varying obligations on public works contracts, including those primarily governed by the Public Works Construction Law or Public Road Works Law.

1. Payment and Retainage Law

For instance, O.C.G.A. Title 13, Chapter 10, Article 2 ("Payment and Retainage Law") requires progress payments and imposes restrictions on retaining funds. Rules governing progress payments and retainage apply to public works construction contracts (i.e., contracts under the Public Works Construction Law), unless they do not exceed $250,000 or 45 days in duration, but not projects under the Public Road Works Law.[68]

In the 2021-2022 session, the General Assembly made substantive changes in the Payment and Retainage Law. The rules still apply to Public Works Construction Contracts[69] and to water or sewer facilities.[70] On and after July 1, 2022, retainage is limited to five percent (5%) of each progress payment, but the local government may release the retainage associated with a subcontractor's work as it is completed. Previously the statute required release of retainage when fifty percent (50%) of the contract value is due, if the work was progressing satisfactory and timely, but this provision has been eliminated. Additionally, upon substantial completion of the work, the local government was limited to retaining 200 percent of the value of "incomplete minor items," but the statute now allows retention of 200 percent of the value of any incomplete work.

2. Prompt Pay Act

A related law is the Georgia Prompt Pay Act,[71] which imposes deadlines on contract payment to contractors. Subject to exceptions, when a contractor has performed in compliance with the contract, it is entitled to payment for the services performed within 15 days after receipt of an application for payment.[72] Subject to similar exceptions, subcontractors and sub-subcontractors are entitled to payment within 10 days after the contractor or subcontractor receives payment.[73] The act imposes interest and attorney fees for noncompliance.

3. E-Verify

In addition, O.C.G.A. Title 13, Chapter 10, Article 3 ("E-Verify Law") imposes certain requirements for E-Verify. It requires public works contractors and subcontractors (at any tier) to register and participate in E-Verify and to verify such compliance by affidavit.[74] The E-Verify Law applies to contracts for the "physical performance of services" in excess of $2,499.99.[75]

---

[68] O.C.G.A. § 13-10-80(c). For similar rules governing contracts affecting water and sewer facilities, see O.C.G.A. §§ 13-10-81 & 13-10-82.

[69] O.C.G.A. § 13-10-80. It does not apply, however, when contract value does not exceed $250,000 or the contract time does not exceed 45 days. O.C.G.A. § 13-10-80(c).

[70] O.C.G.A. § 13-10-81.

[71] O.C.G.A. §§ 13-11-1 through 13-11-11.

[72] O.C.G.A. § 13-11-4.

[73] *Id*.

[74] O.C.G.A. § 13-10-91(b).

[75] O.C.G.A. § 13-10-90(4).

4. Special Bidding Rules

Another peculiar set of statutes governing only certain counties is O.C.G.A. §§ 36-10-2.1 & 36-10-2.2. These statutes require that "contracts for building or repairing any courthouse or other public building, jail, bridge, causeway, or other public works or public property shall be let to the lowest responsible bidder." But in determining whether the bidder is "responsible," it may consider "the bidder's quality of work, general reputation in the community, financial responsibility, previous employment on public works, and compliance with a minority business enterprise participation plan or making a good faith effort to comply with the goals of such a plan."

5. Guaranteed Energy Savings Performance Contracts

For Guaranteed Energy Savings Performance Contracts, see the attached article: "Energy Savings Performance Contracts: Risks and Rewards for Local Governments," Georgia County Government Magazine, August 2012. Additionally, effective July 1, 2021, state and local governments including counties, municipalities, and school systems received expanded power concerning conservation measures. More about the amendments to O.C.G.A. §§ 20-2-506 and 50-37-2 is available in these posts in Cook & Associates' Blogs.

D. Local Government Purchasing Laws

In addition to public works, local governments procure goods, supplies, and equipment for the benefit of the public and their own needs. Local government purchasing is generally governed by local ordinances, rules, and regulations. There are, however, a number of statutory provisions that affect local government purchasing.

