STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 26-09

Energy Savings Contracts and Local Contractual Procurement

Question 1

May Tennessee public entities procure a contract similar to an Energy Savings Performance Contract, as defined by the U.S. Department of Energy, under Tenn. Code Ann. § 12-4-110?

Opinion 1

Yes.

Question 2

May prices be requested and considered in the procurement process authorized by Tenn. Code Ann. § 12-4-110?

Opinion 2

Yes. Because contracts governed by Tenn. Code Ann. § 12-4-110 must be "awarded on the same basis as contracts for professional services," Tenn. Code Ann. § 12-4-110, contracts governed by Tenn. Code Ann. § 12-4-110 must be awarded "on the basis of recognized competence and integrity" and "must not be based upon competitive solicitations," Tenn. Code Ann. § 12-3-1209(a) (governing contracts for professional services). Although this standard does not permit competitive bidding practices in procurement, it does not restrict any consideration of price. On the contrary, price considerations may bear on a potential service provider's "recognized competence and integrity." *Id.*

Question 3

If a Tennessee public entity procures a contract pursuant to Tenn. Code Ann. § 12-4-110, can that procurement be made available to other public entities through cooperative purchasing authorized by Tenn. Code Ann. § 12-3-1205?

Opinion 3

It depends. Contracts governed by Tenn. Code Ann. § 12-4-110 may be the subject of intrastate cooperative agreements under Tenn. Code Ann. § 12-3-1205(a). But to the extent the

question contemplates interstate cooperative agreements under Tenn. Code Ann. § 12-3-1205(b), the answer is no.

Question 4

Does the description in Tenn. Code Ann. § 12-3-1205(a) relating to "the procurement of any supplies, services or construction" encompass a contract similar to an Energy Savings Performance Contract as defined by the U.S. Department of Energy?

Opinion 4

Yes. As indicated by the response to Question 1, Tennessee public entities may procure contracts similar to federal energy savings performance contracts pursuant to Tenn. Code Ann. § 12-4-110. And as explained in response to Question 3, contracts governed by Tenn. Code Ann. § 12-4-110 may be the subject of intrastate cooperative agreements under Tenn. Code Ann. § 12-3-1205(a).

ANALYSIS

The questions presented relate to energy savings and governmental procurement processes. They implicate two Tennessee statutes—Tenn. Code Ann. § 12-3-1205 and Tenn. Code Ann. § 12-4-110—as well as federal "energy savings performance contracts." Tennessee Code Annotated § 12-3-1205 provides a framework for local governments to "participate in," "sponsor," "conduct," or "administer" cooperative purchasing agreements. Tennessee Code Annotated § 12-4-110, in turn, governs "[c]ontracts by counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of this state for energy-related services." And federal "energy savings performance contracts" are contracts entered into "for the purpose of achieving energy savings and benefits ancillary to that purpose." 42 U.S.C. § 8287(a)(1). The questions allude to the definition given to such contracts by the U.S. Department of Energy, which defines energy savings performance contracts as contracts that "provide[] for the performance of services for the design, acquisition, installation, testing, operation, and, where appropriate, maintenance and repair of an identified energy conservation measure or series of measures at one or more locations." 10 C.F.R. § 436.31. The Tennessee statutory schemes at issue here are independent of this federal framework. But, as detailed below, they permit contracts similar to the ones that fall within the referenced federal paradigm.

1. The first question concerns contractual procurement by the Tennessee public entities referenced in Tenn. Code Ann. § 12-4-110: counties, cities, metropolitan governments, towns, utility districts, and other municipal and public corporations of this State. It asks whether these entities may procure a contract similar to an energy savings performance contract as defined by the U.S. Department of Energy. We believe that they may.

The type of contract described in Tenn. Code Ann. § 12-4-110 suggests that the Tennessee public entities referenced in Tenn. Code Ann. § 12-4-110 may procure contracts similar to a federal energy savings performance contract. Tennessee Code Annotated § 12-4-110 contemplates contracts that involve "energy-related services that include both engineering services and equipment, and have as their purpose the reduction of energy costs in public facilities." Tenn.

