

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
425 Fifth Avenue North  
NASHVILLE, TENNESSEE 37243-0497

May 5, 2004

Opinion No. 04-084

Request for Proposals for Construction Management Services

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**QUESTIONS**

1. In TENN. CODE ANN. § 49-2-203(a)(3)(C)(ii), the process for procuring the services of a construction manager is detailed. That process is said to be a request for proposals (RFP) process and outlines information that must be a part of that RFP. Does the law require or was it the legislature's intent to require that the RFP be in a written format?
2. Are the proposals submitted by both successful and unsuccessful construction management firms open to the public?
3. If the proposals are open to the public, at what point during the process must the proposals be open to public inspection?

**OPINIONS**

1. Yes. The statute and the legislative intent are clear that requests for proposals must be in writing.
2. Yes. All proposals are open to the public for inspection after the evaluation process is completed.
3. The proposals are open to the public for inspection after the evaluation process is completed.

**ANALYSIS**

1. Legislative intent is derived from the plain and ordinary meaning of statutory language. *Carson Creek Vacation Resorts v. Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993). TENN. CODE ANN. § 49-2-203(a)(3)(C)(ii) describes the process for procuring construction management services:

(ii) Construction management services which are provided for a fee and which involve coordination and oversight of the planning, design, bid and construction phases of the project, are deemed to be professional services and may be performed by a qualified person on the basis of recognized competence and integrity. **Construction management services are to be procured through a request for proposals process. The request for proposals process will invite prospective proposers to participate and will indicate the service requirements and the factors used for evaluating the proposals. Such factors shall include construction manager's qualifications and experience on similar projects, qualifications of personnel to be assigned to the project, fees, or any additional factor or factors deemed relevant by the procuring entity for procurement of the service; cost is not to be the sole criterion for evaluation. The contract for such services will be awarded to the best-evaluated and responsive proposer.** A construction manager is prohibited from undertaking actual construction work on a project over which such construction manager coordinates or oversees the planning, design, bid or construction phases of the project, except in instances where 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 can perform the construction work at a price agreed upon by the construction manager, the architect and the owner of the project. A school system, at its own discretion, may perform work on the project with its own employees and include the coordination and oversight of this work as part of the services of the construction manager. (Emphasis added).

Qualifications, experience, service requirements, and evaluation criteria must be communicated to proposers in the request for proposals process. The language used in the statute, *viz.*, “[T]he request for proposals process will invite prospective proposers to participate and will indicate the service requirements and the factors used for evaluating the proposals,” indicates that a written request for proposal should be used. Reliance on verbal RFPs would be fraught with problems. A written solicitation guarantees that all proposers receive the same information and establishes a record in the event a dispute arises. A written solicitation instrument also permits compliance with competitive bidding requirements. *See Computer Shop, Inc. v. State of Tennessee*, 780 S.W.2d 729 (Tenn. Ct. App. 1989). A non-written request for proposals would clearly undermine the objectives of competitive bidding described in the *Computer Shop* case that promote the public interest by:

- (1) aiding governments in procuring the best work or materials for the lowest practical price; (2) providing bidders with a fair forum for

competing for government contracts; and (3) protecting the public from its officials' self-dealing, extravagance, and favoritism. (footnotes omitted).

*Id.* at 737. For these reasons, we believe the statute and the legislative intent are clear that requests for proposals must be in writing.

2. All proposals are open to the public for inspection after the evaluation process is completed. TENN. CODE ANN. § 10-7-504(a)(7) states:

Proposals received pursuant to personal service, professional service, and consultant service contract regulations, and related records, including evaluations and memoranda, shall be available for public inspection only after the completion of evaluation of same by the state. Sealed bids for the purchase of goods and services, and leases of real property, and individual purchase records, including evaluations and memoranda relating to same, shall be available for public inspection only after the completion of evaluation of same by the state.

3. See Response to Number 2 above.

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PAUL G. SUMMERS  
Attorney General and Reporter

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MICHAEL E. MOORE  
Solicitor General

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JANIE C. PORTER  
Senior Counsel

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Requested by:

The Honorable Tre' Hargett  
State Representative  
103 War Memorial Building  
Nashville, TN 37243