In the direct purchasing of goods, or in conjunction with a public works contract, local governments are subject to various mandatory or preferential source rules for the acquisition of goods. These rules either require local governments to give preference or mandate them to acquire goods from certain sources, which may include products produced by the Georgia Department of Corrections or Georgia-based providers. For example, O.C.G.A. § 50-5-63 states: "No contract for the construction of, addition to, or repair of any facility, the cost of which is borne by the state or any department, agency, commission, authority, or political subdivision thereof, shall be let unless the contract contains a stipulation therein providing that the contractor or any subcontractor shall use exclusively Georgia forest products in the construction thereof, when forest products are to be used in such construction, addition, or repair, and if Georgia forest products are available." Additionally, local governments must give preference (as far as reasonable and practicable) to products manufactured or produced in Georgia.[76]

Under Title 50, the Georgia Department of Administrative Services is authorized to provide assistance to local governments, which can include purchasing goods on behalf of the local government.[77]

[76] O.C.G.A. § 36-84-1.
[77] O.C.G.A. §§ 50-5-100 & 50-5-103.

E. Other Procurement Laws

In 2018, the General Assembly enacted O.C.G.A. § 36-80-27,[78] which requires counties, municipalities, and boards of education to advertise bid or proposal opportunities valued at $10,000 or more on the Georgia Procurement Registry. As amended in 2019, the statute applies to local governments' bid or proposal opportunities for goods and services valued at $100,000 or more.

Effective July 1, 2019, consultants who advise or assist local governments in developing specifications or solicitation requirements must enter an agreement that requires the consultant to avoid the appearance of impropriety and to disclose any material conflicts of interests.[79] Notably, any person may bring an action to declare as void any purchase in violation of the statute, as well as to seek damages and injunctive relief against any person who makes a bid or proposal in violation of the statute.

On November 3, 2020, Georgia voters approved a constitutional amendment to waive sovereign immunity for actions seeking declaratory and injunctive relief from acts of the state and any county, consolidated government, or municipality, or any officer or employee thereof, if such action is outside the scope of lawful authority or in violation of law.[80] This new constitutional provision has been used for bid protests and open records requests.

III. PROBLEMS AND PITFALLS

Our job as local government attorneys is to keep our clients out of trouble, and we can learn from the experience of others who have run afoul of the public works and procurement laws. This section discusses some of the common pitfalls encountered by local governments.

A. Effect of Failure to Follow Public Works and Procurement Laws

One of the more common problems is the failure to follow the public works statutes, and its implication on the recovery of public funds improperly expended. Several cases address this very issue. They arise when a local government or its staff enters into a contract without proper authorization or without following the procurement rules. The resulting litigation involves the local government's attempt to recover public funds or the contractor's or supplier's attempt to recover compensation for the benefits provided.

In many cases, the contractors or suppliers seek recovery of amounts for services or goods previously provided under a contract declared void for failure to comply with procurement rules. Since contract claims are no help, contractors and suppliers seek recovery under implied contract theories. But as against local governments, these equitable claims run up against sovereign immunity.

An example is found in the Georgia Supreme Court case of *City of Baldwin v. Woodard & Curran, Inc.,*[81] in which an engineering firm sued a city for compensation allegedly due for engineering services and related

[78] As originally enacted, the statute was codified at O.C.G.A. § 36-80-26.
[79] O.C.G.A. § 36-80-28.
[80] GA. CONST. Art. I, § 2, ¶ V.
[81] 293 Ga. 19 (2013); *see Renee Group, Inc. v. City of Atlanta*, 359 Ga. App. 725, 730 (2021) (applying the principle of *City of Baldwin*).

work in connection with a wastewater treatment plant. After the city's mayor signed the firm's proposal, the city determined that federal funds were unavailable, and it declined to pay the engineering firm.

The city relied on the following provision of its charter:

> No contract with the city shall be binding on the city unless the contract is in writing, is signed after review by the city attorney, and is approved by the city council subsequent to its signature by the city attorney, with such council approval entered on the council journal.

Since neither the city attorney nor the city council approved the contract, the city argued the purported agreement between the city's mayor and the engineering firm was ultra vires and void. The court agreed.

When the firm argued for recovery under implied contract theories based on work actually performed for the city, the court again denied recovery. City charters, just like statutory provisions, must be followed, and equitable principles like quantum meruit will not permit recovery when they are not.

