County Technical Assistance Service
INSTITUTE for PUBLIC SERVICE

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Legal Authority for Specific Purchasing Issues

Dear Reader:

The following document was created from the CTAS website (ctas.tennessee.edu). This website is maintained by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

The University of Tennessee
County Technical Assistance Service
226 Anne Dallas Dudley Boulevard, Suite 400
Nashville, Tennessee 37219
615.532.3555 phone
615.532.3699 fax
www.ctas.tennessee.edu

Legal Authority for Specific Purchasing Issues

Reference Number: CTAS-193

Emergency Purchases

Reference Number: CTAS-932

The National Institute of Governmental Purchasing defines an emergency purchase as "a purchase made in an exigency (emergency), often made under special procedures, designed to meet the emergency."[1]

Emergencies of one kind or another are the most common situations for which requirements for competitive sealed bidding or competitive sealed proposals may be waived.[2]Emergencies exist when there is a threat to health, welfare, or safety of the people and/or property.[3]Although poor planning, overlooked requirements, inaccurate usage history, or inadequate forecasting may cause "emergency situations" and the need for expedited purchasing, these are not bona fide emergencies but poor management.[4]

Purchases under true emergency situations generally may be made without the necessity of following the county's normal purchasing procedures. The Tennessee Code Annotated (T.C.A.) provides for emergency purchases in the following statutes:

The County Purchasing Law of 1983 exempts emergency purchases from public advertisement and competitive bidding requirements. The special provision for emergency purchasing is found in T.C.A. § 5-14-204(3).

The County Purchasing Law of 1957 provides for emergency purchasing in T.C.A. § 5-14-110.

The County Financial Management System of 1981 requires that procedures be established for emergency purchases in T.C.A. § 5-21-119 (b)(7).

The County Uniform Highway Law (CUHL) refers to the exemption from public advertisement and competitive bidding requirements in actual emergency purchases arising from unforeseen causes in T.C.A. § 54-7-113 (c)(1)(C).

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[1]National Institute of Governmental Purchasing, *The Dictionary of Purchasing Terms*, 11.

[2]National Institute of Governmental Purchasing, *Public Purchasing and Materials Management*, (Reston, VA : 1983) 137.

[3]ibid, 137.

[4]ibid, 137.

Sole Source Purchases

Reference Number: CTAS-933

The National Institute of Governmental Purchasing defines a sole source purchase as "a contract for the purchase of goods and services entered into after soliciting and negotiating with only one source, usually because of the technology or uniqueness required."[1]

Sole source purchases are goods and services available from only one supplier. There may be just one vendor because of patents or copyrights or simply because the vendor is the only one which supplies the good or service.[2] These types of purchases should require written justification and documentation (e.g., is the product available from only one source and not merchandised through wholesalers, jobbers, or retailers or is the product or service unique and easily established as one of a kind?).[3]

The County Purchasing Law of 1983 contains a provision exempting sole source purchases of goods or services from competitive bidding in counties that are governed by this law. Under T.C.A. § 5-14-204, the person authorizing a sole source purchase is required to make a record specifying the items purchased, the amount paid, and from whom the items were purchased, and this information must be reported to the county mayor and the county legislative body.

The County Financial Management System of 1981 defines "biddable items" in T.C.A. § 5-21-120 as any need of the county where more than one bidder or contractor in the county's trade area can provide the material or service, but any specific requirements for the purchase of sole source items would be found in

the local purchasing policies and procedures in counties governed by that law. Counties operating under the County Purchasing Law of 1957 should also look to their local policies and procedures for guidance on sole source purchases.

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[1]National Institute of Governmental Purchasing, *Public Purchasing and Materials Management*, (Reston, VA : 1983), 28.

[2]ibid, 50.

[3]George Street, *County Purchasing*, The University of Tennessee, CTAS, 38.

Cooperative Purchasing

Reference Number: CTAS-934

The National Institute of Governmental Purchasing defines cooperative purchasing as "the combining of requirements of two or more political entities in order to obtain the benefits of volume purchases and/or reduction in administrative expenses."[1]

Cooperative purchasing requires individual purchasing units in multiple government environments to have a willingness to look beyond individual preferences with regard to detailed specifications, preferred product brand names, etc.[2] A variety of arrangements can be used whereby two or more units purchase from the same supplier using a single IFB/RFP as the basis of the contract documents or cooperative pricing agreements.[3] Some possible objectives of cooperative purchasing are:

- Lower prices from competition for larger volumes.
- Reduced administrative costs—one organization handles bidding process.
- Combined expertise of many purchasing professionals.
- More favorable terms and conditions (e.g.,possible lower freight costs)

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[1]National Institute of Governmental Purchasing, *The Dictionary of Purchasing Terms*, 8.

[2]National Institute of Governmental Purchasing, *Advanced Public Procurement*, (Herndon, VA: 2001) 16-17.

[3]ibid, 16.

Forms of Cooperative Purchasing

Reference Number: CTAS-935

Joint-Bid Cooperatives—The authors of "*Advanced Public Procurement*" assert that joint bid arrangements are a more formal type of intergovernmental cooperative purchasing in which two or more public procurement agencies agree on specifications and contract terms and conditions for a given item or items of common usage and combine their requirements for this item in a single request for competitive sealed bids.[1] Once the bids have been received and discussed by the participants, each public procurement agency issues and administers its own purchase order(s) and/or contract.[2] A sponsoring entity or "lead agency" must be determined. Usually it is the government entity with the most expertise with the technology or commodity being contracted.[3]

Piggyback Cooperatives—The authors of *"Advanced Public Procurement"* maintain that piggyback cooperatives are a less formal type of intergovernmental cooperative purchasing in which a large purchaser requests competitive sealed bids, enters into a contract, and arranges, as part of the contract, for other public procurement units to purchase from the selected vendor under the same terms and conditions as itself.[4] The members of the cooperative simply order from contracts awarded by the sponsoring agency. Members choose to participate independently after the award by the sponsoring entity and place their orders with the consenting supplier.[5] Purchases by local governments from the Tennessee state-wide purchasing contracts or agreements entered into by the Tennessee Department of General Services (TDGS) are examples of a piggyback cooperative**.**

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[1]National Institute of Governmental Purchasing, Advanced Public Procurement, (Herndon, VA:

2001), 17.

[2]ibid, 17.

[3]ibid, 17.

[4]ibid, 19.

[5]ibid, 19.

Legal Authority for Cooperative Purchasing

Reference Number: CTAS-936

T.C.A. § 12-3-1201 (formerly § 12-3-1001). This statute authorizes counties, without public advertisement and competitive bidding, to purchase under the provisions of contracts or price agreements entered into by the Tennessee Department of General Services (TDGS) Central Procurement Office (CPO). This procedure is commonly known as "buying under state contract."

County governments may purchase goods, except motor vehicles (other than those manufactured for a special purpose as defined in T.C.A. § 12-3-1208), under federal General Services Administration (GSA) contracts, but only to the extent permitted by federal law or regulations. Op. Tenn. Att'y Gen. 04-121 (July 22, 2004). For more information about purchasing goods under GSA contracts, visit GSA's website at State and Local Governments | GSA.

T.C.A. § 12-3-1203 (formerly § 12-3-1004). This statute authorizes in-state "piggyback" contracts whereby cities, counties, utility districts, and other local governments in Tennessee may purchase supplies, goods, equipment, and services under the same terms as contracts or price agreements entered into by any other local governmental unit of this state. New motor vehicles (except special purpose vehicles such as school buses and ambulances) and purchases related to transportation infrastructure projects are excluded.