Code Ann. § 12-4-110. Federal energy savings performance contracts similarly "provide[] for the performance of services for the design, acquisition, installation, testing, operation, and, where appropriate, maintenance and repair of an identified energy conservation measure or series of measures at one or more locations." 10 C.F.R. § 436.31. Moreover, although Tenn. Code Ann. § 12-4-110 does not specifically reference "performance" contracting as a facet of the contracts that it governs, the category of contracts it describes is sufficiently broad to include contracts that contain a "performance" element akin to that required under the referenced federal framework.[1]

To be clear, though, while Tenn. Code Ann. § 12-4-110 permits the referenced public entities to procure contracts similar to federal energy savings performance contracts, the statute does not *mandate* that local "energy-related services" contracts comply with the requirements for federal energy savings performance contracts. Put simply, state law imposes different requirements on the contracts described in Tenn. Code Ann. § 12-4-110 than federal law imposes for federal energy savings performance contracts. *Compare* Tenn. Code Ann. § 12-4-110 (requiring that contracts for "energy-related services" "be awarded on the same basis as contracts for professional services"), *with* 42 U.S.C. § 8287(a)(2)(A) (requiring "an annual energy audit" for federal energy savings performance contracts), *and* 10 C.F.R. § 436.35(a) (stating that federal energy savings performance contracts must, among other things, "[p]rovid[e] for a guarantee of energy cost savings . . . and establish[] payment schedules reflecting such guarantee").[2] Indeed, beyond requiring that contracts for "energy-related services" "be awarded on the same basis as contracts for professional services," Tenn. Code Ann. § 12-4-110 does not impose any specific requirements on the "energy-related services" contracts it covers. *See* Tenn. Code Ann. § 12-4-110. So, while Tennessee public entities may enter into contracts akin to federal energy savings performance contracts under Tenn. Code Ann. § 12-4-110, the shape of the contracts governed by Tenn. Code Ann. § 12-4-110 can vary and need not mirror federal energy savings performance contracts.

2. The second question asks whether procuring parties may request and consider prices during the procurement process authorized by Tenn. Code Ann. § 12-4-110. We believe that they may.

Although the statutory analysis begins with the text of Tenn. Code Ann. § 12-4-110, the interpretation of a different statute ultimately answers the question. Tennessee Code Annotated § 12-4-110 mandates that the described contracts "be awarded on the same basis as contracts for professional services." The statute thus tethers its procurement standard to the standard for procurement of "contracts for professional services," which is set out in Tenn. Code Ann. § 12-3-1209(a). *See generally* Tenn. Code Ann. § 12-3-1209(a) (governing contracts by "counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of this state for legal services, fiscal agent, financial advisor or advisory services, services from an

[1] 42 U.S.C. § 8287(a)(1) provides that a contractor operating under a federal energy savings performance contract "shall incur costs of implementing energy savings measures . . . in exchange for a share of any energy savings directly resulting from implementation of such measures."

[2] Although Tenn. Code Ann. § 12-4-118 imposes some requirements that are similar to the referenced federal requirements in the context of "energy performance or guaranteed savings" contracts entered into by "state agencies," that Code section does not apply to "energy-related service contracts . . . for counties, cities, metropolitan governments, towns, utility districts, and other municipal and public corporations of this state." Tenn. Code Ann. § 12-4-118(a), (e).

insurance producer, as that term is defined in § 56-6-102, educational consultant services, and similar services by professional persons").

To unpack the meaning of Tenn. Code Ann. § 12-3-1209(a), a court would naturally "begin with the words that the General Assembly has chosen." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010). Here, the statutory text provides that contracts "must not be based upon competitive solicitations, but must be awarded on the basis of recognized competence and integrity." Tenn. Code Ann. § 12-3-1209(a). Procuring parties may "interview[] eligible persons or entities to determine the capabilities of such persons or entities." *Id.*