While the court handed local governments a victory, it also left open the possibility of recovery when contracts are "imperfectly or irregularly executed." The court explained the exception:

> The exact status of a defective contract . . . depends upon the type of limitation [that] the local government has ignored in making it. If the contract was imperfectly or irregularly executed, it may not necessarily be completely ineffective, as long as it was the type of contract within the power of the local government to make. But if the limitation ignored was one which placed the contract completely beyond the power or competence of the local government, then the contract will be termed ultra vires, and its status is an absolute nullity.

This distinction was noted in *HG Brown Family Ltd. Partnership v. City of Villa Rica*,[82] in which a plaintiff brought a mandamus action to compel the city to approve and record a putative contract. The putative contract did not comply with the city charter because it was not approved by the city council and was not recorded in the minutes. As a result, the contract was ultra vires, null, and void. But the court went on further to say the plaintiff could not indirectly enforce the contract "through mandamus or other means" or through equitable principles or estoppel.

The above cases were distinguished by the Georgia Supreme Court in *State v. Federal Defender Program, Inc.*, 315 Ga. 319 (2022). There, the Court enforced a contract reached by counsel for the Attorney General's office and counsel for a public defender organization. In doing so, it recognized that the State failed to identify any law, regulation, or policy that limited counsel's authority to negotiate and bind the Attorney General or State to the agreement.

As an example of a local government being estopped from asserting the illegality of a contract when it had the authority to contract but failed to comply with some procedural requirement, see *City of Summerville v. Georgia Power Co*.[83] In that case, the city had the authority to grant a franchise right (i.e., a contract), but it granted the franchise without first complying with a charter provision requiring notice

[82] 278 Ga. 819 (2005).
[83] 205 Ga. 843 (1949).

and publication of the proposed franchise. Since the city had the authority, but did not comply with the notice requirement, the court estopped the city from denying the franchise right.

The reverse scenario – when the county seeks recovery of payments under an invalid contract – occurred in *Howard v. Brantley County*,[84] in which the contract was deemed invalid due to the county's failure to comply with the Public Road Works Law's bidding requirement. Such a violation rendered the contract void as beyond the county's authority. As such, the county was permitted to recover funds paid out under the void contract.

In *Twiggs County v. Oconee Elec. Membership Corp*.,[85] the court denied the county's attempt to recoup payments made without a contract to a utility that had performed utility relocation work. In denying the county's claim, presumably based on the voluntary payment doctrine, the court focused on the following controlling factors: the utility had performed all the work, the county waited two years before attempting to recover the payments, no fraud or mistake had induced the county's prior payments, and most importantly, the county had the authority to enter into contracts for utility relocation.

> Read a more about these ultra vires cases on Cook & Associates' blogs – specifically, those under the "Ultra Vires" tag.

Older cases impose direct liability on local government staff when they do not follow the proper procedures. For example, in *Knight v. Troup County Bd. Of Ed*.,[86] a school superintendent entered into a contract with an industrial maintenance company, either on his own behalf or on behalf of the school board, which was not a legal entity anyway. Though the superintendent was absolved of any official liability, because he had no authority to bind the county board of education, the court found he could be individually liable if the jury found he acted outside his scope of authority.

Similarly, in *Dixie Drive It Yourself System v. Lewis*,[87] a principal entered into a contract, purportedly on behalf of a school, for the rental of vehicles. When one of the vehicles was damaged, the plaintiff sought recovery from the principal, as the school itself was not subject to suit. The Court ruled that the principal was liable because "[o]ne who professes to contract as agent for another, when his purported principal is actually nonexistent, may be held personally liable on the contract, unless the other contracting party agrees to look to some other person for performance." Because the school was not a legal entity, the principal could not be its agent. As a result, the court found the principal personally liable on the contract.

As noted above, the new constitutional amendment authorizes declaratory and injunctive relief against the State and local governments for acts in violation of law or outside the scope of their lawful authority.[88]

---

[84] 260 Ga. App. 330 (2003).
[85] 245 Ga. App. 231 (2000).
[86] 144 Ga. App. 634 (1978).
[87] 78 Ga. App. 236 (1948).
[88] GA. CONST. Art. I, § 2, ¶ V.

B. New Debt and Multi-Year Contracts

Many public works contracts extend beyond the local government's current fiscal year. When these contracts are not funded by existing funds in the local government's treasury, they can implicate the constitutional limitation on new indebtedness by local governments (the "Constitutional Debt Limitation"), which requires voter approval for new debt.[89] Georgia courts have ruled that a contractual obligation that extends beyond a fiscal year constitutes a debt of the local government, unless the liability is to be discharged by money already in the treasury or taxes to be levied during the year in which the contract was made.

