STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

November 2, 2017

Opinion No. 17-49

Construction Management-at-Risk Services – Local Correctional Facility Projects

Question

Does Tenn. Code Ann. § 12-4-107 permit the State, counties, cities, towns, or metropolitan governments to solicit or receive proposals or to enter into contracts for "Construction Management-at-Risk Services" for the construction of local correctional facility projects or additions to existing correctional facility buildings?

Opinion

No. Since the "Construction Management-at-Risk Services" contracts in question contemplate that the construction manager may itself perform at least some of the construction work, such contracts would not be permitted under Tenn. Code Ann. § 12-4-107(b) for local correctional facility construction projects.

ANALYSIS

The request for this opinion specifies that the term "Construction Management-at-Risk Services" in the question refers to contractual arrangements under which trade contractors are subcontractors to the construction manager, the construction manager is not obligated to bid or award the subcontracts publicly, and the construction manager may itself perform some or all of the actual construction work.

Tennessee Code Annotated § 12-4-107(b) sets requirements specific to contracts for the "[c]onstruction of correctional facility projects of the state, a county, city, metropolitan government or town." The statute authorizes these governmental entities to "contract for construction management agent or advisor services" in connection with the construction of local correctional facility projects or additions to existing correctional facility buildings. Tenn. Code Ann. § 12-4-107(b)(1).

The statute does not define "construction management agent services" or "construction management advisor services," nor does it define "construction manager." However, it does expressly prohibit a "construction manager . . . 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," with one very limited exception under special circumstances.[1]

[1] The exception applies only when bids have been solicited twice and no bids have been submitted. In that instance, if the construction manager can demonstrate a good faith effort was made in each bid solicitation to obtain bids, the

Tenn. Code Ann. § 12-4-107(b)(1). Moreover, the statute provides that construction work performed under the coordination and oversight of such a construction manager "shall be procured through competitive bids." Tenn. Code Ann. § 12-4-107(b)(3). Sealed bids for the actual construction work must be opened and the names of the contractors and their bid amounts must be openly announced. Tenn. Code Ann. § 12-4-107(b)(1).

Thus, the construction management agent or advisor services for which one of the specified governmental entities may contract do not include—with the one very limited exception—any actual construction work on a project. Rather, the construction management services are limited to coordinating and overseeing the planning, bid, and construction phases of the project. There is also a requirement for a bidding process, with the results made public.

The statute does not address "Construction Management-at-Risk Services" within the context of local correctional facility projects. But the requestor has used that term to mean services that include actual construction work performed by the construction manager itself and to include arrangements that do not necessarily require the open announcement of bidders and bidding amounts for the actual construction work.

Accordingly, a contract for the "Construction Management-at-Risk Services" in question here would not be permitted within the scope of Tenn. Code Ann. § 12-4-107(b). Section 12-4-107(b) only permits the State, counties, cities, towns, and metropolitan governments to enter into contracts for construction management agent or advisor services if—with one exception—the construction manager does not itself perform any of the actual construction work. Since the "Construction Management-at-Risk Services" contracts in question contemplate that the construction manager may itself perform at least some of the construction work, such contracts would not be permitted under Tenn. Code Ann. § 12-4-107(b) for local correctional facility construction projects.

If another statute could be read generally to permit a public entity to contract with an at-risk construction manager for projects, a court would likely conclude that Tenn. Code Ann. § 12-4-107(b) nevertheless governs because it is tailored narrowly and especially to correctional facility construction projects. *See Keough v. State,* 356 S.W.3d 366, 371 (Tenn. 2011) (the general rule of statutory construction is that a special statute will prevail over a general provision in another statute).

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construction manager may provide that portion of the actual construction services for a price agreed upon by the construction manager, owner, and architect. Tenn. Code Ann. § 12-4-107(b)(1).

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