

SENATE BILL 95

By Norris

AN ACT to amend Tennessee Code Annotated, Title 12, Chapter 2, Part 1; Title 12, Chapter 3, Part 5 and Title 12, Chapter 3, Part 7, relative to state procurements.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 12, Chapter 2, Part 1, is amended by adding the following as a new section:

(a) The department of general services and public institutions of higher education may participate in, sponsor, conduct, or administer a cooperative purchasing agreement in accordance with state building commission policies and procedures for:

(1) The procurement of services relating to the transfer, ownership, maintenance, or management of real property;

(2) The procurement of construction, engineering, or architectural services; or

(3) The procurement of construction materials with one (1) or more other states or local governments in accordance with an agreement entered into between the participants.

(b) All cooperative purchasing conducted under this section shall be awarded through full and open competition.

SECTION 2. Tennessee Code Annotated, Section 12-3-512, is amended by deleting the section in its entirety and substituting instead the following:

The central procurement office and public institutions of higher education may participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of goods or services with one (1) or more other states or local

governments in accordance with an agreement entered into between the participants.

All cooperative purchasing conducted under this section shall be awarded through full and open competition.

SECTION 3. Tennessee Code Annotated, Section 12-3-514, is amended by deleting the section in its entirety and substituting instead the following:

(a) As used in this section:

(1) "Protest" means a written objection by a respondent, as defined in § 12-3-201, challenging a solicitation, an award, or a proposed award of a contract; and

(2) "Protesting party" means a respondent, as defined in § 12-3-201, who has filed a protest.

(b) Any respondent who has submitted a response to a solicitation authorized under this chapter and who claims to be aggrieved in connection with the solicitation, award, or proposed award of a contract may protest to the chief procurement officer. The protest shall be submitted in writing within seven (7) calendar days after the earlier of the notice of the award or intent to award the contract is issued. Any issues raised by the protesting party after the seven-day period to protest shall not be considered as part of the protest. Upon receipt of a protest of a solicitation, award, or proposed award of a contract, and a protest bond as required in subsection (d), a stay of the solicitation, award, or proposed award shall be in effect until the protest is resolved as provided under this section.

(c) The signature of an attorney or a protesting party on a protest constitutes a certification by the signer that the signer has read the protest and that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, the protest is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not for any improper purpose, such as to harass, limit competition, or cause unnecessary delay or needless increase in the cost of the procurement or of the litigation. If a protest is signed in

violation of this subsection (c), then the chief procurement officer or protest committee, upon motion or upon its own initiative, may impose upon the person who signed the protest, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties, including the affected state agency, the amount of the reasonable expenses, including reasonable attorneys' fees incurred from the filing of the protest.

(d) A protest under this section is not actionable unless the protesting party submits a protest bond contemporaneously with a protest. A protest bond shall be payable to the state in the amount of:

(1) Five percent (5%) of the lowest bid or cost proposal evaluated;

(2) Five percent (5%) of the maximum liability or estimated maximum liability provided in the solicitation;

(3) Five percent (5%) of the estimated maximum revenue, if the solicitation, award, or proposed award is for a contract in which the state receives revenue; or

(4) For no-cost contracts, an amount to be determined by the chief procurement officer.

(e) The protest bond shall be in form and substance acceptable to the state and shall be surrendered to the state after the protesting party has had an opportunity to oppose the payment of the protest bond and after a finding by the protest committee that:

(1) The protest was signed, before or after appeal to the chief procurement officer or protest committee, in violation of subsection (c);

(2) The protest has been brought or pursued in bad faith;

(3) The affected state agency has suffered damages resulting in a loss of funding, increased expenditures, or a disruption in services; the protest was filed in bad faith or in violation of subsection (c); and the protest was not upheld;

(4) The protest did not state on its face a valid basis for protest; or

(5) For any other reason approved by the protest committee.

(f) The chief procurement officer shall hold the protest bond for at least eleven (11) calendar days after the date of the final determination of the protest by the chief procurement officer. If a protesting party appeals the chief procurement officer's determination to the protest committee, then the chief procurement officer shall hold the protest bond until instructed by the protest committee to either keep the bond, as set forth in subsection (d), or return it to the protesting party.

(g) At the time of filing a notice of a protest of a solicitation, award, or proposed award of a contract in which the estimated maximum liability, estimated maximum revenue, or lowest evaluated cost proposal is less than one million dollars (\$1,000,000), a minority-owned business, woman-owned business, Tennessee service-disabled veteran-owned business, or Tennessee small business, as those terms are defined in § 12-3-1102, may submit a written petition for exemption from the protest bond requirement of subsection (d). The petition shall include clear evidence of status as a minority-owned business, woman-owned business, Tennessee service-disabled veteran-owned business, or Tennessee small business. After receipt of the petition by the central procurement office, the chief procurement officer has seven (7) calendar days in which to make a determination. If an exemption from the protest bond requirement is granted, then the protest shall proceed as though the bond were posted. If the chief procurement officer denies an exemption from the protest bond requirement, then the

protesting party shall post the protest bond with the chief procurement officer as required in subsection (d) within five (5) calendar days of the determination.