The Constitutional Debt Limitation was discussed, for example, in the 2016 appellate opinion of *Fairgreen Capital, LLC v. City of Canton*[90] and in the 2012 Georgia Supreme Court case of in *Greene County School District v. Circle Y Construction, Inc.*[91] In *Fairgreen Capital*, the Court of Appeals upheld the dismissal of a developer's claim for funds advanced to the city in connection with the construction of a public road on city property benefiting the developer's project. The city and developer entered into an agreement that required the city to pay for construction out of over $1 million advanced by the developer. The developer sued to recover the unpaid portion of the advance. But the trial court granted the city's motion for summary judgment ruling that the agreement was void as a matter of law because (i) the agreement constituted a new debt of the city and (ii) the voters had not approved the debt in accordance with the Constitutional Debt Limitation.

In *Circle Y Construction*, the Court addressed the impact of a school district's failure to comply with the school district law governing multi-year contracts (the "Multi-Year Contracting Statute").[92] The case involved a contract between a school district and a contractor for construction management services for construction of the school district's facilities. County voters approved the project funding through an Educational Local Option Sales Tax (ELOST). After eleven months, the school district terminated the contract, and the contractor filed suit.

The school district moved to dismiss the lawsuit, arguing that the contract was void as a matter of law because it did not comply with the Multi-Year Contracting Statute. The contract was unquestionably an open-ended, multi-year contract, yet it did not contain the provisions required by the Multi-Year Contract Statute to be incorporated into multi-year contracts.

> See more analysis of the Green County School District Case at Local Government's Multi-Year Contract Held Valid in Supreme Court Opinion - Cook & Associates.

The Multi-Year Contracting Statute, however, provides that as long as the multi-year contract contains certain provisions (e.g., an annual renewal provision), the contract will not be considered a debt of the local government. As a result, to be constitutionally valid, multi-year contracts constituting "New Debt" must either (i) receive voter approval or (ii) comply with the Multi-Year Contracting Statute.

---

[89] GA. CONST. Art. 9, § 5, ¶ I.
[90] 335 Ga. App. 719 (2016).
[91] 291 Ga. 111 (2012).
[92] O.C.G.A. § 20-2-506.

The Georgia Court of Appeals previously upheld the contract's enforceability under two alternative bases. First, because the voters approved the funding source, the contract need not comply with the Multi-Year Contracting Statute. Second, it relied on an exception contained in the Multi-Year Contracting Statute -- the Proprietary-Function Exception. The Proprietary-Function Exception provides that "reasonable contracts arising out of [local governments'] proprietary functions" are not subject to the Multi-Year Contracting Statute.

> Read more Cook & Associates' blog posts about Georgia's Multi-Year Contracting Statute.

The Supreme Court accepted the first basis for upholding the enforceability of the contract – i.e., it was approved by the voters and did not need to comply with the Multi-Year Contracting Statute. But it vacated the appellate court's holding under the Proprietary-Function Exemption. It held that the Proprietary-Function Exception was not pertinent because the multi-year contract's funding source was approved by the voters. In other words, when the voters approve a multi-year contract, it need not contain the provisions of the Multi-Year Contracting Statute, nor did it need to fit within the Proprietary-Function Exception. Accordingly, the Court of Appeal's alternative ruling was unnecessary and, therefore, vacated.

With regard to the Proprietary-Function Exception, the Court of Appeals recently applied it to a land-sale agreement. In *City of Albany v. South Georgia Rails to Trails*,[93] a landowner and the City executed a contract under which the landowner sold property to the City in exchange for $150,000, and in return, the City agreed to develop the property for "public open space and recreational purposes, including the development of a multi-use trail and installation of City utility lines" within five years after the purchase. The City never developed or constructed on the property, the five-year period lapsed, but the City continued using the property for its utility lines.

In response to the landowner's complaint, the City moved to dismiss because the contract did not comply with the Multi-Year Contracting Statute. But the Court concluded the statute did not apply because the contract was a within the City's proprietary functions – including "[a]ctivities that are undertaken primarily for public benefit rather than for revenue production are governmental functions . . . ." Thus, the Multi-Year Contracting Statute did not affect the contract.

