

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

January 31, 2008

Opinion No. 08-16

Local Government Contracts With “Pure” Construction Managers

QUESTIONS

1. May local governments contract with “pure” construction managers without competitive bidding pursuant to the provisions of Tenn. Code Ann. § 12-4-106?

2. If the answer to question no. 1 is in the affirmative, and Tenn. Code Ann. § 12-4-106 does apply to local government contracts for “pure” construction management services, may local governments contract with corporations that perform such services where the corporation is properly licensed under Tennessee’s contractor licensing statute?

3. Do the provisions of Tenn. Code Ann. § 5-7-107 authorize counties to contract with “pure” construction managers without competitive bidding and, if so, is additional authority necessary for a local government to apply the procedures governing the award of other personal services contracts specifically to personal services contracts with construction managers?

OPINIONS

1. No. Tenn. Code Ann. § 12-4-106(a)(1) does not prohibit local government contracts for “pure” construction managers from being awarded based on competitive bids.

2. Pursuant to Tenn. Code Ann. § 62-6-103(a)(1), any corporation engaged in contracting in Tennessee must be licensed as provided in the Contractors Licensing Act of 1994, Tenn. Code Ann. § 62-6-101, *et seq.*

3. No. Tenn. Code Ann. § 5-7-107 does not authorize counties to contract with “pure” construction managers without competitive bidding. Rather, that statute permits local governments to contract with construction managers to superintend construction projects.

ANALYSIS

1. Tenn. Code Ann. § 5-7-107 (2005) states as follows:

The county legislative body is authorized, but not required, to employ a

competent person to superintend the construction and repair of such county buildings, bridges, levees, etc., as may be necessary; the superintendent to be paid such salary as may be agreed upon, out of the county treasury, but no contract to continue longer than twelve (12) months.

Tenn. Code Ann. § 12-4-106 (1999) provides, in pertinent part, as follows:

(a)(1) 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 bids, but shall be awarded on the basis of recognized competence and integrity. The prohibition against competitive bidding in this section shall not prohibit any entity enumerated from interviewing eligible persons or groups to determine the capabilities of such persons or groups.

(2)(A) In the procurement of architectural and engineering services, the selection committee/procurement official may seek qualifications and experience data from any firm or firms licensed in Tennessee and interview such firm or firms. The selection committee/procurement official shall evaluate statements of qualifications and experience data regarding the procurement of architectural and engineering services, and shall conduct discussions with such firm or firms regarding the furnishing of required services and then shall select the firm deemed to be qualified to provide the services required.

(B) The selection committee/procurement official shall negotiate a contract with the qualified firm for architectural and engineering services at compensation which the selection committee/procurement official determines to be fair and reasonable to the government. In making such determination, the selection committee/procurement official shall take into account the estimated value of the services to be rendered, the scope of work, complexity and professional nature thereof.

(C) Should the selection committee/procurement official be unable to negotiate a satisfactory contract with the firm considered to be qualified, at a price determined to be fair and reasonable, negotiations will continue with other qualified firms until an agreement is reached.

(D) A city, county or utility district having a satisfactory existing working relationship for architectural or engineering services may expand the scope of the services; provided, that they are within the technical competency of the existing firm, without exercising the provisions of this section.

This Office has previously opined that Tenn. Code Ann. § 5-7-107 permits local governments to contract with construction managers to superintend construction projects. Op. Tenn.

Atty. Gen. 89-14 (February 7, 1989); Op. Tenn. Atty. Gen. 89-19 (February 13, 1989). This Office has also opined that Tenn. Code Ann. § 12-4-106 does not prohibit a county from awarding a contract based on competitive bidding to a construction management company even though that company's employees include engineers and architects because the company is not performing services "similar" to professional services of architects and engineers. Op. Tenn. Atty. Gen. 89-14. This Office has further opined that a contract with a construction management company must be awarded according to the authority under which the county normally awards personal service contracts or general building contractor contracts. Op. Tenn. Atty. Gen. 89-19. The duties that the construction management company will perform determine if the contract must be treated like a personal services or a general building contractor contract. Op. Tenn. Atty. Gen. 89-19.

Tenn. Code Ann. § 5-7-107 thus authorizes a county to hire a superintendent of county buildings and other structures, while Tenn. Code Ann. § 12-4-106 prescribes the manner by which counties may contract for professional services, such as "legal services, fiscal agent, financial advisor or advisory services, educational consultant services, and similar services by professional persons or groups of high ethical standards."

This opinion only addresses "pure" construction managers, rather than "construction managers at risk." A "pure" construction manager is a construction manager who acts primarily as the owner's agent in administering, managing, and overseeing a construction project, and who consults with the owner in all phases of construction, from planning and design, to construction and post-construction. In contrast, a "construction manager at risk" is a construction contractor who actually performs the construction project and who, as part of his duties, is also responsible for managing the project. See Op. Tenn. Atty. Gen. 89-19, *citing* CONSTRUCTION LITIGATION: REPRESENTING THE OWNER, §§ 1.7 and 1.8 (Cushman & Cushman 1984 ed.). As we explained in Opinion No. 89-19:

In contrast to the conventional approach to construction projects utilizing a general contractor, a project employing the pure construction contract management method of operation

generally calls for the owner to contract directly with each of the various trade contractors. It differs from the previously discussed method [multiple prime] in that the owner employs a construction manager to perform many of the functions, such as coordination and scheduling, traditionally performed by the general contractor.

In the pure construction management scheme, the construction manager is not in direct contractual privity with any of the trade contractors. (Emphasis supplied).

Id., *citing* CONSTRUCTION LITIGATION: REPRESENTING THE OWNER, §§ 1.7 and 1.8 (Cushman & Cushman 1984 ed.).

