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Opinion No. 08-178

Tenn. Code Ann. § 12-3-219 – Reverse Auctions

QUESTIONS

1. Can cities and/or counties use Tenn. Code Ann. § 12-3-219 as authority to utilize reverse auctions as a purchasing tool?

2. If the answer to the previous question is in the negative, what changes need to be made to the Tennessee Code to allow cities and counties to use reverse auctions?

OPINIONS

1. No. Tenn. Code Ann. § 12-3-219 authorizes only the Tennessee Department of General Services to utilize reverse auctions as a purchasing tool.

2. Assuming the applicable laws governing a specific local government do not prohibit reverse auctions as a purchasing method, reverse auctions appear to comply with the fairness and competitiveness required by the general principles of Tennessee local government purchasing law. In such instances no legislation would be required to permit cities and counties to use reverse auctions. Because of the wide variety of reasons that might prohibit reverse auctions in specific instances, we are unable to state with specificity those legislative changes that may be needed.

ANALYSIS

1. Tenn. Code Ann. § 12-3-219 states as follows:

> (a) For a purchase of goods and services under this chapter, **the Department of General Services may purchase goods and services through a competitive reverse auction process** that allows offerors to bid on specified goods or services electronically and adjust bid pricing during a specified time period. An award shall be made to the offeror determined to be the lowest responsible and responsive bidder at the close of the specified bid period.
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> (b) Policies and procedures concerning this procurement methodology, including the criteria, and the evaluation process **shall be developed by the Department of**

General Services and approved by the board of standards.

(c) This section shall not apply to:

(1) Construction services; or

(2) Architectural or engineering services.

(Emphasis added).

As indicated by the emphasized portions of Tenn. Code Ann. § 12-3-219 above, this statute's provisions apply solely to purchasing conducted by the Tennessee Department of General Services. No local governmental entities are mentioned in the statute. Consequently, the plain language of Tenn. Code Ann. § 12-3-219 indicates that it applies only to purchasing conducted by the Department of General Services.

> Courts are to look to the plain language of a statute and give effect to the ordinary meaning of the words. (citations omitted). We presume that the legislature purposefully chose each word used in a statute and that each word conveys a specific purpose and meaning. (citations omitted). Further, we must 'ascertain and carry out the legislature's intent without unduly restricting or expanding a statute's coverage beyond its intended scope.' (citations omitted). Only if the plain language of a statute is ambiguous must we look beyond the statutory language to determine the legislature's intent. (citation omitted).

State v. Denton, 149 S.W.3d 1, 17 (Tenn. 2004). These canons of statutory construction dictate the conclusion that Tenn. Code Ann. § 12-3-219 does not authorize city or county governments to conduct reverse auctions.

2. The fact that Tenn. Code Ann. § 12-3-219 does not authorize local governments to conduct reverse auctions does not necessarily mean that local governments cannot conduct reverse auctions. In fact, in many instances it appears that city and local governments may conduct purchasing through reverse auctions.

There are a number of statutory schemes governing purchasing by city and county governments. As a general rule, most county purchasing is probably governed by Tenn. Code Ann. § 5-14-201, *et seq*. (The County Purchasing Law of 1983). Counties, however, may also adopt other purchasing laws, such as the County Purchasing Law of 1957 (Tenn. Code Ann. § 5-14-101, *et seq*.) or the County Financial Management System of 1981 (Tenn. Code Ann. § 5-21-101, *et seq*.).[1]

[1]In addition to the statutory schemes mentioned above, some counties operate under private acts applicable to one county only, and other counties operate under metropolitan or charter forms of government. Purchasing for these counties must be guided by the applicable Private Act or charter provisions, as the case may be. Finally, some entities within counties, such as county school boards or county highway departments, may conduct purchasing under

Similarly, while most municipal purchasing is probably governed by Tenn. Code Ann. § 6-56-301, *et seq*. (The Municipal Purchasing Law of 1983), there are numerous other statutes under which municipalities may operate and conduct purchasing.[2] While an exhaustive review of the variety of purchasing laws and procedures is beyond the scope of this opinion, as a general rule, competitive bidding is a primary requirement of most public purchasing laws.[3]

If we look, for example, to the provisions of the County Purchasing Law of 1983, cited above, Tenn. Code Ann. § 5-14-204 provides that "**all** purchases and leases or lease-purchase agreements **shall** be made or entered into **only after public advertisement and competitive bid**, except as follows: . . .." (emphasis added), after which the specific exceptions to the competitive bidding rule are described. A very similar provision, Tenn. Code Ann. § 6-56-304, is part of the Municipal Purchasing Law of 1983, cited above: "[e]xcept as hereinafter provided, **all** purchases and leases or lease-purchase agreements **shall** be made or entered into **only after public advertisement and competitive bid**, except as follows: . . .."

