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Opinion No. 09-181

Procurement Process Required For Municipal Boards of Education

QUESTIONS

1. May a municipal board of education, in its procurement activities, legally utilize the same procurement process and procedures promulgated by and used by the State Building Commission?

2. If a municipal board of education may lawfully use the procurement process of the State Building Commission for a school construction project, may the school board create its own "hybrid" version of the process or must the school board follow the State Building Commission's process with no variations?

3. If a municipal board of education may not use the State Building Commission's procurement process, then what process must the school board adhere to?

OPINION

Tennessee law permits local boards of education considerable latitude regarding the procurement process employed for their construction projects.[1] Accordingly, local school boards may adopt any procurement process that employs advertisement and competitive bidding as required by Tenn. Code Ann. § 49-2-203.

ANALYSIS

Local school boards in Tennessee may adopt any construction procurement process that satisfies the minimal requirements established in Tenn. Code Ann. § 49-2-203. Tenn. Code Ann. § 49-2-203(a)(3)(C)(i) states as follows:

[1] Due to the wording of your questions, this opinion employs the term "procurement" as it refers to the securing of construction services in connection with construction projects and capital improvements, and not the more general sense of "procurement" that includes the purchase of school supplies, equipment, and other services in connection with the day-to-day operation of schools.

> (a) It is the duty of the local board of education to:
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> . . .
>
> (3) Purchase all supplies, furniture, fixtures and material of every kind through the executive committee;
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> . . .
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> (C)(i) For construction of school buildings or additions to existing buildings, the LEA may follow prescribed procedures of its respective local governing body, **so long as that body, through its charter, private act, or ordinance, has established a procurement procedure that provides for advertisement and competitive bidding**. **If the LEA chooses not to follow the local governing body's procedure, the board shall contract, following open bids, for the construction of school buildings or additions to existing buildings, the expenditure for which is in excess of ten thousand dollars ($10,000). Public notice shall be given at least ten (10) days in advance of accepting bids for such construction, and the board shall award the contract to the lowest and best bidder**. Whether following local governing body procedures or those set forth in this subdivision (a)(3)(C)(i), in the event no bid is within the budgetary limits set by the board for such construction, the board may negotiate with the lowest and best bidder to bring the cost of the construction within the funds available, with the approval of the commissioner of education; [2]
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> . . ..

(Emphasis added).

As the emphasized language above makes clear, a local education agency (LEA) has the option of adopting any procurement procedure, provided the method includes (1) open competitive bidding with public advertisement at least ten (10) days in advance of acceptance of bids, and (2) awarding of bids to the "lowest and best bidder." Consequently LEAs may employ the procurement process followed by the State Building Commission,[3] they may adopt procedures followed by local governments under one of the state local government purchasing laws,[4] or they may employ their own procedures, as long as those procedures meet the

[2] The provisions of Tenn. Code Ann. § 49-2-203(a)(C)(3) apply to county and municipal boards of education. Tenn. Code Ann. § 49-2-203(a)(3)(E).

[3] *See* Tenn. Code Ann. § 4-15-102.

[4] *See, e.g*., Tenn. Code Ann. § 5-14-201, *et seq*., (The County Purchasing Law of 1983), Tenn. Code Ann. § 5-14-101, *et seq*., (The County Purchasing Law of 1957), and Tenn. Code Ann. § 5-21-101, *et seq*., (The County Financial Management System of 1981). In addition, the City Manager-Commission form of government (Tenn.

requirements of Tenn. Code Ann. § 49-2-203(a)(3)(C)(i).[5]

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Code Ann. § 6-18-101, et seq.) and the Modified City Manager-Council form of government (Tenn. Code Ann. § 6-30-101) each has its own purchasing procedures. Other municipalities may operate under charters authorized and created by private act, or under home rule charters under which purchasing is governed by the applicable provisions in each municipal charter, where those charters include purchasing provisions.

[5] *See also* Op. Tenn. Att'y Gen. No. 99-094 (April 21, 1999)(copy attached), addressing local school boards' authority to contract with a Public Building Authority to design and construct a school building without employing competitive bidding.