

January 25, 2002

Dear City Manager:

You have the following question: Can the City construct a new municipal building through the "design-build" concept without competitively bidding the project? In my opinion, while design-build contracts are legal in Tennessee, they must be competitively bid (except in the case of public building authorities).

The legal problem in the use of design-build contracts for municipal buildings is that generally, municipal purchases, including construction services, must with few exceptions, be competitively bid. Tennessee Code Annotated, ' 12-4-106 exempts "professional services" from those competitive bidding requirements, but design-build contracts probably do not qualify as professional services within the meaning of that statute.

The only mention of public design-build contracts in state law appears in the Public building Authorities Act of 1971, codified in Tennessee Code Annotated, 12-10-101 et seq. Tennessee Code Annotated, ' 12-10-124 (substantially amended in 2001), prescribes in detail the process by which a PBA can use the design-build construction method, including the processes for use that method with or without competitive bidding. [For historical reference as to the application of Tennessee Code Annotated, ' 12-10-124 with respect to the municipal use of the design-building concept before the 2001 amendment, see the unreported cases of Shanke v. Bedford County Board of Education, 1997 WL 83662(Tenn. Ct. App.).] There is no counterpart of that law authorizing the design-build method for municipalities in general.

The Tennessee Attorney General in TAG 00-086, opined that Sumner County could not use the design-build method to construct a road, without competitively bidding the contract. He reasoned that:

This office recognizes that contracts extended by counties for professional services, including engineering services, shall be awarded "on the basis of recognized competence and integrity," not necessarily on the basis of a competitive bidding process. Tenn. Code Ann. ' 12-4-106. However the road design and construction contract that the county proposes to let to an engineering firm/road construction firm partnership is more than a contract for "services by professional persons." The proposed "design-build" contract is a public contract for the construction of a county road, and the county must utilize the competitive bidding process to let such a contract. [At 2-3]

I came to a similar conclusion on the same ground several years ago with respect to design-build contracts for the construction of municipal buildings, and nothing has occurred in statutory or case law to change my mind. Even though a design-build contract for the

January 25, 2002

Page 2

construction of a public building has a design component, it is predominately a construction contract, and construction services (except perhaps to certain specialized services) are not professional services within the meaning of Tennessee Code Annotated, ' 12-4-106. Obviously, the construction of city municipal building is more complicated than the road involved in TAG 00-086, but the principle is the same.

That conclusion is supported by Manhattan v. Government of the Virgin Islands, 1999 WL, 117765 (Terr. V.I.). I am not sure of the precedential value of Virgin Island cases, but the reasoning of that case is compelling. A Virgin Islands statute provided an exemption from competitive bidding of "professional services," which were defined as "professional, financial ...or other expert services." The question was whether the award of a design-build contract for a jail was a "professional service," within the meaning of that statute. No, held the Court. In reaching its conclusion, it rejected the theory that the construction of a jail met the definition of professional services contained in two earlier cases. In Autotote Ltd. v. Jew Jersey Sports and Exposition Authority, 427 A.a2d 55 (N.J. 1981), it was held by the New Jersey Supreme Court that a "totalisator system" at a racetrack, which was "a complex computer network" designed to perform certain complex betting services, was a professional service, even though the contract also called for the purchase of equipment purchases. The Court reasoned reconciled the equipment purchase aspect of the contract by calling the contract an "the inextricable integration of a sophisticated computer system and services of ...a [highly] technical and scientific nature." [at 59] For that reason, the competitive purchasing laws of the state did not apply. Similarly, in Waste Management, Inc. v. Wisconsin, Solid Waste Recycling Authority, 267b N.W.2d 659 (Wis. 1978), the construction and operation of a recycling plant was held to be exempt from the state's competitive purchasing laws because the systems components were "so interrelated that the ultimate nature of the system must result from professional expertise and educated judgment," because the Authority wanted to hold one entity responsible for the successful operation of the plant.