(h) The chief procurement officer, in consultation with the head of the state agency, has authority to resolve the protest. The chief procurement officer shall resolve the protest within sixty (60) calendar days after a protest is filed. The final determination of the chief procurement officer shall be made in writing and submitted to the protesting party, the protest committee, and the comptroller of the treasury. If the chief procurement officer fails to resolve the protest within sixty (60) calendar days, then the protesting party may request that the protest committee meet to consider the protest. The chief procurement officer shall provide the minutes of the protest proceedings to each committee member and to the comptroller of the treasury and shall post the final determination within fifteen (15) business days to the web site of the central procurement office. A request for consideration before the protest committee shall be made in writing within seven (7) calendar days from the date of the chief procurement officer's final determination or within seven (7) calendar days following the chief procurement officer's failure to resolve the protest within sixty (60) calendar days after receipt of the protest.

(i) A stay made pursuant to subsection (b) shall not be lifted unless, after giving the protesting party an opportunity to be heard, the chief procurement officer or the protest committee makes a written determination that continuation of the procurement process or the award of the contract without further delay is necessary to protect the interests of the state.

(j) Nothing in this section requires a contested case hearing as set forth in the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. A protesting party shall exhaust all administrative remedies provided in this section prior to the initiation of any judicial review of a protest.

(k) If a protest is received by the state subsequent to a contract executed pursuant to a procurement process, then the Tennessee claims commission has exclusive jurisdiction to determine all monetary claims against the state, including, but not limited to, claims for the negligent deprivation of statutory rights pursuant to § 9-8-307(a)(1)(N).

(l) Protests appealed to the chancery court from the protest committee shall be by common law writ of certiorari. The scope of review in the proceedings shall be limited to the record made before the protest committee and shall involve only an inquiry into whether the protest committee exceeded its jurisdiction, followed an unlawful procedure, or acted illegally, fraudulently, or arbitrarily without material evidence to support its action.

(m) The procurement commission is authorized to promulgate necessary rules in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, as well as policies and procedures, to implement this section.

SECTION 4. Tennessee Code Annotated, Section 12-3-701, is amended by deleting the section in its entirety and substituting instead the following:

(a)

(1) The chief procurement officer may authorize the procurement of goods and services with a limitation of a contractor's liability; provided, all respondents to a solicitation had an equal opportunity to request a limitation of liability.

(2) Unless authorized under this section by the chief procurement officer, no contract shall limit a contractor's liability to the state in an amount less than two (2) times the maximum liability, estimated liability, or maximum revenue of a contract.

(3) The chief procurement officer may authorize a limitation of liability amount of less than two (2) times the maximum liability, estimated liability, or maximum revenue of a contract if the chief procurement officer determines that the limitation of liability amount is necessary to prevent harm to the state from failing to obtain the goods or services sought or from obtaining the goods or services at a higher price.

(4) The chief procurement officer is authorized to approve a limitation of liability amount greater than two (2) times the maximum liability, estimated liability, or maximum revenue of a contract if the chief procurement officer determines that an increase in the liability amount is necessary to protect the state's best interests.

(5) A solicitation that includes a limitation of liability amount of less than two (2) times the maximum liability, estimated liability, or maximum revenue of a contract shall be approved by the comptroller of the treasury before the limitation of liability amount may be included in a contract.

(6) A solicitation that does not have a maximum liability, estimated liability, or maximum revenue of a contract may have a limitation of liability if approved by the chief procurement officer and the comptroller of the treasury, and if all respondents to the solicitation had an equal opportunity to request a limitation of liability.

(b) A limitation of liability in a contract with the state shall not apply to:

(1) Liability for intellectual property or to any other liability, including, without limitation, indemnification obligations for infringement of third-party intellectual property rights;

(2) Claims covered by any specific provision in a contract with the state providing for liquidated damages; or

(3) Claims for intentional torts, criminal acts, fraudulent conduct, or acts or omissions that result in personal injuries or death.

(c) A limitation of liability included in a contract with the state shall not waive or limit the state's legal rights, sovereign immunity, or any other immunity from suit provided by law. Nothing in this section authorizes a cause of action against the state in any foreign jurisdiction.

(d) The procurement commission is authorized to promulgate rules, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, as well as policies and procedures, to implement this section.

SECTION 5. This act shall take effect upon becoming a law, the public welfare requiring it.