This statute also authorizes local education agencies (LEAs) to purchase equipment under the same terms of a legal bid initiated by another LEA in Tennessee. The LEA may purchase directly from the vendor the same equipment, at the same price, and under the same terms provided in the contract entered into by any other LEA in Tennessee.

This statute also authorizes counties and other governmental entities to make purchases on behalf of each other as long as the statutory requirements are met.

T.C.A. § 12-3-1205 (formerly § 12-3-1009). This statute authorizes both in-state and out-of-state cooperative purchasing agreements. A city, county, utility district, or other local government may participate in, sponsor, conduct or administer an in-state cooperative purchasing agreement for procurement of any supplies, services, or construction.

A city, county, utility district, or other local government also may participate in, sponsor, conduct, or administer a cooperative purchasing agreement with one or more other governmental entities outside Tennessee, including authorized federal agencies, for the purchase of goods, supplies, services and equipment. The master agreement for out-of-state cooperatives must be approved by the local legislative body and the items must be purchased by a governmental entity in accordance with its purchasing procedures and made available for use by other governmental entities. Out-of-state cooperatives cannot be used for purchasing motor vehicles other than special purpose vehicles; construction, architectural, and engineering services; construction materials; or fuel, fuel products and lubricating oils. Note that the definition of "motor vehicle" for purposes of this exemption does not include farm tractors, mowers, earth-moving machinery, construction machinery, or other similar machinery or equipment, so these items may be purchased using out-of-state cooperatives. However, construction machinery cannot be purchased using joint purchasing with federal agencies.

T.C.A. § 12-3-512 (formerly § 12-3-216). This statute authorizes the state's central procurement office to enter into cooperative purchasing agreements with local governments, provided that each contract is established through full and open competition and pursuant to policies approved by the state procurement commission.

T.C.A. § 12-9-101 *et seq*. The Interlocal Cooperation Act permits any local government of this state to enter into joint agreements to exercise any legitimate governmental function (including purchasing) with any other local government, in Tennessee or in any other state. Participating local governments in another state must have the same authority under that state's own laws. See Op. Tenn. Att'y Gen. 09-55 (April 9, 2009).

T.C.A. § 7-86-129. This statute allows any emergency communications district to purchase equipment under the same terms of a legal bid initiated by any other district, and to purchase directly from a vendor

the same goods and equipment at the same price and under the same terms as provided in a contract for equipment entered into by any other district.

Procurement Cards

Reference Number: CTAS-937

According to the authors of *"Advanced Public Procurement"*, procurement cards are small, thin, plastic debit or credit cards that look very similar to a Visa or MasterCard.[1]They have authorization and spending limitations embedded into a magnetic strip on the card.[2]The majority of procurement cards in use today are credit cards.[3]A major bank usually issues procurement cards, but depending on the transaction volume, a local bank may be able to meet requirements with the assistance of a credit card company (Visa, MasterCard, etc.).[4]The issuing bank provides reporting information to the county in several different ways, i.e., special reports, transaction reports, cardholder activity reports, and audit reports (as provided by the agreement).[5]

The purpose of the procurement card is to offer county departments a procurement process for purchase and payment of low-dollar, non-inventory, non-capital items. The intent is to streamline the traditional procurement process by reducing the number of requisitions, purchase orders, invoices, and checks.[6]

Procurement cards are a purchasing tool because they facilitate the purchasing activity. They are also a payment card because they facilitate and often expedite the payment to the vendors. Cards may reduce the cost of doing business while preserving controls and maximizing the audit trail and data captured at the point of sale. The card has historically been used for small purchases that do not require competitive bidding.[7]

There currently is no state law concerning the subject of procurement cards. However, sound accounting practices require some controls on the usage of such cards be in place prior to their use in counties. The method of adopting these controls will depend on the purchasing laws under which the county operates, as well as the established procedures the county follows relative to purchasing.[8]

Any county desiring to use procurement cards should consult with its county attorney to determine the appropriate method for authorizing the use of procurement cards and adopting policies and procedures. *As a very general guide*, CTAS has developed sample documents which a county may use as a starting point for developing its own set of documents authorizing procurement cards and governing their use.

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[1]National Institute of Governmental Purchasing, *Advanced Public Procurement*, (Herndon, VA: 2001), 45.

[2]ibid, 45.

[3]ibid, 45.

[4]ibid, 45.

[5]ibid, 46.

[6]Ronald Cohen,*"Review of Internal Controls Over Procurement Card",* Internal Audit Office, Fairfax County, Va, 2.

[7]Advanced Public Procurement, 45.

[8]The University of Tennessee, CTAS, Spotlight on Current Issues, *Purchasing Card Usage in Counties*, Executive Director's Memo, February 7, 2001, 1.

Purchasing-Records Management

Reference Number: CTAS-938

Reasons for Records Management

Space—In most counties, it is rare for a county office or courthouse to have all of the space it needs. Courthouses are bursting at the seams with old records stuffed into basements, storage closets, attics, and other more creative locations. Thus, it is cost effective for counties to implement a records management program.

Records Serve as a Legal Foundation—Local governments and the citizens they serve are both dependent upon good documentation to demonstrate their legal status. When disputes arise over legal issues, it is important to have good documentation to rely on. Local governments have an

important responsibility to preserve these records. Proper records management will insure these records are preserved and can be found when needed.

Historical Preservation of Documents—Counties play a vital role in preserving our nation's history. The documents and records of local governments give us insights into the lives of our ancestors and circumstances of our times. With proper records management, the important records are preserved, the less essential records are destroyed when no longer useful so they do not take up available space. The records are catalogued and organized so that officials and the public can access them. The records are stored under proper conditions to enable long term preservation.

Laws that Require Records to be Kept

Since county governments are instrumentalities of the state, most of the laws regarding what records need to be kept by county officials and how those records should be managed are found in the *Tennessee Code Annotated* (T.C.A.). County officials should also be aware that federal laws and regulations require them to keep certain records. This is particularly true of payroll information and other employment related records. Not every record in a government office has a corresponding statute or regulation requiring that record to be kept. Many records are generated simply as an ordinary course of business without any legal authority mandating their creation.

For more information, see the Records Management topic.

Retention Schedule for Certain Purchasing Records

Disposition of Surplus Property

Reference Number: CTAS-940

County governments frequently need to sell or convey equipment or property which is no longer needed for county purposes. The disposition of surplus property is the final step in the county's purchasing cycle. County officials and department heads should become familiar with the various laws and/or private acts that govern the sale and/or transfer of surplus property for their respective county. A review of the laws pertaining to the disposition of surplus property follows.

General Law. When there are no specific requirements imposed by general law or private act, the disposal of county property is within the discretion of the county legislative body. See T.C.A. § 5-7-101 (authorizing the county to dispose of its property) and T.C.A. § 5-1-103 (authorizing the county legislative body to act for the county). The county legislative body would have to act at a meeting that complies with the open meetings law. See *Op. Tenn. Att'y Gen.* U86-112 (August 1, 1986), *Op. Tenn. Att'y Gen.* 03-131 (October 3, 2003). Counties are authorized to lease real property owned by them under T.C.A. § 5-7-116.

County Financial Management System of 1981. In counties that have adopted the County Financial Management System of 1981 (1981 Act), it is the duty of the finance director under T.C.A. § 5-21-118(b) to conduct public sales of county property when the county legislative body declares the property surplus. In a county operating under the 1981 Act, all sales of county surplus property must be by public sale. *Op. Tenn. Att'y Gen.* 13-84 (October 31, 2013). For property of the board of education, this statute must be interpreted in conjunction with the provisions of T.C.A. §§ 49-6-2006 and 49-6-2007, which give the board of education certain authority over the disposition of its property. See Disposition of Surplus Property in the Education Department.

