S T A T E O F T E N E S E
OFFICE OF THE
ATTORNEY GENERAL
425 Fifth Avenue North
NASHVILLE, TENNESSEE 37243-0497

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Opinion No. 02-001

Drug-Free Workplace Program Required by TENN. CODE ANN. § 50-9-113 and Its Effect on Competitively Bid Construction Services for a Local Board of Education

QUESTIONS

1. Whether a board of education should regard an employer as barred from bidding on a contract under TENN. CODE ANN. § 50-9-113, public contracting statutes and other provisions of the law where the employer with the low bid (i) submitted an affidavit stating that the employer has a drug-free workplace program with its bid for construction services for a board of education project, (ii) did not have a certificate of compliance from the Department of Labor and Workforce Development at the time the affidavit was submitted, (iii) subsequently provided information showing it had obtained a certificate of compliance after the bid was submitted, and (iv) the local board of education had independent knowledge that the employer with the low bid did not have a certificate of compliance from the Department of Labor and Workforce Development at the time the affidavit was submitted?

2. Whether the board of education may award the contract under Tennessee law to the employer by relying on the affidavit in accordance with Section 50-9-113(d)?

3. Whether the board of education may award the contract to another bidder who complied with Section 50-9-113?

4. Whether the board of education may reject all bids and re-bid the entire project?

OPINIONS

1. Yes. Based on the facts provided and assuming that TENN. CODE ANN. § 50-9-113 is applicable, the employer is not in compliance with the statute and thus is not eligible to contract with the local board of education for construction services.

2. No. Because it appears that the local board of education had actual knowledge that the employer was not in compliance with the statute, TENN. CODE ANN. § 50-9-113(d) does not apply to this situation.

3. Yes. The board of education should award the contract to the next lowest bidder who has complied with TENN. CODE ANN. § 50-9-113 because the low bid employer has not complied with the terms of this statute.

4. No. The board of education should not reject all bids and re-bid the entire project unless all the bidders failed to comply with the terms of the statute.

ANALYSIS

1. The Drug-Free Workplace Program, enacted by the legislature in 1996, is intended to promote drug free workplaces to maximize the productivity of employers and to reduce work-related accidents and costs arising from drug or alcohol abuse by employees. TENN. CODE ANN. § 50-9-101(a). The legislative intent also provides that employees who choose to engage in drug or alcohol abuse face the risk of unemployment and the forfeiture of workers' compensation benefits. *Id*.

While participation in the Drug-Free Workplace Program is voluntary, it has incentives for employers who comply with its requirements because such employers are eligible to qualify for discounts provided under TENN. CODE ANN. § 50-6-418, may deny workers' compensation medical and indemnity benefits and can shift the burden of proof under TENN. CODE ANN. § 50-6-110(c). Since 2001, compliance with the requirements of the Drug-Free Workplace Program is required for state and local governmental construction contracts "at least to the extent required of governmental entities." TENN. CODE ANN. § 50-9-113(a).

The definition of a "covered employer" includes the requirement that in addition to maintaining a drug-free workplace pursuant to this chapter, the employer must be covered by the Workers' Compensation Law. The definition of a "covered employer" states that the chapter has no effect on employers who do not meet this definition. TENN. CODE ANN. § 50-9-103(5). The Workers' Compensation Law, however, does not apply to the State of Tennessee, counties and municipal corporations, or any department of division thereof, unless said governmental entity opts to accept the provisions of the Workers' Compensation Law in writing and is a "covered employer" under the Drug-Free Workplace Program. TENN. CODE ANN. § 50-6-106(5). *See* Op. Tenn. Atty. Gen. 99-126 (June 29, 1999). (Copy attached).

Therefore, unless the board of education has elected in writing to be covered by the Workers' Compensation Law and is a "covered employer," Chapter 9 and TENN. CODE ANN. § 50-9-113 do not apply. For purposes of this opinion, however, we assume that the local board of education has elected to be covered by the Workers' Compensation Law and is a "covered employer" under the Drug-Free

Workplace Program. With this assumption, the employer who bid on the contract must comply with TENN. CODE ANN. § 50-9-101, *et seq.* at least to the extent required of the local board of education.

