



May 01, 2025

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# Professional Services Contracts

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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.

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# 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”.<sup>1</sup> 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.”*<sup>2</sup>

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.”<sup>3</sup>*

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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<sup>1</sup>Philip L. Bruner and Patrick J. O’Connor, Jr., “Project Delivery Methods and Contract Pricing Arrangements”, Construction Law, November 2009, 6:57.

<sup>2</sup>Philip L. Bruner and Patrick J. O’Connor, Jr., “Governmental Regulation: Licensing and Permitting” Construction Law, November 2009, 16:15.

<sup>3</sup>U.S. Department of Labor, Bureau of Labor Statistics,

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