County Purchasing Law of 1957. In counties that have elected to be governed by the provisions of the County Purchasing Law of 1957, the county purchasing agent must sell surplus real or personal property pursuant to T.C.A. § 5-14-108(o) by public auction or by sealed bid after the county legislative body has declared the property surplus (for property of the board of education, the board would make the determination that the property is surplus, and may conduct the sale if the department of education is not under the 1957 law; see Disposition of Surplus Property in the Education Department). The county purchasing agent, with the assistance of the county purchasing commission, may adopt rules for requiring reports from county departments of surplus equipment and supplies, and the transfer of surplus equipment and supplies that may be used by other county departments, and rules for the sale, after receipt of competitive bids, of surplus equipment (T.C.A. §§ 5-14-107(5) and 5-14-107(6)). In these counties, the county legislative body is authorized under T.C.A. § 5-14-108(o) to establish by 2/3 vote a procedure whereby the purchasing agent, upon request of the county mayor, may dispose of surplus personal property with an estimated value of $1,000 or less by selling on the open market or by gift, trade, or barter to a nonprofit or charitable organization.

Transfers of Surplus Property Among Governmental Entities. There are two statutes that authorize counties to transfer surplus property to other governmental entities. Under T.C.A. § 12-2-420 (formerly T.C.A. § 12-3-1005), counties may transfer surplus personal property to other governmental entities by sale, gift, trade, or barter upon such terms as the county legislative body may authorize, without public

advertisement or competitive bidding, regardless of any other law to the contrary. The approval of the governing bodies of both entities is required. A similar statute, T.C.A. § 12-9-110, authorizes public agencies, including county legislative bodies and boards of education, to convey or transfer both real property and personal property to other public entities without sale or competitive bidding. The conveyance may be made by an agreement between the governing bodies of the public agencies authorizing the conveyance and determining that the terms and conditions are appropriate. The public agency or agencies receiving the conveyance or transfer must use the property for a public purpose. This provision may be used without declaring property surplus, and it supersedes any contrary requirements in any other general law or private act. T.C.A. § 12-9-110.

County Officials and Employees Prohibited from Privately Purchasing Surplus County Property—Under T.C.A. § 5-1-125, county officials and employees are prohibited from purchasing surplus county property unless the property is being sold by public auction or by competitive sealed bid.

Sale of Surplus Property by Internet Auction—Under T.C.A. § 5-1-128, counties are authorized to sell surplus property by internet auction.

Sale of Historic or Scenic Property. Under T.C.A. § 12-2-501, counties may sell real or personal property by private negotiation and sale if (1) the property is significant for architectural, archaeological, artistic, cultural, or historical purposes or for its open, natural, or scenic condition, and (2) the property is sold to a nonprofit corporation or trust in furtherance of its preservation or conservation purposes, and (3) a preservation or conservation agreement is placed in the deed and the nonprofit may only dispose of the property subject to covenants promoting preservation or conservation. or if applicable, securing the right of public access.

Disposition of Confiscated Property or Property Acquired at Tax Sales. These types of property are not considered surplus county property that can be disposed of using the methods outlined above, but rather are governed by their own procedures which are covered elsewhere.

Sale of Real Property to Certain § 501(c)(3) Entities. Notwithstanding any rule, regulation or other law to the contrary, any county, upon two-thirds (2/3) vote of the county legislative body, may dispose of real property at a nominal cost by private negotiation and sale to a nonprofit corporation incorporated under the laws of this state that has received a determination of exemption from the Internal Revenue Service pursuant to 26 U.S.C. § 501(c)(3), and whose purpose includes providing educational and vocational training services to children and adults with disabilities, or whose purpose includes providing educational services to youth in areas including health, science, agriculture, and civic engagement through in-school and after-school programs and school and community clubs and camps. T.C.A. § 5-7-119.

Property Taken by Eminent Domain. If a condemning entity determines that property taken by eminent domain is not used for the purpose for which it was condemned, or for some other authorized public use, or if the condemning entity decides to sell the property within 10 years of taking the property, then the condemning entity must first offer the property for sale to the persons from which the property was taken. Such persons may purchase the property for not less than fair market value plus costs and have 30 days to sign a purchase agreement for the property. If the former owner does not purchase the property within the 30 days, then the property may be sold in any commercially reasonable manner for not less than fair market value plus costs. T.C.A. § 29-17-1005.

Property Brought in after Delinquent Tax Sale. Property brought in by the county after a delinquent tax sale is not considered county surplus property but instead is sold in accordance with T.C.A. § 67-5-2507. See Disposition of Property Purchased by County at Tax Sale.

Surplus First Responder Two-Way Radios. Following notice to the commissioner, the department of safety may transfer surplus first responder two-way radios to a county designated as destressed by the Appalachian Regional Commission. After the transfer of the surplus two-way radio to a destressed county, other radios may be transferred to other county governments in need that submit proof to the department that the county cannot purchase the equipment. However, two-way radios obtained by the federal government must be transferred in accordance with federal law. T.C.A. §12-2-403.

Disposition of Surplus Property in the Education Department

Reference Number: CTAS-941

The decision to sell surplus property in the education department generally is a decision of the board of education. The board of education has the power to dispose of real property titled in its name, as provided in T.C.A. § 49-6-2006. With respect to personal property of the education department declared surplus by the board of education, T.C.A. § 49-6-2007 requires newspaper advertisement and competitive bidding for items valued at $500 or more.

The board of education has the power to lease or sell buildings and property or the portions of buildings or property it determines are not being used or are not needed by the public school system in the manner deemed by the board to be in the best interest of the school system and the community that the system serves, under T.C.A. § 49-2-203(b)(10). That statute also provides that a local board of education may dispose of surplus property under T.C.A. §§ 49-6-2006 and 49-6-2007, it being the stated legislative intent that a local board at its discretion may dispose of surplus property to private owners as well as civic or community groups.

Under T.C.A. § 49-6-2006(c), the board of education may dispose of property upon which it has constructed a building under its vocational education program by public sale or negotiated contract, notwithstanding the provisions of any other law to the contrary.

Under T.C.A. § 49-6-2006(d), the board of education may elect to transfer surplus real or personal property to the county or to any municipality within the county for public use, without the requirement of competitive bidding or sale.

Under T.C.A. § 49-6-2007(f), the board may donate computers that have been removed from inventory in its schools to low-income families in the school district, or they may dispose of computers by selling or trading them to computer vendors or manufacturers as part of the proposal to purchase new computers for the LEA.

School systems dispose of their surplus textbooks under T.C.A. § 49-6-2208, which provides for sale by public auction, sealed bids, internet auction, or negotiated contract for sale (by reference to T.C.A. § 12-2-403(a)(1)-(4)), or by other methods that are approved by the local board of education.

In counties that have adopted the County Financial Management System of 1981, it is the duty of the county purchasing agent under T.C.A. § 5-21-118(b) to conduct public sales of school real and personal property when the board of education declares the property surplus and determines that the property should be sold. See *Op. Tenn. Att'y Gen*. 13-84 (October 31, 2013). The purchasing agent should conduct such sales of personal property in accordance with T.C.A. § 49-6-2007, and public sales of real property according to the direction of the board of education.

In counties that have elected to be governed by the County Purchasing Law of 1957 and where schools are included, the provisions of T.C.A. §§ 49-6-2006 and 49-6-2007 must be read in conjunction with the provisions of T.C.A. § 5-14-108 (o). The statutes should be read together and harmonized to the extent possible. To the extent that these statutes are in direct conflict, however, the provisions of T.C.A. § 5-14-108 should be followed.