In our opinion, Tenn. Code Ann. § 12-3-1209(a) does not foreclose a procuring party from making an inquiry into price. On the contrary, we believe that the statutory text supports the viability of price consideration during procurement. Consider the requirement to award contracts based on "recognized competence and integrity." *Id.* Price considerations could bear on that standard. For instance, as it specifically relates to the question of competence, we think it is easy to imagine scenarios where the proposed price touted by a potential service provider could reveal that the provider lacks a sufficient understanding of its industry and the nature of the work to be accomplished. And in certain specific situations, a proposed price that seems unusually low might call into question whether a potential provider would really be able to perform the contracted-for services in a sufficient manner. As we see it, then, an inquiry into price is consistent with the procuring party's duty to award contracts based on "recognized competence and integrity." *Id.* In fact, a procuring party might even inquire into price considerations during interviews that are held to gauge the capabilities of a potential service provider. *See id.* (providing that procuring parties are not prohibited from "interviewing eligible persons or entities to determine the capabilities of such persons or entities").

It is also unclear from a practical perspective how a procuring party would even come to an agreement without considering price.[3] And relatedly, it would be somewhat curious if a procuring entity had to execute a contract simply because it had first determined—unconnected to any price considerations—that a given provider was most competent to provide the service at issue. Indeed, what if the provider, otherwise determined to be most qualified, insisted on providing the service at an exorbitant price beyond the resources of the procuring entity? Such a circumstance would indicate a lack of integrity on the part of the provider, and the law wisely does not compel such a result.

Beyond the text of Tenn. Code Ann. § 12-3-1209(a) and common sense, precedent also supports the conclusion that a procuring party may consider price in the procurement process for professional services contracts. Generally instructive is *Strickland v. City of Lawrenceburg*, 611 S.W.2d 832 (Tenn. Ct. App. 1980). There, the Tennessee Court of Appeals examined a statutory predecessor to present-day Tenn. Code Ann. § 12-3-1209(a) that contained the same "recognized competence and integrity" polestar. *See id.* at 836. Although the plaintiff complained that the trial

[3] One part of the scheme for professional services contracts entered into pursuant to Tenn. Code Ann. § 12-3-1209(a) expressly contemplates that entities may consider financial considerations incident to procurement and contractual execution. Specifically, Tenn. Code Ann. § 12-3-1209(b) provides certain professionals shall perform "only pursuant to a written contract" that specifies, among other things, the "costs" of the services.

judge had stated that the statute "did not preclude a city from entering into a contract for a definite amount or putting a ceiling on a definite amount to perform auditing services," the appellate court found no error in the trial judge's statutory explanation. *Id.*

Price is thus a legitimate object of inquiry incident to the procurement of contracts under Tenn. Code Ann. § 12-3-1209(a), meaning that, by extension, it also is a legitimate object of inquiry during the procurement of contracts for energy-related services under Tenn. Code Ann. § 12-4-110. *See* Tenn. Code Ann. § 12-4-110 (providing that contracts for energy-related services "shall be awarded on the same basis as contracts for professional services"). In both of these procurement contexts, price may be considered as it might bear on a provider's "recognized competence and integrity." Tenn. Code Ann. § 12-3-1209(a).

At the same time, price alone may not be the basis for a contract award. The governing procurement standard, after all, prohibits competitive bidding. *See* Tenn. Code Ann. § 12-3-1209(a) (providing that contracts "must not be based upon competitive solicitations"); Tenn. Att'y Gen. Op. 22-10 (July 25, 2022) (describing the standard in Tenn. Code Ann. § 12-3-1209(a) as an "exception" to competitive bidding). But the operative prohibition on awarding contracts based on "competitive solicitations"[4] does not impose a blanket restriction on price considerations. And for the above reasons, we believe that procuring parties may request and consider prices during the procurement process authorized by Tenn. Code Ann. § 12-4-110.

3. The third question concerns the interplay between Tenn. Code Ann. § 12-4-110 and Tenn. Code Ann. § 12-3-1205. As broadly phrased, it effectively invites two queries regarding contracts whose procurements are governed by Tenn. Code Ann. § 12-4-110: (1) whether Tenn. Code Ann. § 12-3-1205(a) permits intrastate cooperative agreements with respect to such contracts and (2) whether Tenn. Code Ann. § 12-3-1205(b) permits interstate cooperative agreements with respect to such contracts. We address the latter query first.