Those cases did not apply said the Court, reasoning that "the exemption [for professional services] applies only to highly technical contract where 'the crux of the project package' is an exempt service and the requirement of non-exempt services are merely incidental to the professional services" [At 10] Of the fact that the project was a jail, the Court said,

...notwithstanding the design component of the prison project, the bulk of the work to be performed in the construction phase will not require the degree of technical skill associated with the integration of the cutting edge technology that was require in these other cases. Rather, the Court finds that after the prison addition and new jail are designed, the contractor will be primarily responsible for actually constructing correctional facilities, which according to the evidence accounts for approximately 70% of the work under the contract. Undoubtedly, this construction will require professional managers and highly skilled artisans. However, all successful construction projects required such skilled craftsmen

and managers. If the Court were to construe all such construction responsibilities as professional services under the Code and Rules, the exception for professional services would swallow the requirement of competitive bidding for public works construction projects. Surely, the Legislature did not intend this result. [At 10]

There is at least one Tennessee case dealing with the question of what is a professional service, but it never addressed the question in a construction context. In *Modjeski and Masters v. Pack*, 388 S.W.2d 144 (1965), the question was whether an engineering firm hired to determine the feasibility of bridge construction had to comply with competitive bidding requirements. No, held the Court, reasoning that engineers provide "professional services requiring special training and skill." In determining what is a professional service, the Court relied on the test set forth in 43 Am.Jr. Public Works and Contracts, ' 28:

As a general rule, statutory and constitutional provisions prohibiting letting of contract by a state or by municipal subdivisions, without first advertising for bids, do not apply to contracts for professional services, such as the services of physicians or attorneys, or to contract requiring special training and skill, such a contracts calling for the services of architects, engineers, accountants, or the like, and such contracts may be let without bid.

However, the engineering service in that case was clearly engineering study involving bridge construction, but did not itself involve a construction component.

Questions with respect to design-build contracts have arisen in several other states within the framework of the municipal purchasing laws of those states. Apparently the state attorneys general in Kentucky, Virginia, Idaho, Indiana, South Carolina, and perhaps North Carolina and New York, have opined that design-build contracts are questionable under those states' governmental purchasing laws. [See Robert H. Buesing, "The Law Struggles to Keep Pace with the Trend of State and Local Government Experience With Design/Build," 11 Construction Lawyer, No. 4, Oct. 1991; Christopher C. Whitney, "An Evolving Perspective on Design/Build Construction: A View From the Courthouse," 15 Construction Lawyer, No. 2, Apr., 1995; Justin Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process*, 5th Ed., West Publishing Co., St. Paul. Minn., 1994.] I do not have a copy of opinions of those attorneys general, but based on the brief synopses of them found in Buesing, "The Law Struggles.....," they are based on state laws that do not have an applicable counterparts in Tennessee law. For that reason, they are not helpful in our inquiry.

At this point it will be helpful to define the term "design-build" for the purpose of determining how design-build contracts are distinguished from traditional construction contracts, and why the design-build concept has generated the question of whether municipalities can enter into them:

A Practical Guide to Tennessee Construction Law, 2nd Ed.:

The “design and build” contract transforms the traditional scenario where the architect designs the project while the contractor performs the necessary construction, to a scenario in which one entity accomplishes both the design and construction of the project. The services of both the design and the construction of the project are incorporated into a single contract. The “design and build” entity is usually a large construction company which employs architects and engineers or retains them on a consulting basis. Other variations include architects and engineers and construction managers which offer design/build services and then subcontract the construction work to contractors. Another variation is the formation of a joint venture by an architectural firm and a contracting firm to perform the design/build work.... [At 4-5]

Real Estate Law & Practice Course Handbook Series 261 Construction Contracts 1985:

The basic idea of the Design Build arrangement is that a single party or a group of parties obligates itself to the Owner to produce the finished product from beginning to end. Although there are a myriad of variations, the two basic approaches to Design Build are Joint Venture Design Build Team and Design Build-Sole Contractor. [At 33]

Sweet, Justin, Legal Aspects of Architecture, Engineering and the Construction Process, 5th ed., West Publishing Co., St. Paul, Minn. 1994:

Transactions in which the architect or a contractor both designs and builds have become an important variation from the traditional methods of organizing for construction. D/B (design-build) can encompass at one extreme the homeowner building a single-family home patterned on a house that the builder has already built and at the other a large engineering company agreeing to both design and build highly technical projects, such as petrochemical plants. The former is likely to be a builder with an in-house architect on its staff or one that engages an independent architect where it is required by law that design be accomplished by a registered architect or engineer. At the more complex extreme, the designer/builder may employ a large number of construction personnel and licensed architects and engineers in-house to offer a total package for projects such as power plants, dams, chemical processing facilities, and oil refineries. Between these extremes, D/B is often used for less technical repetitive work such as warehouses or small standard commercial buildings.