TENN. CODE ANN. § 50-9-113(a) states as follows:

> 50-9-113. State and local government construction contracts.
>
> (a) *Each employer* with no less than five (5) employees receiving pay who contracts with the state or any local government to provide construction services or who is awarded a contract to provide construction services or who provides construction services to the state or local government *shall submit an affidavit stating that such employer has a drug-free workplace program that complies with this chapter, in effect at the time of such submission of a bid at least to the extent required of governmental entities.* Any private employer that certifies compliance with the drug-free workplace program, only to the extent required by this section, shall not receive any reduction in workers' compensation premiums and shall not be entitled to any other benefit provided by compliance with the drug-free workplace program set forth in this chapter. Nothing in this section shall be construed to reduce or diminish the rights or privileges of any private employer who has a drug-free workplace program that fully complies with this chapter. *For purposes of compliance with this section, any private employer shall obtain a certificate of compliance with the applicable portions of the Drug-free Workplace Act from the department of labor and workforce development. No local government or state governmental entity shall enter into any contract or award a contract for construction services with an employer who does not comply with the provisions of this section.*

(Emphasis added).

The statute prohibits a local government or state governmental entity from entering into a contract or from awarding a contract for construction to an employer who does not comply with the statute's provisions. To be in compliance, an employer must have a drug-free workplace that complies with the provisions of the statute. Such compliance, by the terms of the statute, requires, *inter alia*, the employer to obtain a certificate of compliance from the Department of Labor and Workforce Development.

Based on the facts presented in your request, it appears that the employer who bid on the contract submitted an affidavit that it had a drug-free workplace, but did not, at that time, have a certificate of compliance from the Department of Labor and Workforce Development. Consequently, because the

employer was not in compliance with the statute at the time the bid was submitted, the local board of education should regard the employer as barred from bidding on the contract under TENN. CODE ANN. 50-9-113(a).

2. TENN. CODE ANN. § 50-9-113(d) states in its entirety:

> (d) A written affidavit by the principal officer of a covered employer provided to a local government at the time such bid or contract is submitted stating that the employer is in compliance with this section shall absolve the local government of all further responsibility under this section and any liability arising from the employer's compliance or failure of compliance with the provisions of this section.

The foregoing language allows a local government to rely upon an affidavit submitted by a covered employer with its bid without independent verification of its accuracy. The provision must be interpreted in a reasonable manner to give effect to the statute. *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998). In this case, the local board of education apparently had independent knowledge that the employer with the low bid did not, in fact, have a certificate of compliance concerning the employer. In such situations, a local government entity cannot reasonably rely on the affidavit of the employer. *Cf. Spectra Plastics, Inc. v. Nashoba Bank*, 15 S.W.3d 832, 840-41 (Tenn. Ct. App. 1999), *appeal denied* (Feb. 28, 2000) (knowledge of actual facts prevents one party from relying on contrary representation made by a second party). Therefore, the board may not rely on this provision to overlook the employer's failure to comply with the statute.

3. Based upon the foregoing analysis, it appears that the low bid employer did not comply with the statutory requirements of TENN. CODE ANN. § 50-9-113. The board of education should award the contract to the next lowest bidder who has complied with TENN. CODE ANN. § 50-9-113.

4. The board of education should not reject all bids and re-bid the entire project unless all the bidders failed to comply with the terms of this statute. The contract should be awarded to a complying low bid employer unless it is not in the best interest of the board of education to award the contract because other factors exist that constitute good cause for rejecting bids. For a more thorough discussion of the rejection of bids and factors that should be considered, *See* Op. Tenn. Atty. Gen. 81-295 (May 7, 1981).

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JANIE C. PORTER
Assistant Attorney General

Requested by:

The Honorable Matt Kisber
State Representative
33 Legislative Plaza
Nashville, TN 37243-0173