S T A T E O F T E N N E S S E E
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Opinion No. 13-04

Construction or Renovation of Public School Buildings

QUESTIONS

1. Does Tenn. Code Ann. § 12-4-115 apply to contracts procured by a local education agency for the construction or renovation of public school buildings?

2. Does the answer to the first question depend on the specific procurement process employed by a local education agency for its construction projects?

OPINIONS

1. No.

2. No.

ANALYSIS

1. Pursuant to Tenn. Code Ann. § 49-2-203(a)(3)(C)(i), one of the duties and powers of a local education agency ("LEA") is the "construction of school buildings or additions to existing buildings." Tenn. Code Ann. § 49-2-203(a)(3)(C) also specifically delineates the procedures to be utilized by an LEA regarding the procurement of contracts for the "construction of school buildings or additions to existing buildings." Tenn. Code Ann. § 49-2-203(a)(3) states in relevant part:

> (a) It is the duty of the local board of education to:
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> . . . .
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> (3) Purchase all supplies, furniture, fixtures and material of every kind hrough the executive committee;
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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 the 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 the 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;

(ii) Construction management services that are provided for a fee and that involve preconstruction and construction administration and management services are deemed to be professional services and may be performed by a qualified person licensed under title 62, chapter 6. Construction management services are to be procured for each project through a written request for proposals process through advertisement made pursuant to subdivision (a)(3)(A). A board may include, in a single written request for proposal process, new school construction or renovation projects at up to three (3) sites, if construction at all sites will occur at substantially the same time. The written request for proposals process will invite prospective proposers to participate and will indicate the service requirements and the factors used for evaluating the proposals. The factors shall include the construction manager's qualifications and experience on similar projects, qualifications of personnel to be assigned to the project, fees and costs or any additional factors deemed relevant by the procuring entity for procurement of the service. Cost is not to be the sole criterion for evaluation. The contract for such services shall be awarded to the best qualified and responsive proposer. A construction manager is prohibited from undertaking actual construction work on a project over which the construction manager coordinates or oversees the planning, bid or construction phases of the project, except in instances where bids have been solicited twice and no bids have been submitted. If the construction manager can document that a good faith effort was made in each bid solicitation to obtain bids and no bids were received, then the construction manager may perform the construction work at a price agreed upon by the construction manager, the architect and the owner of the project. A school system, at its own discretion, may perform work on the project with its own employees, and may include the coordination and oversight of this work as part of the services of the construction manager. Sealed bids for actual construction work shall be opened at the bid opening and the names of the contractors and their bid amounts shall be announced;

(iii) Construction management agent or advisor services for the construction of school buildings or additions to existing buildings in accordance with subdivision (a)(3)(C)(ii) may be performed by:

(***a***) A general contractor licensed in Tennessee pursuant to title 62, chapter 6; provided, that none of such services performed by a general contractor involve any of the services exempt from the requirements of title 62, chapter 6 as "normal architectural and engineering services" under § 62-6-102(4)(B) or (C), unless, with regard to the performance of any services defined as normal architectural and engineering services, the general contractor is also licensed as an architect or engineer under title 62, chapter 2; or

(***b***) An architect or an engineer licensed pursuant to title 62, chapter 2; provided, that none of such services performed by an architect or engineer involve any of the services required to be performed by a contractor within the definition of "contractor" under § 62-6-102, unless with regard to the performance of any services included within the definition of contractor, the architect or engineer is also licensed as a contractor under title 62, chapter 6.

(iv) Construction work that is under the coordination and oversight of a construction manager shall be procured through competitive bids as provided in this subsection (a);

(D) No board of education shall be precluded from purchasing materials and employing labor for the construction of school buildings or additions to school buildings;

(E) Subdivisions (a)(3)(A), (B) and (D) apply to local boards of education of all counties, municipalities and special school districts; provided, however, that subdivisions (a)(3)(A) and (B) shall not apply to purchases by or for a county's or metropolitan government's board of education in counties with a population of not less than two hundred thousand (200,000), according to any federal census, so long as the county, through county or metropolitan government charter, private act, or ordinance, establishes a procedure regarding purchasing that provides for advertisement and competitive bidding and sets a dollar amount for each purchase requiring advertisement and competitive bidding; and provided, further, that purchases of less than the dollar amount requiring advertisement and competitive bidding shall, wherever possible, be based upon at least three (3) competitive bids. Subdivision (a)(3)(C) applies to county and municipal boards of education . . .