Organizationally, D/B has variations. One method is an architect promising to design and build and employing a contractor to execute the design. Because of the capital needed, a more common technique is the D/B to be a contractor who engages a design professional to create the design. Finally, a D/B can be a joint venture between a design professional and a contractor. [At 367]

A variation of the design-build contract is the turnkey contract. It is said in Legal Aspects of Architecture, Engineering and the Construction Process, above, that:

There are a great variety of turnkey contracts. At its simplest, the contract is one in which the owner gives the turnkey builder some general direction as to what is wanted and the turnkey builder is expected to provide the design and construction that will lead to the satisfaction of the express needs of the client. In theory, once having given these general instructions, the owner can return when the project is completed, turn the key, and take over.

Many turnkey projects are not that simple. The instructions often go beyond simply giving a general indication of what is wanted. They can constitute detailed performance specifications.

Also, the obligation to design and build may be dependent upon the owner furnishing essential information or completing work upon which the turnkey contractor relies to create the design and to build. Finally, the owner who has commissioned a turnkey project is not likely to remain away until the time has come to turn the key. As in design-build, the owner may decide to check on the project as it is being built and is almost certain to be making progress payments while the project is being built. The most important attribute of the turnkey project is that one entity both designs and builds....

Some turnkey contracts require the contractor not only to design and build the building but also to provide the land, the financing, and interior equipment and furnishings.

As these definitions of design-build contracts suggest, under a traditional process to build a new municipal building, the city would probably first buy property for the building. The actual construction of the building would entail the city hiring an architect who would design the building, following which it would hire a construction contractor to effect the architect's design. However, the design-bid concept eliminates the separate hiring of an architect and of a contractor; one entity is responsible for the design and construction. In addition, under the turnkey concept, it may eliminate the separate purchase of property.

The Municipal Purchasing Law contained in Tennessee Code Annotated, section 6-54-301 generally requires "public advertisement and competitive bid" for most municipal purchases

January 25, 2002

Page 6

made with municipal funds and costing over \$2,500 (which can be raised to \$10,000 by ordinance). The law contains certain important exceptions, one of which is for "Purchases by authorized officials in municipalities having charter provisions or private act requirements governing competitive bidding and purchasing." [Tennessee Code Annotated, section 6-56-301 and 302.] I find no such provisions in your City Charter.

As pointed out above, Tennessee Code Annotated, section 12-4-106, also prohibits the competitive bidding of professional services. Arguably, that exception applies where the proposed design-builder is an architect or an engineer. Indeed, the design-build method contemplates a marriage of the design and the build functions of building construction. However, I doubt the courts would construe that prohibition broad enough to embrace design-build contracts, because of the public policy reasons supporting the competitive bidding statutes, *and because the competitive bidding statutes are construed strictly against the government.* [Computer Shoppe., Inc. v. State, 780 S.W.2d 729 (Tenn. App. 1989); Browning-Ferris Ind. v. City of Oak Ridge, 644 S.W.2d 400 (Tenn. App. 1982).] In addition, the General Assembly has provided in the Public Building Authorities Act for the design build construction method with and without competitive bidding. Had the General Assembly wished to extend that authority to municipalities in general, it would have been easy for it to do so.

There appear to be surprisingly few cases involving the legality of design-build contracts under state and local government purchasing law. Most of the few cases there are turn on the language of the purchasing law of the particular state at issue, and do not generally provide much support one way or another for the award of design-build contracts by governments in Tennessee. Greater Cincinnati Plumbing Contractors' Association v. City of Blue Ash, 666 N.E.2d 654 (Ohio app. 1995), upheld the award of a design-build contract by a city, reasoning that under its home rule charter, the city had the right to accept responsible bids which, in the city council's judgment offered the best and most responsible proposal to the city, considering quality, service, performance, record and price, and that the design-build method constituted competitive bidding provides for "open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves from any kind of favoritism or fraud in its varied forms." [At 658]

But that case points to the proposition that under Ohio Law, home rule cities in Ohio have broader power than do home rule cities in Tennessee. But the Tennessee Municipal Purchasing Law exempts from its application any municipality that has competitive bidding requirements in its charter. As pointed out above, your City's charter does not qualify.

