

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

September 3, 2002

Opinion No. 02-096

Warren County Purchasing Laws

QUESTIONS

1951 Tenn. Priv. Acts Ch. 16 establishes a purchasing commission in Warren County for all purchases over \$1,000, excluding highways and bridges. The purchasing commission has authority to let “all bids.” 1959 Tenn. Priv. Acts Ch. 61 authorizes the Warren County Road Superintendent to make purchases of up to \$1,000 without the prior approval of the purchasing commission. Under these acts:

1. Which agency — the purchasing commission or the head of the department submitting the request — is responsible for establishing bid specifications for a contract?
2. Which agency is responsible to determine whether a bid meets the bid specifications?
3. If the bid does not meet the specifications and the purchasing commission nevertheless accepts the bid, which agency is accountable if the product, service or project is unacceptable?
4. If general law highway specifications do not specifically address county road projects, but the road superintendent wants the county road to be built in accordance with state standards, does the bid have to meet those specifications?
5. If the bid specifications for a highway project do not comply with general law specifications for public roads, which agency is responsible if the bid is permitted to proceed and the contract is let?

OPINIONS

1. The answer to this question may depend on the particular county department and any private or general law specifically applying to that department. Under the private act governing purchasing generally, the purchasing commission is responsible for preparing the bid specifications. But the private act authorizes the purchasing commission to procure the materials and supplies “listed” on the requisition request from the county department. Thus, the private act anticipates that the department and the purchasing commission will cooperate to ensure that bid specifications in the

advertisement for the bid will elicit bids for materials and supplies that conform to the department's requisition request.

2. Under the private act, the purchasing commission is responsible for determining that the bids meet the bid specifications. Presumably, the commission would consult with the department requesting the materials or supplies to ensure that the winning bid is for materials and supplies "listed" on the requisition request from the county department.

3. The purchasing commission is given responsibility for advertising and accepting bids, and it must procure the goods "listed" on the department's requisition. By accepting a bid, the purchasing commission has necessarily concluded that the bid meets the applicable specifications. This conclusion is binding on the requisitioning department. Depending on the facts and circumstances, a third party might have an action against the county, but the basis for such action, as well as the appropriate remedy, could only be definitively resolved by a court of law.

4. and 5. As discussed above, the county purchasing commission is responsible for preparing bid specifications and awarding contracts, and is charged with obtaining materials requisitioned by the county department that requests them. By accepting a bid, the purchasing commission has necessarily concluded that the bid meets the applicable specifications. This conclusion is binding on the requisitioning department, including the road superintendent. Depending on the facts and circumstances, a third party might have an action against the county, but the basis for such action, as well as the appropriate remedy, could only be definitively resolved by a court of law.

ANALYSIS

1. Preparing Bid Specifications

This request concerns responsibility for county purchases in Warren County. 1951 Tenn. Priv. Acts Ch. 16, as amended, establishes a purchasing commission in Warren County. The commission has four members: the county auditor, who serves as the chairman; two members elected by the county commission; and the county executive. Section 2 of the private act provides in relevant part:

That it shall be the duty of such Purchasing Commission to purchase all supplies of every kind and character, subject to the limitations hereinafter provided which shall be paid for from funds belonging to Counties to which this Act applies, provided, however, that contracts for personal services are expressly excluded from the jurisdiction of said Purchasing Commission.

Any department of said County desiring to make any purchases of any sort shall requisition for the same to such Purchasing Commission, who shall thereupon proceed to procure the materials

and supplies listed in the following manner: Purchases aggregating less than five thousand dollars (\$5,000.00) may be made by the Chairman of such Commission upon his own initiative without the necessity of action by the remaining members thereof. All purchases amounting to more than five thousand dollars (\$5,000.00) shall be made upon sealed competitive bids after due advertisement of the time and place as to where such bids shall be taken. All bids so taken shall be opened in the presence of all members of the Commission and the contract therefor awarded to the lowest and best bidder. The Commission shall likewise be authorized to let all contracts for the building of County structures paid for from public funds in said County except for the construction of bridges upon the County Highways and all school buildings which latter shall remain under the jurisdiction of the County Board of Education.

The County Purchasing Law of 1983 applies to purchases by authorized officials in all counties except, among other exemptions, purchases made by any county governed by a private act regarding purchasing if that act provides for advertisement and competitive bidding for each purchase of five thousand dollars or some lesser amount. Tenn. Code Ann. § 5-14-202(4). That law, therefore, does not apply in Warren County, since the applicable private act meets the requirements for the exemption.

1. Preparing Bid Specifications

The first question is which agency — the purchasing commission or the county department that submitted the request — is responsible for establishing bid specifications for a contract. The answer to this question may depend on the particular county department and any private or general law specifically applying to that department. The private act states that a department will “requisition” for supplies to the purchasing commission. The commission must then procure “the supplies and materials listed” either through the chairman or, if the amount of the purchase is five thousand dollars or more, by a sealed bidding process in which all members of the purchasing commission participate. The private act puts the purchasing commission in charge of the bidding process, including advertising the bids. Presumably, the bid specifications would appear in the advertisement for bids. The purchasing commission would therefore be responsible for preparing the bid specifications. On the other hand, the private act authorizes the purchasing commission to procure the materials and supplies “listed” on the requisition request from the county department. Therefore, the private act anticipates that the department and the purchasing commission will cooperate to ensure that bid specifications in the advertisement for the bid will elicit bids for materials and supplies that conform to the department’s request.