Following is an example of how the disposition of surplus property in a school system under the provisions of the County Purchasing Law of 1957 or the County Financial Management System of 1981 might flow (note that this is an example only):

Sample Steps:

1. The school board declares the property surplus and decides whether to sell the property at public auction or sealed bid, or whether to transfer the property to another governmental entity as authorized in T.C.A. § 49-6-2006.
2. If the school board decides to hold a public auction or public sale, the purchasing agent advertises a public sale in the newspaper at least seven days prior to the sale. T.C.A. § 49-6-2007(b).
3. The purchasing agent holds the sale as advertised and sells the items on behalf of the school board.

Disposition of Surplus Property in the Highway Department

Reference Number: CTAS-942

Under the County Uniform Highway Law (CUHL), the road superintendent has "supervision and control over and is responsible for all the machinery, equipment tools, supplies, and materials owned or used by the county in the construction, reconstruction, repair, and maintenance of county roads and bridges." T.C.A. § 54-7-112. This is a basic grant of custodial power over equipment to the road superintendent. The county legislative body has general control over county property and its disposition. T.C.A. § 5-7-101. Road superintendents often transfer/trade surplus equipment with other counties, with the approval of both governing bodies, pursuant to T.C.A. § 12-2-420 (formerly T.C.A. § 12-3-1005). If the authority of T.C.A. § 12-2-420 is not used, in counties that have elected to be governed by the provisions of the County Purchasing Law of 1957, it is the duty of the county purchasing agent under T.C.A. § 5-14-108 to sell by public auction or sealed bid any surplus county property (both personal and real property) when the county legislative body declares the property surplus. The county purchasing agent, with the

assistance of the county purchasing commission, may adopt rules for requiring reports from county departments (including highway department), of surplus equipment and supplies, and the transfer of surplus equipment and supplies that may be used by other county departments, and rules for the sale, after receipt of competitive bids, of surplus equipment. T.C.A. §§ 5-14-107(5) and 5-14-107(6).

In counties that have adopted the County Financial Management System of 1981 (CFMS of 1981), it is the duty of the county purchasing agent under T.C.A. § 5-21-118 (b) to conduct public sales of county property (including highway department) when the county legislative body declares the personal property surplus, and public sales of real property owned by the county. T.C.A. § 5-21-118(b).

Purchasing at Public Auctions

Reference Number: CTAS-943
Under T.C.A. § 12-2-421 (formerly § 12-3-1006), counties are authorized to purchase new or secondhand articles, including materials, supplies, commodities, and equipment, at publicly advertised auctions without public advertisement and competitive bidding. This law requires the county legislative body to establish written procedures to govern purchases at public auctions. CTAS has developed a sample set of policies and forms that a county may use as an example in developing its own procedures.
Each county's procedures should be tailored to the purchasing laws under which that particular county operates.

If a county purchases any materials, supplies, commodities, or equipment at a publicly advertised auction, the statute requires that the purchasing official report the following information to the county legislative body:

1. Description of materials, supplies, commodities, or equipment purchased
2. Auction where items were purchased
3. Purchase price of items
4. Vendor of items

Transfer of Assets for Fire Protection

Reference Number: CTAS-944
T.C.A. § 12-3-1206 (formerly § 12-3-1010) states, "Notwithstanding any other provision of the law, a county, municipality, and metropolitan government may transfer the ownership of assets for fire protection purchased through or with the proceeds of federal, state or local grants to volunteer fire departments within such county, municipality or metropolitan area; provided, that such volunteer fire departments are registered as non-profit organizations with the office of the secretary of state. This section shall have no effect in a county, municipality or metropolitan area unless it is approved by the appropriate legislative body." The application of this statute is discussed in *Op. Tenn. Att'y Gen.* 07-87 (6/5/07).

Purchase of Insurance

Reference Number: CTAS-945
Under T.C.A. § 29-20-407, counties may purchase tort liability insurance without competitive bidding from the local government insurance pool or any other plan authorized and approved by any organization of governmental entities representing cities and counties, regardless of any general law, private act or charter restrictions. However, this statute only applies to liability insurance purchased from pools or plans described in the statute. When purchasing other insurance, counties must follow applicable competitive bidding laws. Insurance products do not fall within the definition of professional services in T.C.A. § 12-3-1209, which exempts professional services from competitive bidding. Op. Tenn. Att'y Gen. 13-65 (8/23/13).

Electronic Procurement

Reference Number: CTAS-946
Electronic Bidding—Notwithstanding any law, rule or regulation to the contrary, local governments may satisfy any requirement for mailing by distributing invitations to bid, requests for proposals and other solicitations electronically. In addition, local governments may receive bids, proposals, and other offers electronically. In order to assure the fullest possible participation of small businesses and minority-owned businesses, local governments shall not require such small businesses and minority-owned businesses to

receive or respond to invitations to bid, requests for proposals, or other solicitations electronically. T.C.A. § 12-4-116.

Electronic Contracts, Signatures and Records—Electronic contracts, signatures, and records cannot be denied legal effect or enforceability solely because they are in electronic format. If a law requires a record to be in writing, an electronic record is sufficient. If a law requires a signature, an electronic signature satisfies the law. T.C.A. § 47-10-107.

Local Government Electronic Technology Act (T.C.A. § 4-30-103)—This statute encourages local governments to use current electronic technology to perform the business functions of their offices. A local government must file a plan with the comptroller of the treasury for comments, prior to the local government implementing any new electronic technology associated with: the disbursement of public funds; purchasing; the sale of local government assets; or the collection of various taxes, fines, fees or payments. The plan must be filed at least 30 days prior to implementation. The plan must contain the following information:

1. A description of the business process and the technology to be utilized;
2. A description of the policies and procedures related to the implementation;
3. Documentation of internal controls that will ensure the integrity of the business process; and
4. The estimated implementation cost and a statement as to whether the implementation of the new electronic technology will be implemented within the existing operating resources of the office or indicate prior approval of the governing body if additional operating resources are needed.

Highways and Roads "Buy America" Act

Reference Number: CTAS-947

Counties cannot buy any materials that are used for highway or roadway construction, resurfacing, or maintenance from any foreign government, any company wholly owned or controlled by a foreign government, or any agency of a foreign government or company. Materials covered by the act include, but are not limited to, asphalt cement, asphalt emulsion, rock, aggregate, liquid and solid additives, sealers, and oils. This legislation is not applicable if materials made by American companies are of unsatisfactory condition, are not of sufficient quantity, or increase the overall project cost by five percent more than the overall project costs using materials produced by foreign companies. T.C.A. § 54-5-135.

Life Cycle Cost and Procurement Act

Reference Number: CTAS-948

The Tennessee Department of General Services determines which commodities and products may be bought according to energy efficiency standards. The state is required to adopt rules and regulations relative to energy efficiency standards for major energy consuming products.

Life cycle costs are to be used when contracting for major energy-consuming products. In determining life cycle costs, the state may consider the acquisition cost of the product, its energy consumption and the projected cost of energy over the useful life of the product, and the expected resale or salvage value of the product.

Except where prohibited by private act or state law, the county shall adopt the energy efficiency standards and life cycle costing employed by the state. The county may develop and adopt its own energy efficiency standards, provided they are more stringent than the state's. T.C.A. § 12-3-901 *et seq*. (formerly § 12-3-601 *et seq*.)

Purchasing from Disabled Persons

Reference Number: CTAS-949

Political subdivisions may purchase services and commodities from individuals with severe disabilities through the central nonprofit agency as long as commodities or services purchased by political subdivisions are certified by the chief financial officer of the political subdivision. T.C.A. § 71-4-703.