While these statutes require competitive bidding, the statutory schemes of which they are a part do not set forth with specificity the exclusive methods by which competitive bids must be obtained. Rather, the emphasis is on employing a bidding process that is open, fair, and competitive.

The Tennessee Supreme Court, when faced with the task of defining the essentials of competitive bidding, where a private act requiring a county to employ competitive bidding failed to specify those elements, cited with approval a number of authorities, including the following:

> "The request for bids must not unduly restrict competition. All persons or corporations having the ability to furnish the supplies or materials needed, or to perform the work to be done, should be allowed to compete freely without any unreasonable restrictions." 10 McQuillin, Municipal Corporations s 29.44, pg. 294.
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> "In order to attain competitive bidding in its true sense, proposals for bids must be invited under fair circumstances which afford a fair and reasonable opportunity for competition. Consequently, it is essential that the bidders, so far as possible,

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separate statutory schemes. *See, e.g.*, The County Uniform Highway Law, Tenn. Code Ann. § 54-7-113, and Tenn. Code Ann. § 49-2-203(a).

[2]For example, the City Manager-Commission form of government (Tenn. Code Ann. § 6-18-101, *et seq*.) and the Modified City Manager-Council form of government (Tenn. Code Ann. § 6-30-101, *et seq*.) each has its own purchasing procedures. In addition, other municipalities may operate under charters authorized and created by private act, or under home rule charters (*see* Article XI, Section 9, of the Tennessee Constitution), in which case purchasing is governed by the applicable provisions in each municipal charter, where those charters include purchasing provisions.

[3]*See also* Tenn. Code Ann. § 12-3-1007, regarding competitive bidding requirements in municipalities, counties and metropolitan governments with populations exceeding 150,000.

> be put on terms of perfect equality, so that they, may bid on substantially the same proposition, and on the same terms." 10 McQuillin, Municipal Corporations s 29.52, pg. 312.
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> 'Competitive bidding' requires due advertisement, giving opportunity to bid and contemplates a bidding on the same undertaking upon each of the same material items covered by the contract; upon the same thing. It requires that all bidders be placed upon the same plane of equality and that they each bid upon the same terms and conditions involved in all the items and parts of the contract, and that the proposal specify as to all bids the same, or substantially similar specifications.[4]

As a general rule, therefore, Tennessee local government purchasing must employ competitive bidding, but Tennessee law does not restrict the method by which competitive bidding is achieved. Turning once again to reverse auctions under Tenn. Code Ann. § 12-3-219, this statute describes, in general terms, what is meant by a "reverse auction:"

> . . . a competitive reverse auction process . . . allows offerors to bid on specified goods or services electronically and adjust bid pricing during a specified time period. An award shall be made to the offeror determined to be the lowest responsible and responsive bidder at the close of the specified bid period.

As described, reverse auctions appear to comply with general principles of competitiveness, fairness, and equality among bidders. It therefore appears that, as a general rule, many local governments operating under the laws governing municipal or county purchasing are currently permitted to employ reverse auction procedures without a specific enactment by the General Assembly to that effect.[5]

It is important to note, however, that because of the myriad of applicable laws, charter provisions, and private acts governing local government purchasing in Tennessee, each county and/or municipality must examine its own applicable purchasing provisions to determine whether reverse auctions comply with those purchasing requirements. It is thus the opinion of this Office that, assuming the applicable laws governing a specific local government do not prohibit reverse auctions as a purchasing method, reverse auctions appear to comply with the fairness and competitiveness required by the general principles of Tennessee local government law.[6]

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[4] *State ex rel. Leech v. Wright*, 622 S.W.2d 807, 815 (Tenn. 1981).

[5] Depending upon the statutory scheme under which a local government operates, use of reverse auctions may require enactment of a local ordinance or similar local legislative action.

[6] We further note the requirements of Tenn. Code Ann. § 12-3-704: "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

With regard to those local governments that may be prohibited from employing reverse auctions, because of the wide variety of reasons that might prohibit reverse auctions in specific instances, we are unable to state with specificity those legislative changes that may be needed.[7]

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not require such small businesses and minority owned businesses to receive or respond to invitations to bid, requests for proposals, or other solicitations electronically." Consequently, local governments that employ reverse auctions as a purchasing tool must be mindful of the requirements of this statute in doing so. *See also* Op. Tenn. Att'y Gen. 00-090 (May 9, 2000).

[7]For example, where the provisions of a private act charter prohibit, or are inconsistent with, reverse auctions, legislative amendment of the applicable private act would be necessary. On the other hand, in the case of a home rule charter whose provisions prohibited, or were inconsistent with, reverse auctions, amendment of the charter would not require action by the General Assembly.

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