This Office previously answered the question regarding “[w]hether T.C.A. § 12-4-106 prohibits a county from awarding a contract based on competitive bidding to a construction management company if the company’s personnel who would actually be performing the work are engineers and architects.” Op. Tenn. Atty. Gen. 89-14. As this Office previously opined:

Although a construction management company's employees may be architects and engineers, that fact alone does not require the application of T.C.A. § 12-4-106. . .

The focus of § 106 is on the services that are to be performed by the architect and engineer employees of the construction management firm and whether these services are “similar” to the other services listed in § 106. The “services” § 106 addresses are ones provided by professionals in their field of exclusive expertise. The “services” performed by the professionals who are employed by the construction management company are to “manage” the building's construction. These services are not “similar” to the professional services of architects and engineers. Therefore, because the “services” the construction management company employee performs are not similar to the professional “services” performed by architects and engineers and are not otherwise “similar services” as used in § 106, § 106 does not prohibit awarding contracts to a construction management company based on competitive bidding.

Op. Tenn. Atty. Gen. 89-14.

Furthermore, this Office previously answered the question regarding “[w]hether a contract with a construction management company must be competitively bid.” Op. Tenn. Atty. Gen. 89-19. As this Office previously opined:

The method for awarding the contract depends upon the duties the construction manager must perform under the contract and the legal requirements in effect in the county. In general, there are two categories of duties contract managers perform: 1) coordinating, scheduling, observing and recommending to the owner and 2) assuming charge of providing, directing, overseeing or subcontracting for the necessary services, labor, materials, equipment, and tools to complete the contract. *See* CONSTRUCTION LITIGATION: REPRESENTING THE OWNER § 1.7 and § 1.8 (Cushman & Cushman 1984 ed.) and T.C.A. § 62-6-102(1)(A). The first type of contract would, in essence, be a personal services contract. The second type essentially requires the contract manager to perform duties similar to a general contractor.

If the duties of the contract manager are essentially personal services, the contract must be awarded according to procedures which govern the award of other personal services contracts by the specific county. The method for awarding personal services contracts may be required by private act, the County Purchasing Law of 1957 (T.C.A. § 5-14-108 et seq), the County Purchasing Law of 1983 (T.C.A. § 5-14-202

et seq) or the County Financial Management System of 1981 (T.C.A. § 5-21-118), whichever is in effect in the particular county. T.C.A. § 12-4-106 does not prohibit these contracts from being awarded based on competitive bids. *See* Op. Tenn. Atty. Gen. 89-14 (February [7], 1989).

If the contract requires contract manager to perform duties similar to those in the second category, the contract must be awarded according to whatever procedures the county is required to use in awarding other contracts with general building contractors. In addition, the nature of the duties to be performed will determine whether the manager must be licensed as a building contractor pursuant to T.C.A. § 62-6-102.

Op. Tenn. Atty. Gen. 89-19.

Accordingly, as this Office has previously opined, Tenn. Code Ann. § 12-4-106 does not prohibit awarding contracts to “pure” construction managers based on competitive bidding because the “services” a “pure” construction manager performs are not “legal services, fiscal agent, financial advisor or advisory services, educational consultant services, and similar services by professional persons or groups of high ethical standards.” Tenn. Code Ann. § 12-4-106(a)(1). As this Office previously explained, “[t]he ‘services’ § 106 addresses are ones provided by professionals in their field of exclusive expertise. The ‘services’ performed by the professionals who are employed by the construction management company are to ‘manage’ the building’s construction.” Op. Tenn. Atty. Gen. 89-14. Even though construction managers may advise and consult with owners concerning the construction of buildings, these services performed by construction managers are not “similar” to the professional services of professions such as lawyers, fiscal agents, financial advisors, educational consultants, engineers, and architects. Therefore, Tenn. Code Ann. § 12-4-106 does not prohibit awarding contracts to “pure” construction managers based on competitive bidding.¹

2. As explained above, Tenn. Code Ann. § 12-4-106(a)(1) does not prohibit local government contracts for “pure” construction managers from being awarded based on competitive bids. This Office notes that, pursuant to Tenn. Code Ann. § 62-6-103(a)(1), any corporation engaged in contracting in Tennessee must be licensed as provided in the Contractors Licensing Act of 1994, Tenn. Code Ann. § 62-6-101, *et seq.* A “pure” construction management company performs or causes to be performed many of the activities defined in Tenn. Code Ann. § 62-6-102(3)(A), including supervising, superintending, overseeing, scheduling, directing, or in any

¹ Since the duties of a “pure” construction manager are essentially personal services,

the contract must be awarded according to procedures which govern the award of other personal services contracts by the specific county. The method for awarding personal services contracts may be required by private act, the County Purchasing Law of 1957 (T.C.A. § 5-14-108 *et seq.*), the County Purchasing Law of 1983 (T.C.A. § 5-14-202 *et seq.*) or the County Financial Management System of 1981 (T.C.A. § 5-21-118), whichever is in effect in the particular county.

Op. Tenn. Atty. Gen. 89-19.

manner assuming charge of the construction of any building project. Accordingly, such a construction management company must be licensed as provided in the Contractors Licensing Act of 1994, Tenn. Code Ann. § 62-6-101, *et seq.*

3. Tenn. Code Ann. § 5-7-107 does not authorize counties to contract with “pure” construction managers without competitive bidding. Rather, that statute permits local governments to contract with construction managers to superintend construction projects. *See* Op. Tenn. Atty. Gen. 89-14; Op. Tenn. Atty. Gen. 89-19. Tenn. Code Ann. § 5-7-107 does not contain any language regarding competitive bidding.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

DAVID E. COENEN
Assistant Attorney General

Requested by:

Honorable Mark Norris
State Senator
303 War Memorial Building
Nashville, Tennessee 37243-0223