Construction Projects

Reference Number: CTAS-951

Contractor License Information Requirements—For construction projects, the license information for the general contractor and certain subcontractors must be placed on the outside of the bid envelope or in the electronic bid submission in accordance with T.C.A. § 62-6-119. The following information must appear on the outside of the envelope containing the bid or in the submission of the electronic bid: (1) The name, license number, expiration date thereof, and license classification of the contractor applying to bid for the prime contract; (2) The name, license number, expiration date thereof, and license classification of the contractor applying to bid for the masonry contract where the total cost of the materials and labor for the masonry portion of the construction project exceeds one hundred thousand dollars ($100,000); (3) The name, license number, expiration date thereof, and license classification of the contractor applying to bid for the electrical, plumbing, heating, ventilation, or air conditioning contracts except when such contractor's portion of the construction project is less than twenty-five thousand dollars ($25,000); and (4) For each vertical closed loop geothermal heating and cooling project, the company name, department of environment and conservation license number, classification (G, L or G,L) and the expiration date, except when the geothermal portion of the construction project is in an amount less than twenty-five thousand dollars ($25,000). Prime contractor bidders who are to perform the masonry portion of the construction project which exceeds one hundred thousand dollars ($100,000), materials and labor, the electrical, plumbing, heating, ventilation or air conditioning or the geothermal heating and cooling must be so designated. Only one (1) contractor in each of the listed classifications shall be written on the bid envelope or provided within the electronic bid document.

Failure of any bidder to comply with these requirements voids the bid and the bid cannot be considered. Upon opening the envelope or acceptance of an electronic bid, the names of all listed contractors must be read aloud at the official bid opening and incorporated into the bid. Prior to awarding a contract, the awarding person or entity and its authorized representatives must verify the accuracy, correctness and completeness of the required information. Any discrepancies found in the spelling of names of bidders, transposition of license numbers, or other similar typographical errors or omissions may be corrected within forty-eight (48) hours after the bid opening excluding weekends and state-recognized holidays.

For design/bid/build procurements where cost is the primary criterion for the contract award, no invitation to bid may require that a subcontractor be identified until the final bid submission, nor require that a contractor accept the bid of any subcontractor until the final bid submission.

Anyone preparing bid documents is required to include a reference to Tennessee Code Annotated, Title 62, Chapter 6 (the Contractors Licensing Act of 1994), and a specific statement informing bidders that it is necessary for the bidder to provide evidence of compliance with the applicable provisions of Title 62, Chapter 6 before the bid may be considered.

Any person who awards a bid to a contractor who is not licensed in accordance with Title 62, Chapter 6, commits a Class A misdemeanor. T.C.A. § 62-6-119 and -120.

Discrimination against Contractors Licensed by the State—Under T.C.A. § 62-6-111, counties and cities cannot discriminate against contractors licensed by the state of Tennessee on the basis of the licensee's nonresidency within the county or municipality. *See* Op. Tenn. Att'y Gen. 15-69 (October 1, 2015).

Income or Residency Requirements Prohibited---Counties and cities cannot require companies bidding or contracting on public construction projects to employ individuals residing within their jurisdiction or within a specific income range, unless otherwise required by federal law. T.C.A. § 12-4-117.

Employment of Licensed Architect or Engineer on Public Works—If a public works project is expected to cost more than $50,000 and involves architecture, engineering or landscape architecture, the plans, specifications and estimates for the project must be prepared by a registered architect, engineer, or landscape architect. T.C.A. § 62-2-107.

Drug-free Workplace Requirements for Construction Contracts—Private employers with five or more employees who contract with the county to provide construction services must submit an affidavit stating that they have a drug-free workplace program in effect at the time of submission of a bid, in accordance with T.C.A. § 50-9-113. As long as the county obtains a written affidavit from the principal officer of the covered employer stating that the employer is in compliance with T.C.A. § 50-9-113, the county has no further liability. The form of the affidavit is not prescribed by statute. An example of an affidavit.

The county is required to include certain information in bid specifications for construction services as set out in T.C.A. § 50-9-114, including a statement as to whether the county operates a drug-free workplace program or drug testing program, a statement describing the program, and a statement requiring bidders to submit an affidavit as part of their bid that the bidder operates a drug-free workplace program at least as stringent as the county's. Any construction contract that does not meet these requirements is subject to challenge in chancery court if such challenge is filed within seven days.

Contractors and Public Contracts— Unless required by federal or state law, T.C.A. § 50-3-109 prohibits

local governments, as part of a contract to improve real estate, from requiring a contractor or remote contractor to: (i) obtain, gather, or disclose personnel information of the contractor's employees; (ii) provide personnel information of the contractor's employees to a person or entity; (iii) adhere to safety and health standards in excess of those required by OSHA and TOSHA; (iv) provide access to the worksite to anyone who would not otherwise have legal access to the worksite; (v) provide access to personnel information of anyone furnishing labor or materials on the worksite to a third party unless the third party is a certified public accountant performing an audit for the contract; (vi) require written contracts for labor and materials; (vii) be responsible for another party's compliance agreement to the improvement; or (viii) offer employment to a temporary laborer regardless of the length of service. Local governments are not authorized to prohibit a contractor from bidding, proposing, or accepting a contract unless the contractor has committed a willful violation of federal or state law. T.C.A. § 50-3-109.

Local Government Requirements On Private Employers– Local governments are prohibited from requiring, as a condition to do doing business or contracting with a local government, a private employer to pay its employees an hourly wage in excess of minimum wage required under applicable federal or state law, and may not impose a wage or employment benefit mandate on a private employer. T. C. A. § 50-2-112. Except as provided by state or federal law, local governments may not, as a condition to doing business with the local government, require private employers to establish a leave policy that changes the state requirements such as those authorized under § 4-21-408; provide health insurance benefits to persons employed by such employer; request any information on an application for employment or during the process of hiring a new employee; or imposing a requirement upon an employer pertaining to hours worked, schedule that an employer is required to provide employees, or employee output during work hours. T. C. A. § 7-51-1802.

T. C. A. § 50-2-112 further provides that local governments are prohibited from seeking to control or affect the wages or employment benefits provided by its vendors, contractors, service providers, or other parties doing business with the local government. A local government is prohibited from the use of evaluation factors, qualifications of bidders, or otherwise award preferences on the basis of wages or employment benefits provided by its vendors, contractors, service providers, or other parties doing business with the local government. With respect to construction contracts, a local government has no authority to require a prevailing wage be paid in excess of the wages established by the prevailing wage commission for state highway construction projects in accordance with title 12, chapter 4, part 4 or the Tennessee occupational wages prepared annually by the department of labor and workforce development, employment security division, labor market information for state building projects. If compliance with T. C. A. § 50-2-112 by a local government relative to a specific contract, project, or program would result in the denial of federal funds that would otherwise be available to the local government, then the local government may require a private employer to pay its employees a wage necessary to meet the federal requirements to obtain the federal funds, but only relative to such contract, project, or program.

Construction Contracts Retainage—Retainage on construction contracts is governed by Title 66, Chapter 34. Retainage amounts on public and private construction contracts cannot exceed 5% of the contract amount, and retainage must be released to the prime contractor within 90 days after completion of the project or within 90 days after substantial completion of the project for work completed, whichever occurs first. The prime contractor must pay all retainages due to any remote contractor within ten days after receiving the owner's retainages. Any remote contractor receiving the retainage from the prime contractor must pay to any lower-tier remote contractor all retainages due within ten days after receipt of the retainages T.C.A. § 66-34-103.

When the prime contract is $500,000 or more for real property improvement, retainage amounts must be placed in a separate interest-bearing account with a third party. The account must be established upon

the withholding of any retainage. At the time of the withholding, the funds become the separate property of the prime or remote contractor, subject to the person's rights withholding the retainage in the event the prime or remote contractor defaults on or does not complete its contract. Every time funds are withheld from a contractor's application for payment, the contractor must be notified of the name of the financial institution holding the escrow, the account number, and the amount of funds deposited into the account from that payment. T.C.A. § 66-34-104.