Title 12, Chapter 4 of the Tennessee Code concerns public contracts. Tenn. Code Ann. § 12-4-115 states as follows:

Contracts by counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of this state for energy-related services that include both engineering services and equipment, and have as

> their purpose the reduction of energy costs in public facilities, shall be awarded on the same basis as contracts for professional services.

The question posed is whether the provisions of Tenn. Code Ann. § 12-4-115 apply to LEAs that contract for the construction or renovation of public school buildings pursuant to Tenn. Code Ann. § 49-2-203. The more persuasive interpretation of the interrelationship between these statutes is that Tenn. Code Ann. § 12-4-115 is not applicable to the LEAs' procurement process for obtaining a contract to construct or renovate a public school.

Initally, some uncertainty exists whether an LEA is an entity covered by Tenn. Code Ann. § 12-4-115, which by its terms applies only to "counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations." To come within the ambit of Tenn. Code Ann. § 12-4-115 an LEA would have to be a "municipal" or "public corporation." This Office has previously observed that whether a school district can be treated the same as a municipal or public corporation "seems to depend on the context." Tenn. Att'y Gen. Op. 90-51, at 3 (Apr. 11, 1990). This opinion noted that the following Tennessee cases had reached different conclusions on this point depending on the circumstances presented:

> *Compare Breeding v. Williams*, 9 Tenn. App. 335, 339 (1929) (school district is a public institution in the nature of a municipal or a quasi-municipal corporation and implied if not expressly has the right to take and hold property for the specific purpose for which it was created) ***with Perritt v. Carter***, 204 Tenn. 611, 325 S.W.2d 233, 234 (1959) (a special school district does not come within the definition of a municipality as contemplated in the Home Rule Amendment, §9, Art. 11 of the Constitution of the State of Tennessee) ***and Kee v. Parks***, 153 Tenn. 306, 309, 283 S.W. 751 (1926) (school district is not a municipal corporation in the sense that it can be authorized to impose taxes) (citing ***Quinn v. Hester,*** 135 Tenn. 373, 380, 186 ***S.W.*** 459 (1916***)).***

Id. See also 16B *McQuillin Mun. Corp.* § 46:20 (3d ed.) (stating that "[b]oards of education and school districts are sometime described as municipal corporations, sometimes as public corporations, particularly where disconnected with the government of the municipal corporation, sometimes as bodies corporate or bodies politic, sometimes as quasi-municipal corporations, and sometimes in even different terms") (footnotes omitted).

Even if an LEA is considered a municipal or public corporation for purposes of Tenn. Code Ann. § 12-4-115, a court would likely conclude that the more specific provisions of Tenn. Code Ann. § 49-2-203 governing the LEA's procurement process for securing contracts to construct and renovate public schools would supersede the more general provisions of Tenn. Code Ann. § 12-4-115 that address how certain defined public entities procure contracts for "energy-related services" that will reduce "energy costs in public facilities." *See Keough v. State*, 356 S.W.3d 366, 371 (Tenn. 2011) (stating the general rule of statutory construction that a special statute will prevail over a general provision in another statute). Thus, to the extent a contract to construct or renovate a public school might include services to reduce energy costs, its procurement by an LEA would be governed by the specific process set forth in Tenn. Code Ann. § 49-2-203.

2. For these same reasons, the answer to the second question is that Tenn. Code Ann. § 49-2-203 and not Tenn. Code Ann. § 12-4-115 controls how an LEA shall procure contracts to construct or renovate a public school.

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