The City also argued that the statute prohibiting council actions that bind future councils rendered the contract void.[94] The Court rejected this argument because that statute does not apply to contracts within the local government's proprietary functions. Since it concluded the contract was within the City's proprietary function, the statutory prohibition against binding successors did not apply.

C. Failure to Obtain Payment Bond

As noted above, local governments that fail to obtain payment bonds on public works projects are directly liable to subcontractors and suppliers. As an example, in *City of Atlanta v. United Electric Co., Inc.*,[95] the city obtained a payment bond for one portion of the project but did not obtain one for another. After a contractor filed bankruptcy leaving a subcontractor unpaid, the subcontractor sued the city.

[93] 375 Ga. App. 494 (2025).
[94] O.C.G.A. § 36-30-3(a).
[95] 202 Ga. App. 239 (1991).

The portion of the project at issue involved completion of the commercial facilities. So the city argued that the project was not a public works project. The court disagreed, citing the underlying contracts and the fact that the project was constructed under the Downtown Development Authorities Act. "As the city failed to require payment and performance bonds in accordance with [the Public Works Construction Law], [the subcontractor] has a direct right of action to recover for any resulting loss."

In a more recent case, *City of College Park v. Sekisui SPR Americas, LLC*,[96] a city did not obtain a payment bond, but it qualified under the "emergency exception" of the Public Works Construction Law. Accordingly, it was not directly liable to an unpaid subcontractor.

D. Failure to Consider the Statute of Limitations on Performance Bond Claims

While most written contracts are subject to a six-year statute of limitations, performance bonds under the Public Works Construction Law are subject to a one-year limitations period, accruing upon completion and acceptance of the project.[97] Sometimes local governments seek to work with a struggling contractor, attempting to cajole a reluctant contractor to remedy problems. To the chagrin of local government staff, when these efforts prove futile, it may be too late to bring in the surety.

In many cases, there is no clear delineation of when the project is completed[98] or accepted.[99] In those cases, sureties are reluctant to perform or offer substantial amounts for settlement. As a result, when problems arise, it is best to engage the contractor and its surety early enough to comply with the statute with more than adequate time.

IV. Additional Resources on Local Government Public Works and Procurement Law

For more resources on local government public works and procurement law, please visit our blogs;

- Georgia Local Government Law Blog
- Construction and Procurement Law Blog

[96] 331 Ga. App. 404 (2015).
[97] O.C.G.A. § 36-91-72.
[98] "'Completion of the contract,' for purposes of one-year statute of limitations for actions on performance and payment bond, occurs when general contractor has completed its work, and not when appropriate public authority has completed all its functions in connection with the contract." *U.S. Fidelity & Guaranty Co. v. Rome Concrete Pipe Co., Inc*., 256 Ga. 661, 353 S.E.2d 15 (1987).
[99] *Southern Electric Supply Co. v. Trend Const., Inc*., 259 Ga. App. 666, 578 S.E.2d 279 (2003) (listing factors of acceptance).

V. HELPFUL CHARTS OF PUBLIC WORKS LAWS

A. Dollar Thresholds

	Public Works Construction Law	Public Road Works Law
Applicability (subject to other exceptions)	$250,000 or more*	No $ threshold, but certain requirements apply or are exempted based on $ amount. Competitive bidding is required for contracts costing $250,000 or more
Bid Bonds / Proposal Guaranty	Greater than $100,000**	No $ limit, but amount of bond is set by local government (For municipalities, see text above.)
Performance Bond	Greater than $100,000**	$5,000 or more
Payment Bond	Greater than $100,000**	$5,000 or more
Payment and Retainage Law	Greater than $250,000 and 45-days or more	N/A
Prompt Pay Act	No $ threshold	No $ threshold
E-Verify	Greater than $2,499.99	Greater than $2,499.99

* See text above noting awards of contracts for more than $20,000 but less than $250,000 must be based on at least two estimates.

** See text above noting the applicability of the Public Works Construction Law is limited to contract with a cost of $250,000 or more.

B. Contract Award Bases

	Public Works Construction Law	Public Road Works Law
Bidding	Lowest responsible and responsive bidder	Lowest reliable bidder
Proposals	Responsible and responsive offeror whose proposal is determined to be most advantageous based on the evaluation factors	N/A