Immediately following satisfactory completion of the contract, all funds with interest must be paid to the prime or remote contractor to whom the funds are owed. If the owner, prime contractor, or remote contractor fail to release the funds, then the prime or remote contractor may seek equitable relief, including injunctive relief provided in T.C.A. § 66-34-602. Upon written agreement of all parties, other claims may be settled by arbitration according to the Uniform Arbitration Act. Compliance with the statute is mandatory and may not be waived by contract. T.C.A. § 66-34-104.

If an owner or prime contractor withholds retainage used for the benefit of the prime contractor or remote contractor pursuant to T.C.A. § 66-34-104(a) and (b), then neither the remote contractor nor any of the remote contractors are required to deposit additional retainage funds into the escrow account. T.C.A. § 66-34-103(d).

Bonds on Construction Projects

Reference Number: CTAS-939

Bid Bond—The National Institute of Governmental Purchasing (NIGP) defines a bid bond as "a written agreement or check by which a third party guarantees that a bidder will accept a contract as a bid, if it is awarded."[1] If the bidder does not accept the award, the bond is forfeited in whole or in part. A bid bond is issued most often in an amount equal to 5 percent of the total price of the bid. [2] Some Tennessee statutes or local government policies may require a different amount for certain projects or services; e.g., T.C.A. § 62-6-129 states that *"no contract for the services of a construction manager shall be awarded for any public work in this state by any city, county, or state authority, or board of education unless there is posted at the time of submittal of a proposal for services by a construction manager a bid bond equal to ten percent (10%) of the value of the services proposed and the value of the work to be managed, or may at the time of contracting provide payment and performance bonds in amounts equal to the combined monetary value of the services of the construction manager and the value of the work to be so managed."*

Performance Bond—The National Institute of Governmental Purchasing (NIGP) defines a performance bond as "a contract of guarantee, executed subsequent to award by a successful bidder to protect the buyer from loss due to the bidder's inability to complete the contract as agreed."[3]

A performance bond is issued to the local government by a surety company at the contractor's request after the contractor has received notice of award; the contract is usually not signed until the local government receives the performance bond.[4] The amount of the performance bond is usually for 100 percent of the contract price; however, some local government's policies may specify the minimum amount of the bond or use considerable leeway to determine the amount and whether it will be issued as a percentage of the contract price or for a specific sum.[5]

Payment Bond—A payment bond guarantees that the contractor will pay all suppliers and subcontractors who assist in the performance of the work.[6] A payment bond, issued in the same manner as a performance bond, is a surety company's guarantee that the contractor will pay its subcontractors and the suppliers. Payment bonds are used primarily in construction contracts but are applicable to service contracts under which the contractor contracts all or part of the work to one or more subcontractors. [7] The usual amount of a payment bond is 100 percent of the contract price; [8] however, some Tennessee statutes stipulate the amount of the bond as a percentage of the contract price (T.C.A. § 12-4-201 states that for public works projects over $100,000 the bond shall be for at least 25 percent of the contract price).

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[1] National Institute of Governmental Purchasing, *The Dictionary of Purchasing Terms*, 3.

[2] Donald F. Harney, Service Contracting: A Local Government Guide, ICMA (Washington D.C.: 1992), 61.

[3] *The Dictionary of Purchasing Terms*, 22.

[4]Harney, 61.
[5]ibid, 61.
[6]ibid, 60-61.
[7]ibid, 61.
[8]ibid, 61.

Professional Services Contracts

Reference Number: CTAS-952
Under T.C.A. § 12-3-1209 (formerly § 12-4-106), "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, 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, 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." Similar language in the former statute had been interpreted by the Tennessee Attorney General not to preclude the mention of cost in solicitations as long as cost was not the sole determining factor. Op. Tenn. Att'y Gen. 89-17 (February 13, 1989).

Architectural and engineering services are procured under T.C.A. § 12-4-107 (formerly § 12-4-106), which provides for procurement by a request for qualifications/experience process and selection of a "firm deemed to be qualified to provide the services required." A fair and reasonable price is to be negotiated taking into account "the estimated value of the services to be rendered, the scope of work, complexity and professional nature thereof." If satisfactory contract cannot be negotiated, "negotiations will continue with other qualified firms until an agreement is reached." If the county has a satisfactory existing working relationship for architectural or engineering services, the scope of services may be expanded without following the procedures set out in this statute as long as the services are within the technical competency of the firm.

In counties operating under the County Financial Management System of 1981, the board of education does not have the authority to enter into contracts for professional services such as architectural and engineering services. Ops. Tenn. Att'y Gen. 89-76 and 06-139. The same would hold true in counties operating under the County Purchasing Law of 1957 with schools included.

Under T.C.A. § 12-4-110 (formerly § 12-4-115), contracts for energy-related services that include both engineering services and equipment and have as their purpose the reduction of energy costs in public facilities must be awarded on the same basis as professional services.
The purchase of insurance is not considered professional services within the meaning of T.C.A. § 12-3-1209, but under T.C.A. § 29-20-407 local governments are authorized to purchase liability insurance through a plan authorized and approved by any organization of governmental entities representing cities and counties without the necessity of competitive bidding. Op. Tenn. Att'y Gen. 13-65 (August 23, 2013).

Construction Management Services

Reference Number: CTAS-953
The authors of "*Construction Law*" (Brunner and O'Connor) submit that modern construction management was developed in the 1960s and early 1970s. Brunner and O'Connor describe a construction manager as a "party with construction expertise who comes into the process to protect the interests of the owner and to take the lead in coordinating the design and construction services".[1] Further, these authors describe—

> *"The duties and responsibilities of a construction manager vary greatly from contract to contract. Under some construction management contract models, the construction manager functions as an agent to the owner. Under this contractual scheme, the construction manager's relationship to the owner is similar to that of the architect, although the construction manager performs different services—such as coordination and scheduling of the work—rather than preparing plans and specifications.*[2]

The U.S. Department of Labor, Bureau of Labor Statistics states that a construction manager "*coordinates*

and supervises the construction process from the conceptual development stage through final construction, making sure that the project gets completed on time and within budget. They often work with owners, engineers, architects, and others who are involved in the process. Given the designs for buildings, roads, bridges, or other projects, construction managers supervise the planning, scheduling, and implementation of those designs. Construction managers plan, direct, coordinate, and budget a wide variety of construction projects, including the building of all types of residential, commercial, and industrial structures, roads, bridges, wastewater treatment plants, and schools and hospitals".[3]

The Tennessee Attorney General describes a "pure" construction manager as **"**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". The Tennessee Attorney General further states that *"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. 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."* See Op. Tenn. Att'y Gen. 08-16 (January 31, 2008).

The method of procurement for construction management services varies depending on the type of project. Following is a summary of the requirements for solicitation of construction management services.

Construction Management Services for County Projects—Counties are authorized to contract for construction managers and construction managers at-risk under T.C.A § 12-4-107 (formerly § 12-4-106) using a written request for proposals (RFP) process with public advertisement in accordance with the county's purchasing laws, rules and regulations. The RFP must indicate the service requirements and factors that will be used to evaluate the proposals. Factors may 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. Construction management may be performed by (1) a licensed general contractor, as long as none of the services performed by the general contractor involve architectural and engineering services, unless, with regard to those services, the general contractor is also licensed as an architect or engineer; or (2) a licensed architect or engineer, as long as none of the services performed by the architect or engineer involve any of the services required to be performed by a contractor, unless, with regard to those services, the architect or engineer is also licensed as a contractor**.** Actual construction work performed under the coordination and oversight of a construction manager must be procured through competitive bids. 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 when 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. The county governing body, at its 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.

