STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 25, 2022

Opinion No. 22-10

Requirement that Local Governmental Entities Seek Competitive Bids for the Purchase of Insurance Following Passage of Chapter 719 of the 2022 Tennessee Public Acts

Question 1

If a local governmental entity is using the professional services of an insurance producer under 2022 Tennessee Public Acts, chapter 719, may it purchase insurance from a private corporation without requiring competitive bids?

Opinion 1

No. Tennessee Code Annotated § 12-3-1209(a), as amended by 2022 Tennessee Public Acts, chapter 719, does not relieve a local governmental entity from complying with competitive-bidding requirements when it purchases insurance.

Question 2

If not, to what extent may an insurance producer assist a local governmental entity in obtaining insurance?

Opinion 2

While Tenn. Code Ann. § 12-3-1209(a), as amended by 2022 Tennessee Public Acts, chapter 719, does not relieve a local governmental entity from complying with competitive-bidding requirements when it purchases insurance products, by adding "*services* from an insurance producer" to the other professional services that were already expressly exempt from competitive bidding under Tenn. Code Ann. § 12-3-1209(a), Public Chapter 719 does relieve a governmental entity from competitive-bidding requirements when it is procuring the *services* of an insurance producer. To the extent that an insurance producer is providing services in assisting a local governmental entity, competitive bids for those services are not required. Services rendered by an insurance producer to a local governmental entity could include, for instance, designing a comprehensive insurance program for the entire entity, identifying risks, recommending ways of reducing risks, and performing analyses to minimize costs while maximizing protection.

ANALYSIS

Local governmental contracts must generally be let by competitive bidding, but there are exceptions.[1] One such exception is Tenn. Code Ann. § 12-3-1209(a), which requires local governmental entities to award contracts for certain types of professional services on the basis of recognized competence and integrity rather than by competitive bidding. Specifically, Tenn. Code Ann. § 12-3-1209(a), as recently amended by Chapter 719 of the 2022 Tennessee Public Acts, requires local governmental entities to award contracts for "legal services, fiscal agent, financial advisor or advisory services, *services from an insurance producer, as that term is defined in § 56-6-102*, educational consultant services, and similar services by professional persons or groups of high ethical standards" on the basis of recognized competence and integrity rather than by competitive bidding. The 2022 amendment added the italicized language—"services from an insurance producer"—to the list of professional-service contracts specified in § 12-3-1209(a) that must be awarded on the basis of recognized competence and integrity rather than by competitive bidding. An "insurance producer" is "a person required to be licensed under the laws of this state to sell, solicit or negotiate insurance." Tenn. Code Ann. § 56-6-102(7).

Thus, the passage of Public Chapter 719 in 2022 removed any doubt that the *services* of an insurance producer are covered under Tenn. Code Ann. § 12-3-1209(a). That is, by adding "*services* from an insurance producer" to the other professional services that were already expressly exempt from competitive bidding under Tenn. Code Ann. § 12-3-1209(a), Public Chapter 719 relieves a governmental entity from competitive bidding requirements when it is procuring the *services* of an insurance producer. The services rendered by an insurance producer to a local governmental entity could include, for instance, designing a comprehensive insurance program for the entire entity, identifying risks, recommending ways of reducing risks, and performing analyses to minimize costs while maximizing protection. *See Daul Ins. Agency, Inc. v. Parish of Jefferson*, 489 So.2d 364, 367 (La. App. 1986).

"[S]ervices from an insurance producer," however, do not include the purchase of the product of insurance. The product of insurance is a "good," not a "service," under Title 12, chapter 3. *See* Tenn. Code Ann. § 12-3-201(8)(A) ("'Goods' means all personal property, including, but not limited to supplies, equipment, materials, printing, and *insurance*.") (emphasis added). Only professional "services" are exempted from legal competitive bidding requirements under Tenn. Code Ann. § 12-3-1209(a). While a purchaser of an insurance product may be guided in the purchase by the advice of an insurance producer as to which type or range of insurance would best suit the governmental entity, that advice does not turn the transaction into the purchase of professional services within the scope of Tenn. Code Ann. § 12-3-1209(a). *See* Tenn. Att'y Gen. Op. 13-65 (Aug. 23, 2013) (making this observation and opining that *because liability insurance is a product, not a service,* the purchase of that product by a local governmental entity did not fit within § 12-3-1209(a), which exempts only "services" from otherwise controlling competitive bidding requirements).

Because insurance coverage is a product, not a service, it follows that the addition of insurance-producer *services* to § 12-3-1209(a) does not enable a local governmental entity to

[1] *See* Tenn. Code Ann. §§ 5-14-101 to -116; §§ 5-14-201 to -207; §§ 5-21-101 to -130; §§ 6-56-301 to -307; §§ 12-3-1201 to -1212.

purchase insurance from a private corporation without requiring competitive bids. Put another way, Tenn. Code Ann. § 12-3-1209(a) as amended by Public Chapter 719, does not allow a local governmental entity to obtain insurance without complying with legal competitive-bidding requirements just because it also got assistance from an insurance producer in the course of the purchase process. Other statutory provisions, though, may allow a local governmental entity to purchase specific lines of insurance without seeking competitive bids under certain conditions. For instance, Tenn. Code Ann. § 29-20-407 authorizes local governmental entities to purchase liability insurance without the necessity of public bidding "if such insurance is purchased through a plan authorized and approved by any organization of governmental entities representing cities and counties."

In sum, Tenn. Code Ann. § 12-3-1209(a), as amended by Public Chapter 719, does not relieve a local governmental entity from complying with competitive bidding-requirements when it purchases insurance, but it does relieve a local governmental entity from complying with competitive-bidding requirements when it is purchasing the professional services of an insurance producer—as distinct from the insurance product itself.

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