2. Determining Whether a Bid Meets Bid Specifications

The next question is which agency — the requesting department or the purchasing commission — is responsible for determining whether a bid meets bid specifications. The private act authorizes the purchasing commission to advertise competitive bids, open them and award the contract to the lowest and best bidder. Under the private act, therefore, the purchasing commission is responsible for determining that the bids meet the bid specifications. Presumably, the commission would consult with the department requesting the materials or supplies to ensure that the winning bid is for materials and supplies “listed” on the requisition from the county department.

3. Failure to Meet Bid Specifications

The next question asks if the bid does not meet the specifications and the purchasing commission nevertheless accepts the bid, which agency is accountable if the product, service or project is unacceptable. As discussed above, the purchasing commission is given responsibility for advertising and accepting bids, and it must procure the goods “listed” on the department’s requisition. By accepting a bid, the purchasing commission has necessarily concluded that the bid meets the applicable specifications. This conclusion is binding on the requisitioning department. Depending on the facts and circumstances, a third party might have an action against the county, but the basis for such action, as well as the appropriate remedy, could only be definitively resolved by a court of law.

4. and 5. Contracts for County Road Projects

Questions 4 and 5 appear to concern a difference of opinion between the county road superintendent and the county purchasing commission concerning a particular county road project. Question 4 is whether bid specifications must meet state standards for public roads even if this compliance is not legally required but the road superintendent wants the road to be built in accordance with the standards. Question 5 is which agency is responsible for permitting a bid for a road project with specifications that do not comply with general law specifications for public roads to be awarded.

The office of Warren County Superintendent of Roads is created under 1959 Tenn. Priv. Acts Ch. 61, as amended. The Warren County Road Superintendent is elected by the county voters. 1959 Tenn. Priv. Acts Ch. 61, § 2. The county road superintendent is charged with general supervision over the construction, repair and maintenance of all roads, bridges, gravel pits and other like structures which form a part of the county highway system. 1959 Tenn. Priv. Acts Ch. 61, § 3(a). Section 4 of the same act, as amended, provides:

Purchases of all equipment, rock, machinery, and other supplies of every description, including contracts of every kind, shall be made by and through the Purchasing Commission of Warren County under the terms provided in the Purchasing Commission Act of 1951; provided,

however, that the Superintendent shall have the authority to make purchases aggregating less than one thousand dollars (\$1000) for items which may be required for the efficient operation of the department, an itemized statement of which shall be filed with the County Auditor each month showing the amount of expenditure and the items purchased and the price thereof.

The private act must be read in conjunction with the Tennessee County Uniform Highway Law, Tenn. Code Ann. §§ 54-7-101, *et seq.* That statute applies to all counties except those counties having populations of not less than two hundred thousand according to the United States census of 1970 or any subsequent federal census. Tenn. Code Ann. § 54-7-102. The chief administrative officer — defined to include a county road superintendent — is the head of the county highway department and has general control over location, relocation, construction, reconstruction, repair and maintenance of the county road systems of the county. Tenn. Code Ann. § 54-7-109(a). Tenn. Code Ann. § 54-7-113 governs receipt and disbursement of county highway funds as well as county highway purchases. Subdivision (c)(1) of this statute provides that purchases by or for a county road department or by a chief administrative officer must be by public advertisement and competitive bid, with four exceptions. Subdivision (c)(3) provides in relevant part:

This subsection does not have the effect of repealing existing statutes, including private acts, which establish purchasing provisions for a county road department; but no county road department shall be required to publicly advertise and competitively bid purchases of five thousand dollars (\$5,000) or less even if such bids are now required by public or private act.

As quoted above, the private acts establishing the Warren County Purchasing Commission do not require purchases of \$5,000 or less to be awarded by competitive bid. This provision of the Uniform County Highway Law, therefore, does not change the private act purchasing requirements for highway purchases in Warren County.

As discussed above, under the applicable private act, the county purchasing commission is responsible for preparing bid specifications and awarding contracts, and with obtaining materials requisitioned by the county department that requests them. Presumably, the commission and the department will consult with each other to ensure that the bid procures materials that meet the department's needs, whether those are required by law or by the requesting department. But by accepting a bid, the purchasing commission has necessarily concluded that the bid meets the applicable specifications. This conclusion is binding on the requisitioning department, including a road superintendent. Depending on the facts and circumstances, a third party might have an action

against the county, but the basis for such action, as well as the appropriate remedy, could only be definitively resolved by a court of law.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Charles Curtiss
State Representative
34 Legislative Plaza
Nashville, TN 37243-0143