Tennessee Code Annotated § 12-3-1205(b) provides a legal pathway for Tennessee local governments to enter into cooperative purchasing agreements with non-Tennessee public entities, *see generally* Tenn. Code Ann. § 12-3-1205(b)(1),[5] but this authority does not extend to the type of contracts governed by Tenn. Code Ann. § 12-4-110. First, the contracts governed by Tenn. Code Ann. § 12-4-110 are for "energy-related services that include both *engineering services* and equipment," Tenn. Code Ann. § 12-4-110 (emphasis added), and Tenn. Code Ann. § 12-3-1205(b) expressly "does not apply to . . . "[p]urchases of . . . engineering . . . services," Tenn. Code Ann. § 12-3-1205(b)(4)(B). Second, there is irreconcilable tension in the manner of procurement endorsed by the respective statutes. Whereas, as already explained, Tenn. Code Ann. § 12-4-110

[4] Tenn. Code Ann. § 12-3-1209(a).

[5] The statute generally provides in part that local governments in Tennessee "may participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any goods, supplies, services, or equipment with one (1) or more other governmental entities outside this state, to the extent the laws of the other state permit the joint exercise of purchasing authority." Tenn. Code Ann. § 12-3-1205(b)(1). This authority for cooperation with non-Tennessee entities also extends to "an agency of the United States, to the extent federal law permits the joint exercise of purchasing authority." *Id.*

does not permit competitive bidding, Tenn. Code Ann. § 12-3-1205(b) requires it. Tenn. Code Ann. § 12-3-1205(b)(1).

We reach a different conclusion regarding the intrastate cooperative agreements contemplated by Tenn. Code Ann. § 12-3-1205(a). Unlike Tenn. Code Ann. § 12-3-1205(b), Tenn. Code Ann. § 12-3-1205(a) has no carveout for purchases of engineering services. And in granting authority to Tennessee local governments to enter into cooperative purchasing agreements with one another, Tenn. Code Ann. § 12-3-1205(a) casts a wide net. It provides that "[a]ny municipality, county, utility district, or other local government of the state may participate in, sponsor, conduct or administer a cooperative purchasing agreement for the procurement of *any* supplies, services or construction with one (1) or more other local governments in accordance with an agreement entered into between the participants." Tenn. Code Ann. § 12-3-1205(a) (emphasis added). Given this broad language, a court would likely conclude that the "services" contemplated under Tenn. Code Ann. § 12-3-1205(a) include the subject matter of contracts under Tenn. Code Ann. § 12-4-110: "energy-related services that include both engineering services and equipment, and have as their purpose the reduction of energy costs in public facilities." In our opinion, therefore, contracts for "energy-related services" may be the subject of intrastate cooperative agreements under Tenn. Code Ann. § 12-3-1205(a).

In reaching this conclusion, we are not dissuaded by the fact that the contracts governed by Tenn. Code Ann. § 12-4-110 are elementally hybrid. Although the statute contemplates contracts for "energy-related services that include both engineering services and equipment," the statutory text makes clear that the General Assembly ultimately regards the overall transaction as one for "services." Tenn. Code Ann. § 12-4-110 (addressing "[c]ontracts . . . for energy-related *services* that include both engineering services and equipment" (emphasis added)). Consistent with that understanding, the General Assembly has, as already discussed, tied the associated procurement standard to that of "professional *services*." *Id.* (emphasis added).

4. The final question asks whether the description in Tenn. Code Ann. § 12-3-1205(a) relating to "the procurement of any supplies, services or construction" encompasses a contract akin to a federal energy savings performance contract. We believe that it does. As explained in response to Question 1, federal energy savings performance contracts and contracts governed by Tenn. Code Ann. § 12-4-110 *can* be similar. And as explained in resolving Question 3, the contracts governed by Tenn. Code Ann. § 12-4-110 may be the subject of intrastate cooperative agreements under Tenn. Code Ann. § 12-3-1205(a). Putting it together, a contract governed by Tenn. Code Ann. § 12-4-110 that is similar to a federal energy savings performance contract may be the subject of an intrastate cooperative agreement under Tenn. Code Ann. § 12-3-1205(a).

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