

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

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Opinion No. 13-65

Requirement for Local Governments to Seek Competitive Bids for Liability Insurance

QUESTION

Do the provisions of Tenn. Code Ann. §§ 29-20-407 or 12-3-1209(a)(1) allow a local governmental entity to purchase liability insurance from a private corporation without requiring competitive bids?

OPINION

Under these statutes a local governmental entity in Tennessee may only purchase liability insurance without the necessity of any legally required public bidding if the liability insurance is purchased through a plan authorized and approved by any organization of governmental entities representing cities and counties.

ANALYSIS

Governmental entities are specifically authorized to purchase liability insurance by Tenn. Code Ann. § 29-20-403(a). Tenn. Code Ann. § 29-20-407 authorizes the purchase of such liability insurance by governmental entities without public bidding under certain circumstances, stating:

Any governmental entity may purchase any of the insurance authorized by this chapter, without the necessity of public bidding, as required by any public or private act or charter restriction, if such insurance is purchased through a plan authorized and approved by any organization of governmental entities representing cities and counties.

Accordingly, notwithstanding any requirements for competitive bidding contained in a governmental entity's governing statute or in the entity's charter or local regulations, a governmental entity may purchase liability insurance through a plan authorized by any organization of governmental entities representing cities and counties without public bidding. However, unless the liability insurance offered by a private corporation is purchased through a plan authorized by the type of organization described in Tenn. Code Ann. § 29-20-407, then the governmental entity must abide by any legal requirement that contracts for liability insurance be publicly bid. *See, e.g., Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 714 (Tenn. 2012) (*quoting State v. Strobe*, 232 S.W.3d 1, 9 (Tenn. 2007)) (recognizing that a court is required to "ascertain

and give effect to the legislative intent [of a statute] without unduly . . . expanding a statute’s coverage beyond its intended scope”).

Nor do the provisions of Tenn. Code Ann. § 12-3-1209(a)(1) relieve a local governmental entity from any legal requirement to publicly bid the purchase of liability insurance. This statute, enacted by Chapter 403 of the 2013 Tennessee Public Acts and effective as of July 1, 2013, states:

Contracts by counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of the state, for legal services, fiscal agent, financial advisor or advisory services, educational consultant services, and similar services by professional persons or groups of high ethical standards, shall not be based upon competitive solicitations, but shall be awarded on the basis of recognized competence and integrity. The prohibition against competitive soliciting in this section shall not prohibit any entity enumerated from interviewing eligible persons or entities to determine the capabilities of such persons or entities.

Tenn. Code Ann. § 12-3-1209(a)(1); 2013 Tenn. Pub. Acts ch. 403, § 70.¹

This statute exempts governmental entities from the requirement to hire certain types of professionals on the basis of competitive bidding, specifically listing legal services, fiscal agent, financial advisors and educational consultants but also including similar services offered by professionals of “high ethical standards.” *Id.*

Liability insurance does not fit within this classification of services exempted from any controlling competitive bidding requirements. Liability insurance is not a service. Rather it is an insurance product offered by a private insurance company for purchase by potential customers like Tennessee local governmental entities. *See Couch on Insurance*, 3rd ed., § 1.6 *Insurance defined* (Dec. 2012) (stating that insurance is essentially “a contract by which one party (the insurer), for a consideration that usually is paid in money, either in a lump sum or at different times during the continuance of the risk, promises to make a certain payment, usually of money, upon the destruction or injury of “something” in which the other party (the insured) has an interest”) (footnotes omitted). *See also* Tenn. Code Ann. § 56-7-101(a) (defining “contract of insurance”); Tenn. Att’y Gen. Op. 10-85 (July 6, 2010) (discussing what constitutes a “contract for insurance”). The exception to competitive bidding found in Tenn. Code Ann. § 12-3-1209(a)(1) is limited to professional services and makes no mention of the purchase of any product such as insurance. Although part of the purchase of insurance may include the advice of the selling agent as to which type or range of insurance would best suit the purchasing governmental entity, that advice is not what the governmental entity ultimately buys. That advice is only part of the sales process that the insurance agent hopes will end with the purchase of one of his or her offered insurance policies. As such, the fact that the purchase of liability

¹ Prior to the effective date of Tenn. Code Ann. § 12-3-1209(a)(1), language identical in substance to this statute was found at Tenn. Code Ann. § 12-4-106(a) (2011).

insurance may include any such advice does not cause that transaction to be the purchase of “professional services” as contemplated by Tenn. Code Ann. § 12-3-1209(a)(1).

In sum, the purchase of liability insurance by a Tennessee governmental entity is not exempted from any applicable competitive bidding requirement by the exemption from competitive bidding for professional services found in Tenn. Code Ann. § 12-3-1209(a)(1). Further, Tenn. Code Ann. § 29-20-407 only exempts such a purchase from public bidding if the liability insurance is purchased “through a plan authorized and approved by any organization of governmental entities representing cities and counties.” Thus, unless liability insurance for local Tennessee governments offered by a private corporation is purchased through such a plan, its purchase is not exempted from any applicable competitive bidding requirements.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

C. SCOTT JACKSON
Deputy Attorney General

Requested by:

The Honorable Jim Tracy
State Senator
2 Legislative Plaza
Nashville, TN 37243