In City of Lynn Haven v. Bay County Council of Registered Architects, Inc., 529 So.2d 1244 (Fla. App. 1988), the city decided to build a public safety building. It obtained a set of blueprints from a private contractor and invited bids on the project. The bid instructions provided that the successful bidder would have to provide architectural drawings for the project. The Court upheld an injunction issued by the trial court prohibiting the city from letting the contract. Florida's Consultant's Competitive Negotiation Act (CCNA) required cities directly seeking architectural (or other professional) services to publicly announce in a uniform and consistent manner that architectural services were required for public construction contracts, to competitively select an architect from no fewer than three architectural firms deemed to be the

most qualified to perform architectural services for the construction contract in question, and to negotiate a contract with the most qualified architectural firm that was fair, competitive and reasonable.

The Court noted that the city admitted that it could not directly obtain an architect to design the public safety building without complying with the CCNA, and held that the city could not do indirectly what it could not do directly. In support of its holding, the Court cited the legislative intent contained in the CCNA, which was an intent to further open competition which is a basic tenet of public procurement; to reduce the appearance and opportunity for favoritism; and to ensure that contracts are awarded equitably and economically. [At 1246]

[Florida changed its competitive purchasing laws as a result of this case. Municipalities in that state are now statutorily authorized to enter into design-build contracts.]

The problem with applying this case to the purchase of architectural services by a municipality in Tennessee through a design-build contract is the dissimilarity of the Florida and Tennessee statutes providing for the municipal procurement of architectural (and other professional) services. The Florida CCNA expressly provided for the competitive bid of such services, prescribed an elaborate set of steps for such competitive bids, and contained an express statement of legislative intent. Tennessee Code Annotated, section 12-4-106 expressly *prohibits* the competitive bid for such services, providing that:

- (a) Contracts by counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of the state, for legal services, fiscal agent, financial advisor or advisory services, educational consultant services, and similar services by professional persons or groups of high ethical standards, shall not be based on competitive bids, but shall be awarded on the basis of recognized competence and integrity. The prohibition against competitive bidding in this section shall not prohibit any entity enumerated from interviewing eligible persons or groups to determine the capabilities of such persons or groups.
- (b) Any person providing fiscal agent, financial advisor or advisory services to any county, city, metropolitan government, town, utility district or other municipal or public corporation shall perform such services only pursuant to a written contract to be entered into prior to, upon or promptly after the inception of the relationship, specifying the services to be rendered, the costs therefor, and the expenses to be covered under such contract.

That statute prescribes no procedures for broadcasting an announcement that architectural services are required, or that the architect be competitively selected from a group of candidates. Such services are only to be obtained by written contract, "entered into prior to, upon or promptly after the inception of the relationship, specifying the services to be rendered, the costs therefore, and the expenses to be covered under such contract." No express

legislative intent is found in that statute; however, its language suggests a legislative intent different from the express intent found in the Florida CCNA. The express intent of the Florida CCNA was to foster open competition, reduce the appearance and opportunity for favoritism, and to ensure that contracts were awarded equitably and economically. Tennessee Code Annotated, section 12-4-106, on the other hand, is anti-competitive, requiring only that contracts for professional services be awarded on the basis of “recognized competence and integrity.” It does not appear to represent a statutory scheme requiring that it apply to a city’s procurement of an architect through the indirect means of a design-build contract.

The same result is reached even when Tennessee Code Annotated, section 12-4-106, and Tennessee Code Annotated, section 62-2-107, are read together. The latter statute provides that:

(a) Neither the state, nor any county, city, town or village or other political subdivision of the state, shall engage in the construction of any public work involving architecture, engineering or landscape architecture for which the plans, specifications and estimates have not been made by a registered architect, registered engineer, or registered landscape architect [(b)unless the project costs less than \$25,000 and does not alter the structural, mechanical, or electrical system of the project].

Nothing in that statute appears to require that the architect, engineer, or landscape architect who does design work on public works projects be the architect, engineer, or landscape architect directly employed by the city. One of the disadvantages of the design-build contract cited by construction law experts is that the architect or engineer is not the city’s architect or engineer, and for that reason may be more committed to his or his employer’s interest than to the city’s interest. However, that disadvantage must be weighed against the advantages of a design-build contract, and in Tennessee does not appear to go to the question of whether design-build contracts comply with municipal purchasing laws.

