

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
425 Fifth Avenue North  
NASHVILLE, TENNESSEE 37243-0497

July 5, 2000

Opinion No. 00-117

Construction Manager / Conflict of Interest

---

**QUESTION**

1. Does Tenn. Code Ann. § 49-2-203(a)(4)(C)(2) preclude an individual that was awarded a contract by the county board of education for construction management services from bidding on, contracting to perform and/or being awarded construction work on the school building projects the individual was hired to supervise?

2. (a) Is it a conflict of interest under the provisions of Tenn. Code Ann. § 12-4-101 *et seq.* for an individual providing construction management services for a county board of education to also bid on, contract to perform and/or be awarded construction work on school building projects the individual was hired to supervisor?

(b) If yes, do the provisions in the Architects' contract addendum requiring that the Architect evaluate the bids when the Construction Manager bids on portions of the work, and that the Architect also assume certain contract administration when the Construction Manager becomes a contractor, change this result?

**OPINION**

1. No. Tenn. Code Ann. § 49-2-203(a)(4)(C)(2) does not prohibit a construction manager from performing "actual construction work" on a project that the construction manager superintends as long as the statutory requirements are observed.

2. (a) No. Assuming the construction manager is not a public official or officer, Tenn. Code Ann. § 12-4-401(a)(1) does not apply to this situation.

(b) Based on the answer to 2(a), this question is moot.

**ANALYSIS**

Tenn. Code Ann. § 49-2-203(a)(4)(C)(2) provides as follows:

Construction management services which are provided for a fee and which involve supervision of the planning, design, bid and

construction phases of the project, but not the performance of actual construction work, are deemed to be professional services and may be performed by a qualified person on the basis of recognized competence and integrity. The provisions of this subdivision shall not be construed to authorize or permit actual construction work by a construction manager who has been hired for a construction project or to modify or suspend any competitive bid provisions of the law applicable to the construction work which is under the supervision of such construction manager as applicable only under this section. Contracts for such services shall be procured through competitive bids as provided in this subsection or by a request for proposals process.

No court has had an opportunity to construe this provision. The statute delineates the method by which construction management services may be procured, *i.e.* through a personal service contract. The provision also prevents a construction manager who has been hired to provide construction management services contract from performing actual construction work as part of that construction management services contract. The statute prohibits a construction manager from undertaking or assigning actual construction work outside of the competitive bid process or of a request for proposals process; there is, however, no specific prohibition against a construction manager engaging in the competitive bid process or a request for proposals process to secure a contract for actual construction.<sup>1</sup>

The context of this provision supports the conclusion that it is limited to the means of procuring actual construction work, rather than a blanket prohibition against a construction manager performing such work. For example, Tenn. Code Ann. § 49-2-203(a)(4) specifically empowers the local board of education to make certain purchases. The subparts of this section generally describe the means by which such purchases are made, which ones require competitive bids and which ones are exempt from such requirements. *See, e.g.*, Tenn. Code Ann. § 49-2-203(a)(4)(A) (expenditures over \$5,000 must be made on competitive bids); Tenn. Code Ann. § 49-2-203(a)(4)(B) (expenditures less than \$5,000 may be made in the open market); Tenn. Code Ann. § 49-2-203(a)(4)(C)(1) (contracts for buildings or additions over \$10,000 must be made on competitive bids). Given this context, it appears that Tenn. Code Ann. § 49-2-203(a)(4)(B)(2) is also a description of the means of procurement for construction management services and actual construction work and is not intended to prohibit a construction manager from performing actual construction work, providing that the statutory processes have been observed.

---

<sup>1</sup>If a construction manager also wishes to bid for such work, the State has guarded against the appearance of impropriety by adding language to the Architect's contract that requires the Architect to oversee any competitive bid process or requests for proposal process in which the construction manager is a candidate for actual construction work. Furthermore, in cases where the construction manager is, in fact, performing actual construction work, the Architect's contract provides that the Architect must also assume the oversight and administrative duties related to that contract.

The Comptroller has also asked whether the State's conflict of interest statute, Tenn. Code Ann. § 12-4-101 *et seq.* prohibits a construction manager from performing actual construction on a project that he is supervising. No court has addressed whether this statute would apply to this or a similar set of facts. Generally, this statute has been applied only to public officers or officials. *See e.g.*, Op. Tenn. Atty. Gen. 99-231 (December 15, 1999) ("Tennessee law regarding conflicts of interests involving government contracts is generally addressed to situations in which a state officer or employee has a conflict of interest."); Op. Tenn. Atty. Gen. 99-085 (April 6, 1999) ("A general conflict of interest statute for state and local public officials appears at Tenn. Code Ann. § 12-4-101."). Assuming that the construction manager in issue is not a public official or officer, the conflicts of interest statute would not apply to the situation at hand. This interpretation renders the Comptroller's question concerning the effect of the Architect's contract addendum moot.

---

PAUL G. SUMMERS  
Attorney General and Reporter

---

MICHAEL E. MOORE  
Solicitor General

---

KAE C. TODD  
Assistant Attorney General

Requested by:

John G. Morgan  
Comptroller  
First Floor, State Capitol  
Nashville, TN 37243