Construction Management Services for Education Construction Projects—Construction management services for education construction projects are deemed to be professional services and are to be procured through a request for proposals process set out in T.C.A. § 49-2-203(a)(3)(C). The factors to be considered include the construction manager's qualifications and experience on similar projects, qualifications of personnel assigned to the project, fees, and any other criteria deemed relevant. Cost cannot be the sole criterion. Construction managers cannot perform actual construction work except in instances where bids have been solicited twice and no bids have been submitted. A school system can perform work on its project with its own employees and have a construction manager perform the coordination and oversight of the project. Actual construction work under the direction of the construction manager must be competitively bid. Construction management for school construction or additions may be performed by (1) a licensed general contractor, as long as none of the services performed by the general contractor involve architectural and engineering services, unless, with regard to those services, the general contractor is also licensed as an architect or engineer; or (2) a licensed architect or engineer, as long as none of the services performed by the architect or engineer involve any of the services required to be performed by a contractor, unless, with regard to those services, the architect or engineer is also licensed as a contractor**.**

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[1]Philip L. Bruner and Patrick J. O'Connor, Jr., "Project Delivery Methods and Contract Pricing

Arrangements", Construction Law, November 2009, 6:57.

[2]Philip L. Bruner and Patrick J. O'Connor, Jr., "Governmental Regulation: Licensing and Permitting" Construction Law, November 2009, 16:15.

[3]U.S. Department of Labor, Bureau of Labor Statistics,

Purchase of Used or Secondhand Goods

Reference Number: CTAS-954

T.C.A. § 12-3-1202 (formerly § 12-3-1003) authorizes cities and counties to purchase used or secondhand goods, equipment, materials, supplies, or commodities from private individuals and entities without public advertisement and competitive bidding as long as the purchasing government documents the general range of value of the item through a listing in a nationally-recognized publication or through an appraisal by a licensed appraiser and the price is not more than 5% higher than the highest value of the documented range. For a discussion of what constitutes a nationally-recognized publication under this statute, see Op. Tenn. Att'y Gen. 13-44 (June 10, 2013).

This statute also authorizes cities and counties to purchase used or secondhand goods, equipment, materials, supplies, or commodities from any federal, state, or local governmental unit without public advertisement or competitive solicitations. Also see T.C.A. §12-2-420 (formerly T.C.A. § 12-3-1005) regarding transfer of surplus property among governmental entities.

Contracts for Purchase of Natural Gas, Propane Gas or Electric Power

Reference Number: CTAS-955

Notwithstanding any law to the contrary, any contract for the purchase for resale or municipal use of natural gas, propane gas or electric power may be made without complying with competitive bidding requirements. T.C.A. § 7-51-910.

Public Contracts for Social Services

Reference Number: CTAS-956

TCA § 12-3-308 (formerly § 12-4-122) provides that state and local governments shall contract for goods and services provided through the state departments of Human Services, Children's Services, and Health without discrimination against religious organizations and shall contract with religious organizations on the same basis as any other non-governmental providers without impairing the religious character of the organizations. All programs must be implemented consistent with the First Amendment of the United States Constitution. Any religious organization that contracts with the state or local government shall retain its independence from the government and that the government cannot require the organization to alter its form of governance or remove religious art, icons, scripture or other symbols. See *Op. Tenn. Att'y Gen*. 04-067 (April 20, 2004).

Solid Waste Authorities Competitively Bidding Contracts

Reference Number: CTAS-957

According to the Tennessee Attorney General, when a solid waste authority (established under the Solid Waste Authority Act of 1991) is contracting for collection and disposal services, it is generally subject to the same purchasing laws, including competitive bidding requirements, that govern the counties and municipalities forming the authority. See *Op. Tenn. Att'y Gen*. 04-101 (July 2, 2004).

Purchases from State Industries

Reference Number: CTAS-958

Under T.C.A. §§ 41-22-119 through 41-22-122, state and local government agencies are required to purchase all items produced, re-packaged, assembled, warehoused or manufactured by inmates in the Tennessee Rehabilitative Initiative in Correction (TRICOR) program if the articles have been certified by the board of standards as being of satisfactory quality, reasonably priced, and available. TRICOR publishes and distributes annually a catalogue of products containing the description of all articles and supplies produced by it, and this catalog identifies the articles that are certified by the board of standards. State and local agencies may not evade the intent of the law by slight variations from standards adopted by

TRICOR when articles have been certified. Continued intentional violations, after notice from the governor, constitute wrongdoing in office and may subject the officers or agents responsible for the violation to suspension or removal from office.

Purchase of Confiscated Vehicles and Surplus State Property

Reference Number: CTAS-959

A county may purchase from the department of general services a motor vehicle that has been confiscated by the state alcoholic beverage commission, department of safety, or wildlife resources agency, including those seized by a county sheriff, deputy sheriff, or constable, for violations of the laws relating to intoxicating liquors, or narcotics and contraband drugs, or certain game and fish laws. The purchase must be made in the name of the county and for county government use. T.C.A. § 12-2-201. Counties may purchase other state surplus property in accordance with the provisions of T.C.A. § 12-2-407.

Reverse Auctions

Reference Number: CTAS-960

Wikipedia Encyclopedia defines a reverse auction as *"a type of auction in which the roles of buyers and sellers are reversed. In an ordinary auction, buyers compete to obtain a good or service, and the price typically increases over time - the seller puts an item up for sale, multiple buyers bid for the item, and one or more of the highest bidders buy the goods at a price determined at the conclusion of the bidding. In a reverse auction, sellers compete to obtain business, and prices typically decrease over time".*[1]

In a reverse auction the buyer advertises a need for an item or service. The sellers then place bids for the amount they expect to be paid in order to perform such a service or provide such an item. During the online reverse auction, suppliers/sellers submit anonymous bids against each other until the time expires - the bidding of an online reverse auction is generally captured as it takes place ("real time" bidding). [2] The buyer then would select the lowest responsive, responsible bidder.

Local governments may participate in reverse auctions under T.C.A. § 12-3-1208 (formerly § 12-3-1012), which authorizes local government units to purchase goods and services through a competitive reverse auction process that allows offerors to bid on specified goods or services electronically and adjust bid pricing during a specified time period. Before initial use of a reverse auction, the local government unit must file a plan with the comptroller stating the technology to be used, whether a third party will conduct the auctions, describing the policies and procedures to be used, documenting internal controls that will ensure the integrity of the process, and stating whether additional operating resources will be needed, and if so, indicating prior approval of the local governing body. Items and services that cannot be purchased through a reverse auction are: construction services (except maintenance, repairs, and renovations costing less than $25,000); architectural or engineering services; new or unused motor vehicles (except school buses, garbage trucks, fire trucks, ambulances, and other special purpose vehicles); and new or unused construction equipment. The purchasing agent must solicit bids by placing a notice at least once in a newspaper of countywide circulation five days before the first day bids can be submitted. Bids may also be solicited by mail or electronically. Invitations to bid must contain a general description of the goods or services to be purchased and the time and place for bid opening. The local government is directed to provide a mechanism to facilitate participation of small and minority owned businesses. Bid responses must be made public at the time and place announced in the invitation to bid. The award must be made to the lowest responsible and responsive bidder. Bids must be preserved for 5 years.

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[131] Wikipedia Encyclopedia, Definition of Reverse Auction, January 2010.

[132] www. wisegeek.com

Fuel Purchase

Reference Number: CTAS-961

T.C.A. § 12-3-1214 allows a county, municipality, metropolitan government, utility district, local education agency, or other local government entity to purchase gasoline or diesel fuel in bulk amounts in the open market without public advertisement or competitive bidding provided that such entities shall, whenever possible, obtain at least three documented quotes. Gasoline or diesel fuel may also be purchased from the department of general services' contract where available.