In Negley v. Lebanon Community School Corporation, 362 N.E.2d 178 (Ind. App. 1977), the design-build contract for a school building *would* have been held illegal under Indiana’s municipal competitive bidding law had the entity which built the school been a school corporation. That law required various municipal entities, including school corporations, “to adopt plans and specifications and award a contract for such public work or improvement to the lowest and best bidder who submits a bid for the performance thereof.” That statute, said the Court, “clearly requires school corporations, in constructing school buildings at the public’s expense, to submit plans and specifications for competitive bids and to accept the lowest and the best bid.” [At 181] However, said the Court, the entity which built the school building in question was a school *building* corporation, and was not subject to the state’s competitive bidding laws.

City and Borough of Juneau v. Breck, 706 P.2d 313 (Alaska. 1985); and Breck v. Ulmer, 745 P.2d 66 (Alaska 1987). arise from the same case; the Court denominates them Breck I and Breck II. Breck was a pro se plaintiff in both cases. In Breck I, the City of Juneau let a design-

build contract for over \$5 million for a parking garage and marine park. After the design-build proposals were solicited, but before a contract was let, Breck appeared nine times before city council alleging that the design-build method violated a provision of the Juneau City Charter requiring "contracts for public improvements for an amount estimated to exceed fifteen thousand dollars shall be by competitive sealed bid and be awarded to the lowest qualified bidder." The charter provided for two exemptions: (1) "contracts involving the obtaining of professional services such as, but not limited to, services rendered by architects, attorneys, engineers, and other specialized consultants," and (2) "Where calling for bids on a competitive basis is unavailing or impossible..." In spite of Breck's protests, the design-build contract was let to the highest bidder. Four months after the contract was let, and after approximately 40 per cent of the project was complete, Breck sued. The trial court granted Breck an injunction, stopping the project. The Supreme Court of Alaska overturned the injunction, holding that Breck's delay in bringing suit was unreasonable and represented Laches. There is no hint in Breck I in which direction the Court would have gone on the question of whether the design-build contract violated the city's charter.

In Breck II, Breck sought to hold the Juneau city council members who let the design-build contract personally liable for payments made in violation of the city charter requirement that contracts be competitively bid. Another provision of the charter declared that officers and employees of the city who knowingly authorized or made payments in violation of the charter would be jointly and severally liable for the full amount paid. The Court held the city council members were acting within the scope of their authority and exercising a discretionary function, and thus entitled to qualified immunity for their decision in awarding the design-build contract to the highest bidder, because their conduct did not violate clearly established law. The assistant city attorney had advised the council that the design-build or turnkey method of procurement was defensible under the professional services procurement exemption.

The problem with Breck I and Breck II is that neither contain much of a hint of how the Court would have ruled on the question of whether the design-build contract violated the competitive bidding law. The Court said that, "At the time of the contract award in May 1984, no case law existed interpreting the CBJ charter, CCBJ Chapter 53.50, or the equivalent state law provision." [At 73] As far as I can determine, those provisions have not been subsequently interpreted.

Finally, in Ahern Co. v. Wisconsin State Public Building Commission, 366 N.W.2d 679 (Wis. App. 1983); the state waived the competitive bidding requirements for several office buildings in favor of design-build contracts. The plaintiff, an unhappy contractor, challenged the waiver, pointing to a statute that provided:

No state board, agency, officer, department, commission or body corporate shall enter into a contract or agreement for the construction, reconstruction, remodeling or addition to any building ... which involves a cost in excess of \$15,000 by any means whatsoever, without completion of final plans. [The court's emphasis.]

January 25, 2002

Page 10

The Court declared that the term “final plans” could mean final architectural plans, or final plans consistent with the construction process used, and held that the term meant the latter. The truth is, the state was probably very lucky on that point; clearly, the Court wanted to bend over backwards to support the design-build concept. The state was statutorily entitled to waiver competitive bidding requirements whenever the building commission “determines that the use of innovative types of design and construction process will make better use of the resources and technology available in the building industry....” The unhappy contractor also argued that the state should not have granted the waiver. The design-build concept met the innovative design and construction test, held the Court.

If the city goes ahead with a design-build method of construction of its municipal building without competitively bidding the project, it may have an opportunity to participate in the making of some law in Tennessee in this area. Alternatively, it might consider the construction of the building through a city-created public building authority. There appear to be various options for the construction and operation of the building under the Public Building Authorities Act found at Tennessee Code Annotated, ' 12-10-101 et seq.

Sincerely,

Sidney D. Hemsley
Senior Law Consultant

SDH/