

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 00-090

Public Notice on Internet Site

QUESTIONS

1. Does a local internet news service qualify as a medium for a local government to invite vendors to bid on items to be purchased by such government?
2. Does a local internet news service meet the requirements of advertising a public meeting?
3. Does an advertisement printed in an internet news service satisfy the legal notice requirement for any public notice required by the Circuit Court Clerk, the Chancery Court Clerk, the County Clerk, or by other officials?

OPINIONS

1. Whether an internet news service may qualify as a medium for a local government to invite vendors to bid on items to be purchased by such government would depend, first, on the statute, ordinance, or charter provision governing the particular purchase. We think a statute, ordinance, or charter provision requiring publication in a “newspaper of general circulation,” for example, would not be satisfied by publication on an internet news service. Depending on facts and circumstances, especially the nature of the transaction and whether the community of qualified vendors regularly accesses the internet service for such advertisements, a court might conclude that advertising on an internet news site could satisfy a statute, ordinance, or charter provision requiring that bids be submitted after public advertising.
2. Whether posting a meeting notice on an internet site would be “adequate public notice” under the Open Meetings Act would depend on all the facts and circumstances, particularly whether that location would be one where members of the community could become aware of the notice.
3. A definitive answer to this question would depend on the particular statute requiring notice as well as the applicable facts and circumstances. As discussed in Question 1, we think a statute or rule requiring publication in a “newspaper of general circulation,” for example, would not be satisfied by publication on an internet news service. In addition, if the notice implicates interests protected by due process, it must be reasonably calculated, under all the circumstances, to apprise

interested parties of the pendency of the action and afford them an opportunity to present their objections. Whether posting notice on an internet site would meet this standard would depend on all the relevant facts and circumstances.

ANALYSIS

1. Local Internet News Service as Medium for Local Government to Advertise Contract for Public Bidding

This opinion addresses whether advertising on a local internet news site could meet legal requirements for public advertisement and notice in several different contexts. The first question is whether a local internet news service would qualify as a medium for a local government to invite vendors to bid on items to be purchased by such government. As a general matter, Tenn. Code Ann. § 12-3-704, enacted in 1999, provides:

Notwithstanding any provision of law, rule or regulation to the contrary, state agencies and local governments may satisfy any requirement for *mailing* by distributing invitations to bid, requests for proposals and other solicitations electronically. In addition, state agencies and local governments may *receive bids, proposals, and other offers electronically*. In order to assure the fullest possible participation of small businesses and minority owned businesses, state agencies and local governments shall not require such small businesses and minority owned businesses to *receive or respond* to invitations to bid, requests for proposals, or other solicitations electronically.

Tenn. Code Ann. § 12-3-704 (emphasis added) (1999 Tenn. Pub. Acts ch. 382, § 3). By its terms, however, we think this statute refers to the process of distributing direct solicitations to bid or bid forms to qualified vendors, and not to public advertising requirements. This conclusion is also based on Section 2 of Chapter 382, which states that the intent of the act, in part, is to “[e]nable state agencies and local governments to reduce the cost of the purchasing process by *distributing their solicitations and receiving bids, proposals, and other offers electronically*.” (Emphasis added).

Whether publication on an internet site satisfies a requirement for public advertising of a contract would depend on the particular statute, charter provision, or ordinance governing the particular purchasing agency and transaction. Competitive bidding requirements are strictly construed against the governing authority. *Browning-Ferris Industries v. Oak Ridge*, 644 S.W.2d 400, 403 (Tenn.Ct.App. 1982), *p.t.a. denied* (1983). We think, for example, a court would conclude that advertising on an internet site would not satisfy a provision expressly requiring advertising in a “newspaper of general circulation.” *See, e.g.*, Tenn. Code Ann. § 49-2-203(a)(4)(A) (local education school board purchases of five thousand dollars or more must be made on competitive bids solicited by advertisement “in a newspaper of general circulation in the county[.]”). We note, for example, that the Chattanooga City Code requires contracts for purchases of more than four thousand dollars to be let out for bids and states: “[n]otice for bids shall be advertised at least once in one (1)

or more *daily newspapers published in the city* at least ten (10) days prior to the time set for a public opening of bids.” Chattanooga City Code ch. 2, art. V, § 2-352. We think a court would conclude that this requirement cannot be satisfied by advertising on an internet site. Whether such an advertisement would satisfy a requirement that an invitation to bid be made by “public notice” or “public advertisement” would depend on specific facts and circumstances.

2. Notice on Internet Site as Notice of Public Meeting

The next question is whether advertising on an internet site would satisfy the requirements for giving notice of a public meeting under the Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq.* Under the Open Meetings Act, all meetings of any governing body are public meetings open to the public at all times, except as provided by the Tennessee Constitution. Tenn. Code Ann. § 8-44-102(a). All meetings subject to this law must be held on “adequate public notice.” Tenn. Code Ann. § 8-44-103. “Adequate public notice” as used in this section means adequate public notice under the circumstances. *Memphis Publishing Co. v. City of Memphis*, 513 S.W.2d 511, 512 (Tenn. 1974), *rehearing denied* (1974).

In a recent unpublished opinion, the Tennessee Court of Appeals for the Eastern Section outlined a three-prong test for “adequate public notice” under this provision. *Englewood Citizens for Alternate B v. Town of Englewood*, No. 03A01-9803-CH-00098, slip op. (E.S.Tenn.Ct.App. June 24, 1999). Under that test, the notice must be posted in a location where a member of the community could become aware of such notice; the contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken; and the notice must be posted at a time sufficiently in advance of the actual meeting in order to give citizens both an opportunity to become aware of and to attend the meeting. Slip op. at 2. The Court concluded that posting notice of the meeting in the city hall, the post office, and a local bank satisfied the first requirement of the test. The Court stated “that for purposes of this prong of the adequate notice inquiry, the town can provide adequate notice simply by choosing reasonable public locations and posting notices at those public locations on a consistent basis.” *Id.* Whether posting notice on an internet site would be “adequate public notice” under the Open Meetings Act would therefore depend on all the facts and circumstances, particularly whether that location would be one where members of the community could become aware of the notice.

3. Notice on Internet Site as Notice in Other Contexts

The last question is whether posting notice on an internet site would satisfy requirements for public notice by the Circuit Court Clerk, the Chancery Court Clerk, the County Clerk, or by other officials. A definitive answer to this question would depend on the particular statute, rule, or ordinance requiring the particular notice. As discussed above, for example, posting on an internet site would probably not satisfy a statute or ordinance requiring notice in a “newspaper of general circulation.” Further, depending on the purpose of the notice, the notice may be required to satisfy due process requirements. An elementary and fundamental requirement of due process in any proceeding that is to be afforded finality is notice reasonably calculated, under all the circumstances,

to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950); *Baggett v. Baggett*, 541 S.W.2d 407 (Tenn. 1976). Whether publication on an internet site would meet this requirement would depend on all the relevant facts and circumstances.

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