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Construction Projects

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,

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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 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).

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

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

³*The Dictionary of Purchasing Terms*, 22.

⁴Harney, 61.

⁵*ibid*, 61.

⁶*ibid*, 60-61.

⁷*ibid*, 61.

⁸*ibid*, 61.

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