Additionally, T.C.A. § 7-51-911 authorizes fuel stabilization contracts for a maximum term of 24 months. The statute states that "notwithstanding any other law to the contrary, a municipality may, with the approval of its governing body, enter into a negotiated contract or contracts, including a joint contract or contracts, with other municipalities, with a bank, investment bank or other similar financial institution for the purpose of stabilizing the net expense of the municipality incurred in the purchase of gasoline, diesel or both gasoline and diesel fuel actually purchased by the municipality. Any contract entered into under this section must be for a term of no more than twenty-four (24) months. The authority granted under this section is in addition to, and supplemental to, any existing authority granted a municipality under any other law."

Addenda to Bid Documents

Reference Number: CTAS-1995

Under T.C.A. § 12-4-113 (formerly § 12-4-126), no addendum to the bid documents is permitted within less than forty-eight (48) hours of the bid opening date, excluding weekends and legal holidays designated in § 15–1–101, unless the bid deadline is extended for a reasonable time as determined by the purchasing agent, which shall not be less than forty-eight (48) hours excluding weekends and legal holidays designated in § 15–1–101, to allow for any necessary changes to the bid documents and to allow bidders to resubmit their bids if necessary. Any questions concerning the bid documents must be received by the designer no less than ninety-six (96) hours before bid opening date. These provisions do not apply to contracts funded in whole or in part with state or federal highway funds.

Blind Vendors Program

Reference Number: CTAS-2123

Blind vendors are entitled to a statutory preference in the operation of vending facilities on most public property in Tennessee (commonly known as the Blind Vendors Program) under T.C.A. § 71-4-501 *et seq*. Under this law, the Department of Human Services (DHS) has the right of first refusal and the exclusive right to the operation of any and all vending machines on public property that it determines are capable of being operated by a blind individual that it licenses. T.C.A. § 71-4-502. When a new building or facility has been constructed on public property, or when existing contracts have expired or been changed in any way, the public property manager is required to notify DHS, and DHS will determine whether the property is suitable for being operated by a blind vendor. If it is, DHS handles the selection process for the blind vendor and the property manager must cooperate and provide the space and utilities (but not phone service) at no cost. T.C.A. § 71-4-503 and Op. Tenn. Att'y Gen. 04-083 (4/30/04). If DHS determines not to exercise the privilege at that location, then the property manager may contract with a private vendor. T.C.A. § 71-4-503.

"Public property" is broadly defined and includes all property owned or leased by the county, with the exception of primary and secondary schools and airports. This includes the sheriff's department and the jail commissary. Op. Tenn. Att'y Gen. 07-91 (6/8/07). The blind vendor is not required to have the capability to manage the jail's inmate trust fund accounting system, but the property manager could request that DHS provide someone with that capability. Op. Tenn. Att'y Gen. 01-128 and 06-156. It also includes property owned or leased by a public entity even if it is operated as a joint venture with a nonprofit corporation. Op. Tenn. Att'y Gen. 11-39 (4/28/11). Local government fire stations are within the preference even if the vending machines serve only the fire station employees. Op. Tenn. Att'y Gen. 06-037 (2/21/06).

The statutory definition of a "vending facility" gives DHS discretion to determine the services that it will, or will not, perform while still retaining the statutory priority to other vending facility services. Op. Tenn. Att'y Gen. 06-156.

The public property management must want to have vending services before DHS can place the vending machines on the property; DHS has no authority to require the county to have vending machines, and the county may have all vending machines removed from its property. Op. Tenn. Att'y Gen. 04-083 (4/30/04).

Tennessee Business Enterprises (TBE) is a unit of DHS' Services for the Blind and Visually Impaired Division which administers the statutory program that gives blind vendors priority in providing vending services on public property under the Randolph Sheppard Act, 20 U.S.C. § 107 *et seq*., and T.C.A. § 71-4-501 *et seq*. TBE may contract with a private vending machine management company to arrange for third-party vending and to collect commissions from the operation of vending machines on its behalf. Op. Tenn. Att'y Gen. 04-083 (4/30/04) and 04-166 (11/19/04).

Iran Divestment Act

Reference Number: CTAS-2461

Under the Iran Divestment Act, T.C.A. §§ 12-12-101--12-12-113, political subdivisions in Tennessee are prohibited from entering into any procurement or contract over $1,000 with a person who engages in investment activities in Iran. The state's chief procurement officer is required under T.C.A. § 12-12-106 to create a list of persons who engage in investment activities in Iran. Any person who is on the list is ineligible to contract with any political subdivision of this state, and any such contract is declared void *ab initio* under § 12-12-110. The list is published on the Department of General Services' Public Information Library page.

On or after July 1, 2016, every bid or proposal submitted to a political subdivision where competitive bidding is required must contain the following statement, submitted by the bidder under penalties of perjury: "By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that each bidder is not on the list created pursuant to § 12-12-106."

Under T.C.A. § 12-12-111, a bid shall not be considered nor any award made where the required statement has not been submitted. If the bidder cannot make the certification, the bidder must so state and must furnish with the bid a signed statement setting forth in detail the reasons. A political subdivision may award a bid to a bidder who cannot make the certification, on a case-by-case basis, if:

> (1) The investment activities in Iran were made before July 1, 2016, the investment activities in Iran have not been expanded or renewed on or after July 1, 2016, and the person has adopted, publicized, and is implementing a formal plan to cease the investment activities in Iran and to refrain from engaging in any new investments in Iran; or
>
> (2) The political subdivision makes a determination that the goods or services are necessary for the political subdivision to perform its functions and that, absent such an exemption, the political subdivision would be unable to obtain the goods or services for which the contract is offered. Such determination shall be made in writing and shall be a public document.

Non-boycott of Israel

Reference Number: CTAS-2480

Tenn. Code Ann. § 12-4-119 prohibits public entities (including counties) from entering into a contract for services, supplies, information technology, or construction unless the contract includes a written certification that the company is not currently engaged in, and will not be engaged in for the duration of the contract, a boycott of Israel. Any contract entered into on or after July 1, 2022 that fails to comply with the law is void. The law does not apply to contracts with a value of less than $250,000 or in contracts where the supplier has less than ten employees.

According to the law, a boycott of Israel means engaging in refusals to deal, terminating business activities, or other commercial actions that are intended to limit commercial relations with Israel, or companies doing business in or with Israel or authorized by, licensed by, or organized under the laws of the State of Israel to do business, or persons or entities doing business in Israel, when such actions are taken: (1) In compliance with, or adherence to, calls for a boycott of Israel, or (2) In a manner that discriminates on the basis of nationality, national origin, religion, or other unreasonable basis, and is not based on a valid business reason. Tenn. Code Ann. § 12-4-119.

Counties can comply with the law by including the following language in every agreement or requiring all contractors to submit the certification linked below.

Boycott of Israel. The Contractor certifies that it is not currently engaged in, and will not for the duration of the contract engage in, a boycott of Israel as defined by Tenn. Code Ann. § 12-4-119. This provision shall not apply to contracts with a total value of less than two hundred fifty thousand dollars ($250,000) or to

contractors with less than ten (10) employees.

Sample Non-Boycott of Israel Certification (Updated 09.19.2022)

Purchase of Drones

Reference Number: CTAS-2487

Local governments and law enforcement agencies are prohibited from purchasing or acquiring a drone, as defined in the federal National Defense Authorization Act of 2019 (Pub. L. No. 115-232), produced by a manufacturer banned under Section 889 of the National Defense Authorization Act of 2019, as amended. A contract or agreement for the purchase or acquisition of a drone in violation of this section is void and unenforceable. § 12-4-120.

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